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Essays

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Letter from the Editor

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Sincerely,

Katie McClendon
Director of Publications

The Federalist Society Review

Volume 22 2021

Hamlet Without the Prince

By Kurt T. Lash

Federalism & Separation of Powers Practice Group

A Review of:

The Second Founding: An Introduction to the Fourteenth Amendment, by Ilan Wurman
https://www.cambridge.org/core/books/second-founding/616A124DD13B6A172681A18CA2A3F9AF

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Kurt T. Lash is the E. Claiborne Robins Distinguished Professor of Law at the University of Richmond Law School. A version of this review is also published at the Liberty Fund's Law & Liberty website (January 2021).

Note from the Editor:

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Other Views:

• Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 Geo. Mason U. C.R. L.J. 1 (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100105.

• Randy Barnett & Evan Bernick, *The Difference Narrows: A Reply to Kurt Lash*, 95 Notre Dame L. Rev. 679 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3534299.

• Mike Rappaport, *The Unbearable Wrongness of Slaughterhouse*, Law & Liberty (April 1, 2019), https://lawliberty.org/the-unbearable-wrongness-of-slaughterhouse/.

For Ilan Wurman's response to this review, see *Reading the Wrong Play*, FedSoc Blog (Jan. 13, 2021), *available at* https://fedsoc.org/commentary/fedsoc-blog/reading-the-wrong-play.

Scholars seeking to master commentary on the original meaning of Section One of the Fourteenth Amendment confront a bewildering array of theories and schools of thought. Like the college freshman walking about the quad on "Club Day," the budding Fourteenth Amendment historian is wooed by the competing voices of the "Libertarian Club," the "Substantive Due Process Club," the "Equal Protection Club," and the "Incorporation Club"—all trying to out-shout one another in their attempt to win the affection of the young academic.

The newest voice in this cacophony of Fourteenth Amendment choristers is that of Arizona State Law Professor Ilan Wurman. In his new book, *The Second Founding: An Introduction to the Fourteenth Amendment*, Wurman wanders about the quad visiting the various organizations and, finding none of them completely satisfactory, decides to start his own. It is a short and breezy book (144 pages) that serves as a kind of introduction to Fourteenth Amendment scholarship and the various approaches to this endlessly fascinating and complicated amendment. Although historians will find nothing new here, students of Fourteenth Amendment theory will come away with a deeper appreciation of how utterly fractured this corner of constitutional scholarship has become.

Unfortunately, they will learn relatively little about the history of the Fourteenth Amendment. Instead of introducing the reader to the dramatic story of the framing and ratification of the Fourteenth Amendment, Wurman focuses his efforts on describing the legislation of the Thirty-Ninth Congress that drafted the amendment. The result is a book that says a great deal about the men and ideas behind the Freedmen's Bureau Bill and the Civil Rights Act, but almost nothing about the events that drove the framing of the Fourteenth Amendment or the men who explained the meaning of its text to the ratifying public. Wurman is an excellent writer; his book constructs much of the proper historical background, and he fills his stage with many of the key supporting players. The stars of the Fourteenth Amendment, however, are left standing in the wings.

Wurman divides his book into three parts. Part One discusses antebellum theories of three phrases that eventually find their way into Section One of the Fourteenth Amendment: "due process," "equal protection," and "privileges and immunities." In Part Two, Wurman focuses on the 1866 Civil Rights Act and explains how the legislative efforts of the Thirty-Ninth Congress hold the key to understanding the language of Section One of the Fourteenth Amendment, in particular the Privileges or Immunities Clause. Finally, in Part Three, Wurman applies his understanding of Section One to a few high-profile constitutional cases like *Brown v. Board of Education* and *Obergefell v. Hodges* to see if those decisions would be decided differently under his interpretation of the constitutional text (probably not, at least as to *Brown* and *Obergefell*).

Wurman's approach to the Due Process and Equal Protection Clauses echoes the work of other scholars. For example, he joins most contemporary scholars in rejecting the doctrine of "substantive due process" and adopts the procedural due process theories of Professors Nathan Chapman and Michael McConnell. Wurman also joins a growing number of scholars who read the Equal Protection Clause as a mandate for government *protection* of certain fundamental rights (credit here goes to the groundbreaking work of Chris Green).[1]

Wurman's more controversial position involves his reading of the Privileges or Immunities Clause. Unlike most contemporary constitutional scholars, Wurman rejects the idea that the Privileges or Immunities Clause "incorporates" the Bill of Rights against the states. Instead, Wurman reads this enigmatic text as a kind of equality provision where state citizens are guaranteed equal access to state-defined "privileges and immunities." Whether a state's citizens enjoy freedom of speech thus depends on state law, and not the federal Constitution.

Wurman arrives at his "equal state rights" reading of the Privileges or Immunities Clause by tying the meaning of the Clause to the legislative efforts of the Thirty-Ninth Congress, especially the Freedmen's Bureau Bill and the 1866 Civil Rights Act. The words "privileges" and "immunities" retained an antebellum equal rights connotation due to use in the "privileges and immunities" clause of Article IV. The "Privileges or Immunities Clause" of the Fourteenth Amendment simply transforms what had been the equal "privileges" of out-of-state citizens into to the equal "privileges" of in-state citizens.

Wurman is certainly right to claim that the Thirty-Ninth Congress was concerned about equal rights and the need to respond to the invidious southern "Black Codes." The issue, however, is whether in 1866 this was Congress's *only* concern. Determining the answer to that question requires expanding the scope of investigation beyond the legislative output of Lyman Trumbull's Senate Judiciary Committee, which produced the Freedmen's Bureau Bill and Civil Rights Act. It turns out that other members, and other committees, had much more on their minds than just the eradication of discriminatory codes.

Moments after the clerk gaveled the Thirty-Ninth Congress into session in early December 1865, Congress appointed a Joint Committee on Reconstruction.[2] The committee's job was to consider when, and under what conditions, representatives of the former rebel states would be allowed to return to the seats they had vacated four years earlier. This Joint Committee—whose key members included Pennsylvania Representative Thaddeus Stevens, Ohio Representative John Bingham, and Michigan Senator Jacob Howard—immediately went to work drafting and proposing amendments to the Constitution that had to be in place before Congress could safely readmit the southern states.

According to Thaddeus Stevens, the committee's most important task was to draft an amendment that would prevent the southern states from enjoying the windfall of increased representation due to the passage of the Thirteenth Amendment.[3] Slavery having been abolished, each freedman now counted as a full five-fifths of a person (instead of three-fifths as under the original Constitution). Unless Congress acted, southern Democrats would return with more political power than they enjoyed prior to the Civil War and potentially derail the entire project of congressional Reconstruction.

To prevent this, the Joint Committee proposed an amendment preventing the freedmen in a particular state from being counted for purposes of representation unless the state granted freedmen the vote. The committee also proposed an amendment authored by John Bingham empowering Congress to enforce the rights of national citizenship and the equal due process rights of all persons. According to Bingham, his amendment was "simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution to-day."[4]

Both proposals fell in a withering crossfire of criticism from conservative Republicans who believed the proposals went too far and radical Republicans who believed they did not go far enough.[5] The Joint Committee was forced to go back to the drawing board and rethink its constitutional strategy.

Meanwhile, an entirely different committee, the Senate Judiciary Committee chaired by Lyman Trumbull, proposed the 1866 Freedmen's Bureau Bill and Civil Rights Act.[6] Trumbull insisted that these anti-discrimination statutes were authorized by Section Two of the Thirteenth Amendment. When challenged on that point by more moderate Republicans, supporters responded that the acts also could be viewed as enforcing rights covered by the Due Process Clause of the Fifth Amendment. This latter claim prompted an immediate objection by Joint Committee member John Bingham, who insisted that Congress currently lacked the authority to enforce the Bill of Rights. Enforcing the provisions of the 1791 amendments would have to wait until the passage of his proposed constitutional amendment.[7]

Trumbull pushed through his bills anyway. After Congress failed to override President Andrew Johnson's veto of the Freedmen's Bureau Bill, the Senate voted to retroactively exclude New Jersey Senator John Stockton.[8] This allowed Congress to override Johnson's veto of the Civil Rights Act by a single vote. When it did so, some members thought the act was enforcing the Thirteenth Amendment, others the Due Process Clause, others the Republican Guarantee Clause, and still others neither knew

1 Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 Geo. Mason U. C.R. L.J. 1 (2009).

2 Much of the account that follows is taken from the documents and introductory notes in Kurt T. Lash, The Reconstruction Amendments: Essential Documents (U. Chicago Press, forthcoming 2021), *available at* https://amzn.to/3aDvdFi. *See* Volume 2, 1A: Drafting the Fourteenth Amendment, *id*. at 5, 20 (collecting and introducing original historical documents relating to the drafting and ratification of the Fourteenth and Fifteenth Amendments).

3 *Id*. at 160.

4 *Id*. at 43, 109.

5 *See id*. at 108 (Bingham's bill), 133 (apportionment bill).

6 *Id*. at 35.

7 *Id*. at 135 (opposition by John Bingham)

8 *Id*. at 146.

nor cared but were content to leave the issue of constitutionality to the Supreme Court.

Meanwhile, the Joint Committee remained focused on its central goal of framing and submitting constitutional amendments. At the suggestion of Thaddeus Stevens, the committee ultimately decided to bundle together a variety of its previous proposals and submit them as a single five-sectioned amendment.[9] Section One of this proposed amendment contained Bingham's revised version of his original individual rights amendment, while Section Two addressed the problem of the political power of returning southern states by reducing the representation of any state that continued to deny the franchise to qualified black males.

The bundling strategy worked. In his speech introducing the amendment to the Senate, Joint Committee member Jacob Howard explained that Section One's Due Process and Equal Protection Clauses would prevent the enactment of racially discriminatory "codes," while the Privileges or Immunities Clause would protect constitutionally enumerated rights such as those listed in the first eight amendments.[10] Howard thus expressly echoed what John Bingham had previously (and repeatedly) announced: Section One would enforce the Bill of Rights against the states.

Surprisingly, none of this history about the framing of the Fourteenth Amendment is in Wurman's "Introduction to the Fourteenth Amendment." His chapter specifically titled "The Fourteenth Amendment" focuses instead on the 1866 Civil Rights Act and the legislative efforts of the Thirty-Ninth Congress. It contains nothing at all about the Joint Committee's early versions of the Fourteenth Amendment's various sections, the accompanying legislative debates, the committee's decision to combine the various provisions into a single amendment, or the most influential speeches regarding the meaning of the proposed amendment by John Bingham and Jacob Howard.

Perhaps conscious of his omission, early in his book Wurman assures his readers that there is little reason to explore the amendment's legislative history. After all, a "casual perusal of the debates of 1866" reveals nothing more than "a Babel of opinion" and "political chaos."[11] Nor should readers put too much stock in a "single statement" from Jacob Howard or "a few stray and ambiguous statements by Representative Bingham."[12]

I am not quite sure how one "casually peruses" over six thousand pages of speeches and debates in the Congressional Globe (not including the appendixes). As for Wurman's dismissal of Jacob Howard's "single statement," that single speech was reprinted in newspapers across the United States and was so influential that some commentators actually nicknamed the proposed Fourteenth Amendment the "Howard Amendment." As a self-identified originalist, Wurman should view Howard's influential public description of the Fourteenth Amendment as exactly the kind of evidence that public meaning originalists hope to find.

Most problematic, however, is Wurman's dismissal of Joint Committee member John Bingham. There is no single individual more important to the history of the Fourteenth Amendment. The Ohio Representative authored the Privileges or Immunities Clause along with the Due Process and Equal Protection Clauses. Bingham also secured the amendment's ratification by leading Congress to pass the Reconstruction Acts, which ensured that southern freedmen would be allowed to vote on the proposed amendment. No one did more for, or spoke more about, the Fourteenth Amendment during its framing and ratification, and Bingham's words were reproduced and distributed in newspapers across the country throughout the debates of the Thirty-Ninth Congress.

For theorists like Wurman who reject the incorporation of the Bill of Rights, Bingham's speeches in the Thirty-Ninth Congress (and afterward) present a major stumbling block. From the opening weeks of the Thirty-Ninth Congress and throughout the rest of the session, Bingham repeatedly declared his efforts were directed at passing an amendment that would enforce the Bill of Rights against the states. In a single speech in February 1866, Bingham expressly refers to the Bill of Rights more than a dozen times.

Towards the end of his book, Wurman briefly notes Bingham's references to the Bill of Rights, but he dismisses their relevance since "Bingham may not have been referring to the Bill of Rights as we understand it today."[13] According to Wurman, "recent scholarship show[s] that the term 'bill of rights' was not used as a term of art for the first eight Amendments to the U.S. Constitution until well after the Civil War."

This canard about nineteenth century references to the Bill of Rights has been floating around in various corners of Fourteenth Amendment scholarship for a few years now. It was first suggested in a speech by Pauline Maier, then amplified by Gerard Magliocca, and recently treated as established fact by libertarian theorists like Randy Barnett and Evan Bernick. These revisionists claim that the term "bill of rights" was not commonly used as a reference to the 1791 amendments until the twentieth century.[14] Prior to that time, references to the nation's "bill of

9 *Id.* at 152.

10 *Id.* at 185.

11 Ilan Wurman, The Second Founding: An Introduction to the Fourteenth Amendment 5 (2020).

12 *Id.*

13 Wurman, *supra* note 11, at 111.

14 *Id.* ("[T]he term 'bill of rights' was not used as a term of art for the first eight Amendments to the U.S. Constitution until well after the Civil War."); Gerard N. Magliocca, The Heart of the Constitution: How the Bill of Rights Became the Bill of Rights 6 (2018) ("The belief that the first ten amendments are the bill of rights did not become dominant until the twentieth century."); Randy Barnett & Evan Bernick, *The Difference Narrows: A Reply to Kurt Lash*, 95 Notre Dame L. Rev. 679, 697 (2019) ("[N]o one [at the time of Reconstruction] necessarily meant what we mean today when speaking of 'the Bill of Rights.'"); Michael J. Douma, *How the First Ten Amendments Became the Bill of Rights*, 15 Geo. J.L. & Pub. Pol'y 593, 609–11 (2017) (claiming that the term "Bill of Rights" was not defined as the first ten amendments prior to the late 1920s and early 1930s); Pauline Maier, *The Strange History of the Bill of Rights*, 15 Geo. J.L. & Pub. Pol'y 497, 506–11 (2017) (arguing that "Bill of Rights" did not take on its current meaning as a reference to the 1791 amendments until the 1930s).

rights" were more likely to be references to the Declaration of Independence than to the first ten amendments.

The revisionists are wrong. As a forthcoming article exhaustively details, there is a mountain of evidence establishing that Americans commonly referred to the 1791 amendments as "the Bill of Rights" from the very first decade of their existence.[15] The evidence includes public declarations by Thomas Jefferson, James Madison, Joseph Story (in his hugely influential Commentaries on the Constitution), lawyers arguing before the Supreme Court, antebellum children's schoolbooks, and much more. Although antebellum Americans occasionally referred to the Declaration of Independence as a bill of rights, those occasional references are vastly outnumbered by references to the 1791 amendments as the Bill of Rights, in proportions that remain constant in every decade from the Founding to Reconstruction (and beyond).

In other words, when John Bingham repeatedly declared to his colleagues and the country that his constitutional amendatory efforts were directed at enforcing the "Bill of Rights," everyone listening understood him as proposing an amendment that would "incorporate" (to use a modern term) the Bill of Rights against the states. This understanding would have been cemented in the public's minds when Jacob Howard later stood up and explained to the Senate that the proposed "Privileges or Immunities Clause" required the states to enforce the personal rights enumerated in the first eight amendments to the Constitution.

Whether or not one believes that the declarations of Bingham and Howard represent the original meaning of Section One of the Fourteenth Amendment, it is an exceedingly odd "Introduction to the Fourteenth Amendment" that omits their efforts, along with the entire history of the Joint Committee on Reconstruction. To be fair, Wurman probably intended this brief "Introduction" to set the stage for further scholarly exploration.

I look forward to that production. For now, readers get Hamlet without the Prince.

15 See Kurt T. Lash, *The 1791 Amendments as The Bill of Rights: Founding Through Reconstruction* (forthcoming 2021).

Public Contracting Litigation After *Croson*: Data, Disparities, & Discrimination

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Note from the Editor:

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Other Views:

- Fullilove v. Klutznick, 448 U.S. 448 (1980), *available at* https://supreme.justia.com/cases/federal/us/448/448/.
- City of Richmond v. Croson, 488 U.S. 469 (1989), *available at* https://supreme.justia.com/cases/federal/us/488/469/ (dissenting opinion).
- Concrete Works of Colorado, Inc v. City and County of Denver, Colorado, 321 F.3d 950 (2003), *available at* https://casetext.com/case/concrete-works-v-city-cty-of-denver.

What causes racial disparities, and what, if anything, can and should be done to remedy them? These questions have been the subject of intense debate recently. Discussions of differences among groups in education, employment, health, housing, incarceration, income, and policing often rest on the unstated assumption that members of all groups have, on average, identical talents, behaviors, and preferences, and that therefore disparities are always caused by discrimination. But that assumption is wrong, and the existence of a disparity does not by itself prove discrimination. The question remains: when *does* a disparity prove discrimination?

These thorny questions occasionally make their way into legal disputes too. Judges confront these matters in several contexts because our Constitution and laws forbid racial and other forms of discrimination, which is one potential cause of disparities. Disputes about the outcomes of public procurement expenditures often raise these questions about what causes disparities and what remedies should ensue, and judges have addressed these issues in the context of public contracting disputes for more than thirty years.

When a government—federal, state, or local—decides to undertake a major project, it generally has to decide what firm to hire to complete the project. Because it will pay the firm using taxpayer funds, major public contract awards usually, but not always, are subject to careful procedures to ensure transparency, quality, and low cost. The government first hires a prime contractor that is responsible for the project—say, a public building—and the prime contractor in turn hires subcontractors that specialize in various parts of the project—say, a demolition firm. Prime contracts are usually advertised well in advance with the expected qualifications stipulated. Sealed bid openings revealing the low bid usually determine the award, though appeals are permitted. Subcontracting awards are usually made through detailed contracts between the prime and the sub. While in theory a prime could choose a relative or friend as a sub for personal reasons, selecting a firm that is higher priced or less qualified creates risks for a prime: a higher priced sub could prevent the prime from being the low bidder and winning the contract or, if the bid is successful, a less qualified sub could prevent the prime from completing the work to the government's satisfaction.[1] So a combination of rules and incentives works to ensure that taxpayers get the best value for the money that goes into public projects rather than enriching the cronies of officeholders.

Nevertheless, there is always a political context to the award of public contracts. Although the overt forms of partisan patronage have been largely eliminated, there has been an increasing interest in governments at all levels to distribute contracts on the basis of the race, ethnicity, and gender of firm owners. At the federal level,

1 *See generally* Donald Dorsey, Construction Bidding for Profit (1979).

the Disadvantaged Business Enterprise Program (DBE), the Small Business Administration's 8(a) program, and, according to the Congressional Research Service, hundreds of other departmental programs favor awarding contracts based on a firm owner's race, ethnicity, or gender.[2]

There are also numerous state, local, and special district Minority and Women Business Enterprise (MWBE) programs that use set-asides, bid preferences, and goals to steer contracts to firms owned by minorities and women. In New York State, for example, Governor Andrew Cuomo in 2016 proposed that a new 30% MWBE goal be required for all local contracts (cities, counties, towns, villages, school districts, and college campuses) receiving state funding. These goals were not just to be applied to subcontracting amounts, but to total contract expenditures. To support his action, Governor Cuomo proclaimed:

> We must extend our MWBE program to all state dollars, in order to ensure fairness in opportunity. This proposal will help minority and women-owned businesses compete for another $65 billion in state contracts. This is about continuing New York's legacy as a national leader on economic justice and I am proud to lead the fight again.[3]

I. *Croson*

The question whether all these race, ethnicity, and gender based contracting programs are consistent with the 14th Amendment's mandate that no government shall "deny to any person within its jurisdiction the equal protection of the law" has been the subject of frequent litigation in recent decades.

In the landmark case *City of Richmond v. Croson*, the Supreme Court determined when state and local governments may use racial preferences.[4] Although the city's population was 50% black, only .67% of its prime construction contracts had been awarded to minority-owned businesses in recent years. The city implemented a MBE program that required that 30% of all subcontracting dollars be awarded to minority firms. When Croson, an Ohio-based non-minority small plumbing contractor, lost out on his low bid to install urinals in the Richmond city jail because it did not meet the 30% requirement, he challenged the MBE program as a violation of the Equal Protection Clause of the 14th Amendment.

It was clear that a disparity existed between minority representation in the general population and among owners of firms awarded government contracts. The question the court had to consider was whether that disparity was caused by systematic discrimination against minority-owned firms. If so, the disparity might be remediable by a general MBE preference, but if not, the preference would be unconstitutional.

Previously, courts had been rather deferential when the federal government created contracting preferences.[5] In *Croson*, however, the Court said firmly that strict scrutiny was the standard of review and that Richmond's race-conscious government contracting policy had to have a compelling interest and be narrowly tailored.[6] The Court held that Richmond's policy failed to meet this high bar set by strict scrutiny. The city had not identified any specific contracting discrimination the correction of which might qualify as a compelling interest. The disparity between city prime contracts awarded to MBEs and the general population was not meaningful. Nor had the city tried to use race neutral programs to help MBEs before turning to preferences, so there was no evidence showing that the challenged program was narrowly tailored.

In a passage relevant to many current debates about disparities, Justice Sandra Day O'Connor declared, "It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination." She continued, "Defining these sorts of injuries as 'identified discrimination' would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor."[7] Justice O'Connor's opinion, however, left the door to preferences slightly ajar. She wrote:

> Where there is a *significant* statistical disparity between the number of *qualified* minority contractors *willing and able* to perform a *particular service* and the number of such contractors actually engaged by the locality or the locality's prime contractors, an *inference* of discriminatory exclusion *could arise*.[8]

With her insistence that such an inference could only arise with respect to firms that are qualified, willing, and able to perform the relevant work, Justice O'Connor recognized that variations in the characteristics and behavior of firms were non-discriminatory factors that might affect utilization in government contracting. In 1995, in *Adarand v. Pena*, the Court extended the strict scrutiny standard to federal race preferential contracting programs.[9]

II. Disparity Studies

The possibility of finding an unjustified disparity in public contracting proved an irresistible temptation to politicians who were motivated to find ways to implement contracting preferences in their jurisdictions.[10] After *Croson*, it was clear some sort of study was needed, but who would do it, and what methodologies would they use? At first, major scholars and

2 Charles V. Dale & Cassandra Foley, *Survey of Federal Laws and Regulations Mandating Affirmative Action Goals, Set-asides, or Other Preference Based on Race, Gender, or Ethnicity*, Cong. Research Serv. (Sept. 7, 2004), *available at* https://www.everycrsreport.com/reports/RL32565.html ("a broad, but by no means exhaustive, survey" of such programs). *See also* Robert Jay Dilger, *SBA's "8(a) Program": Overview, History, and Current Issues*, Cong. Research Serv. (updated Dec. 17, 2020), *available at* https://fas.org/sgp/crs/misc/R44844.pdf (a recent overview of the largest such federal program).

3 Rick Karlin, *Cuomo wants to expand MWBE contracts,* Albany Times Union, January 11, 2016.

4 488 U.S. 469 (1989).

5 Fullilove v. Klutznick, 448 U.S. 448 (1980).

6 *Croson*, 488 U.S. at 493-94.

7 *Id.* at 500.

8 *Id.* at 509 (emphases added).

9 515 U.S. 200.

10 Engineering Contractors Ass'n v. Metropolitan Dade County, 122 F.3d 895, 928 (11th Cir. 1997).

accounting firms attempted these studies, but they proved to be political minefields. Persons with notable academic credentials worked on early disparity studies, including Andrew Brimmer, President Johnson's appointee to the Federal Reserve Board; Ray Marshall, President Carter's Secretary of Commerce; and Samuel Myers, Jr., Director of the Center for Human Relations and Social Justice of the University of Minnesota.

One of the Big Four auditing firms, KMPG Peat Marwick, made a brief foray into the disparity study business but quickly left the field. Its 1991 study for Miami-Dade County found that firms owned by white women, but not firms owned by African-Americans or Hispanics, were underutilized. Miami Mayor Xavier Suarez rejected the KMPG study declaring, "We never should have done it."[11] Similarly the Los Angeles City Council rejected a disparity study that found Hispanic but not black-owned firms underutilized.[12]

Eventually the field became dominated by a handful of for-profit consulting firms which have completed over 600 disparity studies at a cost to taxpayers of roughly $300 million. One reason for the growing dominance of these few consulting firms is that jurisdictions write Requests For Qualifications asking firms to demonstrate substantial experience in performing this specialized type of study and then in defending such studies in litigation. This disadvantages university research centers and independent think tanks, even if they could demonstrate that their staff had superior scientific qualifications for objective program evaluation.[13] Still, for-profit disparity study consultants need to be keenly aware of political timing and context of their studies and what governments usually want affirmed when they commission such studies. As the cases described below show, however, results-oriented procurement disparity studies often fall apart when confronted with social science methods and evidence.

Despite this consolidation of study producers, there really is no disparity study industry. No professional association exists, and there are no agreed upon standards for gathering and interpreting data. The key to any procurement disparity study is the measurement of the availability of firms—categorized by the race, ethnicity, and gender of their owners—which are competing for contracts compared to their utilization in contract awards. Utilization can be measured by the percentage of firms identified with a group that receive awards, the percentage of contacts awarded to a group, or the amount of dollars awarded to group member firms. Most studies measure utilization by calculating dollar amounts. But the validity of any disparity is dependent on the accuracy of measuring availability. Is a disparity caused by differences in firm characteristics (qualification and ability) or behavior (willingness), or by discrimination? While determining availability is key to a valid disparity ratio, measurement is complex since data about firm qualifications, willingness, and ability to compete for the various types of public contracts are not readily available. Consequently, most procurement disparity studies settle for compiling lists of otherwise dissimilar firms which have in common only the race, ethnicity, or gender of their owners. Such availability comparisons with utilization create disparity ratios which cannot really indicate discrimination unless more sophisticated statistical analyses are employed.[14]

III. Litigating the Programmatic Results of Procurement Disparity Studies

Firms that lose specific contracts because of racial preference policies or business associations whose members are disadvantaged by them can challenge those policies. Determining the history of the outcome of preferential contracting litigation against governments is difficult, because when a public agency decides it is likely to lose if the issues come to trial, it will often settle the case using taxpayer funds without creating a citable judicial precedent for future cases. This has happened in Atlanta, Cincinnati, Charlotte, Cleveland, Memphis, Miami-Dade County, Milwaukee, Montana, New York City, Phoenix, San Francisco, Texas, and Washington State. Because of this tactic, governments have lost more often than a search of court decisions reveals. Nevertheless, there has been some notable litigation which can be briefly described, focusing on the social science issues decided.

In 1994, the Contractors Association of Eastern Pennsylvania sued to stop Philadelphia's new preferential contracting program which relied on a disparity study completed by Andrew Brimmer. The federal trial court found that the study did not properly measure which firms were qualified, willing, and able; it called these "the three pillars of *Croson*" and enjoined the city's program.[15] The Third Circuit affirmed.[16]

In the next year's *Associated General Contractors of America v. City of Columbus*, the city had imposed 21% MBE and 10% WBE subcontractor goals, effectively shutting out non-MWBE firms from winning subcontracts on many projects. Though Columbus had disparity studies completed by two different consultants, after an extensive trial, the federal district court judge did not find their conclusions credible. First, the court declared:

> The City maintains records of all firms which have submitted bids on prime contracts. This would be a ready source of information regarding the identity of firms which are qualified to provide contracting services as prime contractors. . . . On prime contracts only firms which submit bids are "available." "The concept of investigating discrimination in the award of prime contracts by indirect statistical analysis is inappropriate in this case. The process

11 Dorothy Gaiter, *Court Ruling Makes Discrimination Studies a Hot Industry,* Wall St. J., August 8, 1993.

12 James Rainey, *Council calls Study of Contracts Inadequate,* L.A. Times, December 10, 1994.

13 Adam Yarmolinsky, a presidential advisor to the Kennedy, Johnson, and Carter administrations and former Regents Professor of Public Policy at the University of Maryland Baltimore County, once described for-profit consultants as entrepreneurs who will ask to borrow your watch and then tell you what time it is. As quoted in George R. La Noue, Improbable Excellence: The Saga of UMBC 61 n.138 (2016).

14 George R. La Noue, *Who Counts: Determining the Availability of Minority Businesses for Public Contracting After* Croson, 21 Harv. J.L. & Pub. Pol'y 793, 798-804 (1998).

15 893 F. Supp. 419 (E.D. Pa. 1995).

16 91 F.3d 586 (3d Cir. 1996).

> of awarding prime contracts is not the equivalent of a lottery in which each bidder has an equal chance to win. Prime contracts are awarded to the lowest responsible bidder.[17]

The court then found: "There is no evidence that the City ever failed to award a prime contract to a minority firm that was the low bidder."[18] The judge also refuted the study's use of census data. Citing Thomas Sowell and *Croson,* he pointed out that consultant

> BBC's evaluation of the rates of business ownership and self-employment by ethnicity and gender is based on the assumption that in the absence of discrimination, individuals of both sexes and all ethnic backgrounds will form businesses and seek employment in all the sectors of the economy as they are represented in the total economy.[19]

On appeal, the Sixth Circuit upheld the invalidation of the Columbus program at issue, but it did not permit the judge to permanently enjoin such programs, if new evidence established a need for them.[20]

That same year, a consortium of construction organizations sued in *Engineering Contractors Association of South Florida v. Metropolitan Dade County.* The federal district court found the county's use of anecdotal evidence was not persuasive:

> First, whether discrimination has occurred is often complex and requires a knowledge of the perspectives of both parties involved in an incident as well as knowledge about how comparably placed persons of other races, ethnicities, and genders have been treated. Persons providing anecdotes rarely have such information. . . .
>
> Second, social scientists are frequently concerned about the problem of "interviewer bias" or "response bias" in any interviewing or survey situation. When the respondent is made aware of the political purpose of questions or when questions are worded in such a way as to suggest the answers the inquirer wishes to receive, "interviewer bias" can occur. If a sample is not carefully constructed, the persons providing the anecdotes may reflect a "response bias" because the persons most likely to respond are those who feel the most strongly about a problem, even though they may not be representative of the larger group. . . .
>
> Third, individuals who have a vested interest in preserving a benefit or entitlement may be motivated to view events in a manner that justifies the entitlement. Consequently, it is important that both sides are heard and that there are other measures of the accuracy of the claims. Attempts to investigate and verify the anecdotal evidence should be made.[21]

Consequently, the court found:

> Without corroboration, the Court cannot distinguish between allegations that in fact represent an objective assessment of the situation, and those that are fraught with heartfelt, but erroneous, interpretations of events and circumstances. The costs associated with the imposition of race, ethnicity, and gender preferences are simply too high to sustain a patently discriminatory program on such weak evidence.[22]

On appeal, the Eleventh Circuit focused on the statistical evidence and unanimously found that "In a perfectly non-discriminatory market, one would expect the (bigger) on average non-MWBE firms to get a disproportionately higher proportion of total construction dollars awarded than smaller MWBE firms."[23] The court added:

> It is clear as window glass that the County gave not the slightest consideration to any alternative to a Hispanic affirmative action program. Awarding construction contracts based on ethnicity is what the County wanted to do, and all it considered doing, insofar as Hispanics were concerned.[24]

The court criticized Dade County's failure to evaluate race neutral alternatives for increasing black and Hispanic participation in county contracting and for eliminating discrimination that might be occurring in that marketplace before turning to race and ethnicity-based programs. The court declared:

> The first measure every government ought to undertake to eradicate discrimination is to clean its own house and to ensure that its own operations are run on a strictly race-and ethnicity-neutral basis. The County has made no effort to do this. Nor has the County passed local ordinances to outlaw discrimination by local contractors, subcontractors, suppliers, bankers or insurers. Instead of turning to race- and ethnicity conscious remedies as a last resort, the County has turned to them as a first resort. Because the County's BBE and HBE programs are not narrowly tailored, those programs would violate the Equal Protection Clause even if they were supported by a sufficient evidentiary foundation.[25]

Challenging federal preferential contracting programs proved more difficult, since courts were reluctant to find that Congress, after holding hearings, did not have a compelling interest in creating contracting preferences. DBE programs have been upheld in California,[26] Illinois,[27] Minnesota[28] and

17 Associated Gen. Contractors of America v. City of Columbus, 936 F. Supp. 1363, 1389 (S.D. Ohio 1996).

18 *Id.*

19 *Id.* at 1410.

20 172 F.3d 411 (6th Cir. 1999).

21 Engineering Contractors Ass'n v. Metropolitan Dade County, 943 F. Supp. 1546, 1582-83 (S.D. Fla. 1996).

22 *Id.* at 1584.

23 *Engineering Contractors Ass'n,* 122 F.3d at 917.

24 *Id.* at 928.

25 *Id.*

26 Associated General Contractors v. Cal. Dep't of Transp., No. 11-16228 (9th Cir. 2013).

27 N. Contracting, Inc. v. Illinois, 473 F.3d 715 (7th Cir., 2007).

28 Sherbrooke Turf, Inc. v. Minn. Dep't of Transp., 345 F.3d 964 (8th Cir. 2003).

Nebraska.[29] Actually, only one federal disparity study exists; it was commissioned by the U.S. Department of Commerce in 1999, and it found a very mixed pattern of disparities.[30] So litigation turned to the issue of whether the various DBE goals states created were narrowly tailored.[31]

In *Western States Paving v. Washington State Department of Transportation* (WSDOT), the state asserted that it had demonstrated discrimination because the headcount proportion of DBE firms in the state was 11.17%, while the percentage of contracting funds awarded to them on race neutral contracts was only 9%. But the Ninth Circuit replied:

> This oversimplified statistical evidence is entitled to little weight, however, because it does not account for factors that may affect the relative capacity of DBEs to undertake contracting work. . . . DBE firms may be smaller and less experienced than non-DBE firms (especially if they are new businesses started by recent immigrants) or they may be concentrated in certain geographical areas of the State, rendering them unavailable for a disproportionate amount of work.[32]

After the *WSDOT* decision, the United States Department of Transportation recognized that disparity studies "should rigorously determine the effects of factors other than discrimination that may account for statistical disparities between DBE availability and participation. This is likely to require a multivariate/regression analysis."[33] This is a task for social scientists using objective methods.

IV. Examining Disparity Studies' Underlying Data

Despite the overall pattern of plaintiff success, most firm owners and associations are reluctant to challenge race and gender preferential government procurement programs. That is why, given the number of such programs, there have been comparatively few such cases. Footing mounting bills for a two or three year litigation period can be daunting for a small company or association. Large contractor associations funded some initially successful litigation, but they have become more cautious about new cases. The largest group of construction firms, the Associated General Contractors, which had won major judicial decisions against contracting preferences, seems reluctant to initiate new cases, though it does participate as amicus. The reality is that political support for major projects in many jurisdictions requires political coalitions whose representatives want to know what monetary benefits their constituents will reap.

Finding the right lawyer can also create problems. The attorney must have a background in civil rights law, know something about contracting in the relevant field, and not be conflicted. Large law firms often have conflicts, since they have some partners who represent governments or hope to. So many of the most important disparity study cases have been handled by solo practitioners or lawyers from relatively small firms. Some of these plaintiff lawyers have been overwhelmed by the resources governments possess and have lost these cases.

In recent years, however, new tactics have helped to even the litigation playing field. In almost all early contracting disparity litigation, the study in question was taken at face value. Its methodology and conclusions were assumed to be as described, and the cases turned on omissions and contradictions evident in the study text. But gradually those assumptions began to be challenged.

In 2012, Gary Lofland, an attorney from Yakima, Washington, who had won the landmark *Western States* case, agreed to represent Mountain West Holding Corporation (MWHC) in challenging the DBE goals set by the Montana Department of Transportation (MDOT).[34] This small subcontracting firm installed guard rails and road barriers, and it was being squeezed out of business as prime contractors had to use DBE firms to meet MDOT's goals, even when MWHC provided the lowest quote. Montana had contracted with the D. Wilson consulting firm in 2009 to conduct a $648,783 disparity study to support its DBE goals. Despite the fact that MDOT bureaucrats had doubts about the data in the Wilson study, they adopted it and set new DBE goals based on it.[35]

Lofland tried two tactics that proved effective. First, he used the request to admit, interrogatories, and document production discovery procedures which a defendant must respond to in civil litigation. MDOT had to concede that it could not identify any instance of past discrimination in its contracting and thus that its preferential goals rested entirely on the Wilson study.

Second, Lofland deposed the head of D. Wilson to obtain the underlying data from the study.[36] She claimed she no longer had the Montana underlying data and could not explain the

29 Gross Seeds v. Neb. Dep't of Roads., 345 F.3d 984 (8th Cir. 2003).

30 Disadvantaged Business Procurement: Reform of Affirmative Action in Federal Procurement ("Department of Commerce Benchmark Study"), 64 Fed. Reg. 52,806 (Sept. 30, 1999). For an evaluation of this study, see generally George R. La Noue, *To the "disadvantaged" go the spoils?*, 138 The Public Interest 91 (Winter 2000).

31 George R. La Noue, *Setting Goals in the Federal Disadvantaged Business Enterprise Program*, 17 Geo. Mason U. Civ. Rts. L.J. 423 Spring (2007).

32 Western States Paving, Inc. v. Washington Dep't of Transp., 407 F.3d 983, 1000-01 (9th Cir. 2005).

33 *Western States Paving Company Case Q&A*, U.S. Dep't of Transp. (2006, updated 2014), https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/western-states-paving-company-case-q-and-a.

34 Mountain W. Holding Co. v. Montana, 2014 WL 6686734 (D. Mont. Nov. 26, 2014).

35 See Letter from Sheila Cozzie, MDT Operations Manager/Civil Rights Bureau Chief, to Deirdre Kyle, D. Wilson CEO, February 23, 2010 ("MDT has been unable to reconcile your figures with information that is currently available from our records.").

36 Things had taken a turn for the worse for D. Wilson since it had completed the MDOT study. It had completed a disparity study for the City of Milwaukee that resulted in goals to benefit black- and women-owned contractors. The Hispanic Chamber of Commerce and the American Indian Chamber of Commerce challenged the preferences that harmed their members. After a plaintiff's expert report eviscerated the Wilson study, the City Attorney agreed with the critique and said the study would never see the inside of a courtroom. He then sued D. Wilson, and its insurance company had to pay the city and the plaintiffs about $290,000 in 2013. Since it could no longer get insurance, D. Wilson was effectively out of business when Lofland deposed the president.

study's methodology. She referred Lofland to her statistical subcontractor, but he no longer had the data either and could not remember if a regression analysis, as required after *Western States,* had been done, though he thought some unidentified person on his staff had done one.

Missing data and unexplained methodology—a slam dunk for the plaintiffs? Not quite. In 2014, a Montana federal district court judge decided in summary judgment to ignore the study's missing data issues and found for MDOT on the grounds that "a good ole boy network" existed in the state.[37] The plaintiff appealed to the Ninth Circuit, and the Associated General Contractors of America joined as amicus. In 2017, the circuit panel unanimously reversed and remanded in an unpublished decision articulating five data issues that had to be adjudicated by the lower court.[38] A few days before the new trial was to begin, Montana settled by abandoning its race and gender conscious DBE goals and giving the plaintiffs about $485,000 in taxpayer money to pay MWHC's damages and attorney's fees.[39]

Thus, by 2018, when the Mechanical Contractors Association of Memphis employed local law firm McNabb, Bragorgos, Burgess & Sorin to challenge a Shelby County contracting program with preferences for African-American-owned firms, some new tools were available to plaintiffs.[40] Shelby County's demographics and its politics were changing. As Melvin Burgess, the Chair of the Board of Commissioners at the time the preferential ordinance was passed, put it:

> I mean, you know, as an African-American, I represent, you know, a community of people who look like me, and, of course, like I said earlier, you know, the constituents were concerned that—they felt that they—there was not equity involved when it comes to contracts.[41]

To create contracting preferences, however, the county had to have a new disparity study. It selected Mason Tillman Associates (MTA) from Oakland, California to conduct the study. MTA was a major player in the disparity study contracting niche world.[42] In competing for the contract, it boasted that it had completed 140 disparity studies across the country and had found disparities in 139.[43] More importantly, its studies had never been subject to litigation.[44] With a $310,000 contract from Shelby County, MTA completed a 300 page study with 107 tables and 11 charts.[45] Politicians who hold part time positions and meet infrequently face serious obstacles in absorbing that much information in a type of research they had never seen before.

Some board members were concerned that the MTA recommendations of creating a 10% bid preference on prime contacts and 28% goals on construction subcontracts for African-American-owned firms were too costly.[46] So MTA won a second contract for $60,000 to help rewrite the county's procurement procedures and then insisted successfully that the preferences articulated in its study be enacted as stated.[47]

When litigation began, the plaintiff's lawyers, Nick Bragorgos and John Barry Burgess, took full advantage of multiple discovery tactics. They began by getting the county to admit that it could not identify a single instance of contracting discrimination in the last ten years and that "no employee has been reprimanded, terminated or disciplined for discrimination in connection with the awarding of construction contracts in the past ten years."[48] Further, Shelby County admitted that it has never punished any prime construction company for discrimination in the award of a Shelby County construction subcontract in which a MWBE goal was not set. In short, although the county had a race neutral anti-discrimination policy, it had never had a reason to enforce it before turning to the race and gender preferences in its current MWBE Ordinances. Finally, the county admitted it had never seen the underlying study evidence and could not verify whether any of it was true.

The plaintiffs asked the county for all the MTA underlying study data. Despite a contractual agreement to provide such data to the county, MTA initially rebuffed repeated requests for the documentation of its study conclusions. Eventually, MTA released some raw data from the study which it said was as all the data it had. But what was released was not specifically connected to the study's 107 tables and 11 charts or to the statistical calculations leading to disparities that had been found and the goals the county had set. That left the county in the awkward position of arguing that it had a compelling interest supporting its new preferential contracting program based on data it had never seen. Deposition after deposition confirmed that conundrum. When Carolyn A. Watkins, the county official who reviewed whether the goals were met on specific contracts, was asked in deposition if she knew "if anybody at the County reviewed the study to see if it was accurate," she answered, "I don't know if it happened, but I

37 *Mountain W. Holding Co.*, 2014 WL 6686734, at *3.

38 Mountain W. Holding Co. v. Montana, 691 Fed. App'x 326 (9th Cir. 2017).

39 Associated Press, *Montana pays $485K to white-owned firm that claimed discrimination*, Billings Gazette, March 21, 2018, https://billingsgazette.com/news/state-and-regional/govt-and-politics/montana-pays-485k-to-white-owned-firm-that-claimed-discrimination/article_aeed8122-68de-5ebb-aecd-6da602e781e3.html.

40 Mechanical Contractors Ass'n of Memphis, Inc. v. Shelby County, Tenn., 2:19-CV-02047 (W.D. Tenn. 2019).

41 Burgess deposition at 49-50, *Mechanical Contractors Ass'n of Memphis*, 2:19-CV-02047.

42 MTA Response to Shelby County RFQ for a Disparity Study, Section 3.1.3 List of Mason Tillman Studies.

43 *Id.*

44 *Shelby County Tennessee Legal Analysis and Disparity Study* (March 2016).

45 *Id.*

46 Eryn Taylor & Shay Arthur, *Tempers flare as County Commissioners discuss disparity study*, WREG News, May 18, 2016.

47 Linda A. Moore, *Shelby County Commission hires consultants to help with new purchasing policies,* Memphis Commercial Appeal, May 23, 2016, http://archive.commercialappeal.com/news/government/county/shelby-county-commission-hires-consultants-to-help-with-new-purchasing-policies-334e0f02-ef5e-04c6-e-380573761.html.

48 Shelby County Admissions #4, #6, and #8, *Mechanical Contractors Ass'n of Memphis*, 2:19-CV-02047.

don't know anybody in the County that would have the ability to do so." When asked whether she knew if MTA's conclusions were accurate, Watkins responded she could not verify if any were accurate, "But I pray they're accurate."[49]

Bragorgos and Burgess then decided to subpoena MTA in California, where its home office was located, to obtain the Shelby County study's underlying data directly. When no MTA representative appeared for the deposition and no data was produced, a motion to compel was filed in a San Francisco federal district court. Whatever judges might think about the merits of a case, they are always protective of judicial prerogatives and procedures. The magistrate judge required MTA to turn over the data within the boundaries of a protective order for "commercial proprietary information."[50] MTA appealed to the Ninth Circuit, which promptly dismissed the petition.[51] MTA still refused to comply with the subpoena, and the district court said MTA "has acted in bad faith in failing to comply with the subpoena" and found it in contempt.[52] That outcome made it clear that MTA could no longer provide expert testimony to defend its study.[53] So in an unprecedented tactic, the county hired a new disparity study firm to try to solve its predicament. The new expert, working at $350 an hour, produced a 111 page "final report" about the MTA study, but he was less than enthusiastic about it and, of course, he had not seen MTA's underlying data either.[54]

Shelby County ultimately had to settle the case. On November 9, 2020, the Board of Commissioners approved a settlement eliminating all of its MWBE program, though the plaintiffs had challenged only the construction components.[55] The board also agreed "to never again rely" on the MTA study or to use the MTA study to "support or justify any possible 'MWBE' or similar program in the future."[56] While using the standard "defendants deny any wrongdoing" language, the county agreed to pay $331,959 to the plaintiffs to settle the case.[57] Altogether, Shelby County has spent probably more than a million dollars on activities related to this litigation, including the MTA study, the aftermath of trying to salvage that study with another consultant, and then paying two outside attorneys to defend what they could. The County Attorney played an inconspicuous role in the case.

While this outcome might be considered as just another example of a successful plaintiff challenge to a MWBE program without a judicial ruling, it may have much broader significance. MTA's website claims the company has done 30% of all the disparity studies completed in the country.[58] It is not clear that MTA can or will produce the complete underlying data for any of the more than 140 disparity studies it has completed, even when found in contempt. If so, the question of whether secret data can be used to demonstrate a compelling interest to use contracting racial preferences will become pivotal in any challenges to programs MTA studies have been used to support.

V. Conclusion

Racial or ethnic contacting preferences can only be used legally in the "extreme case" where some form of narrowly tailored remedy might be necessary to break down "patterns of deliberate exclusion."[59] The history of litigation over contracting disparity studies holds some important lessons. These cases demonstrate that finding a disparity is just the beginning of the inquiry about whether discrimination is the causal factor, not the end. Yet disparity studies never identify any specific contract, public official, or private firm that discriminated or was discriminated against. To do so would raise the question of why the jurisdiction had not previously sanctioned the persons involved and instead resorted to a system of bid preferences and goals benefitting firms that had not suffered discrimination and penalizing firms that had not discriminated. Disparity studies instead just produce generalized disparity ratios without ever identifying any specific cause which might lead to a narrowly tailored remedy. Under the rigorous discovery process in civil litigation and judicial scrutiny, claims that discrimination caused the disparity have generally failed.

It is essential that actual discrimination be identified and remedied, but it is also important that false allegations and improperly calculated disparities unconnected with bias be challenged. It is significant that there is no history of successful litigation by minority or women contractors against governmental bodies, except, as previously noted, when Hispanic-American and Native-American contractors successfully sued to overturn Milwaukee's MWBE program that excluded them to benefit African-American- and women-owned firms. This suggests that MWBE firms have not identified discrimination against them that could be vindicated in court, which undermines the widespread

49 Watkins deposition at 64-66 (Oct. 22, 2019), *Mechanical Contractors Ass'n of Memphis*, 2:19-CV-02047.

50 Order Granting Motion to Compel, Mechanical Contractors Ass'n of Memphis, Inc. v. Shelby County, Tenn., Case 3:19MC80226 (N.D. Ca. Dec. 18, 2019).

51 *See* Order Granting Second Motion to Compel and Awarding Further Sanctions, *Mechanical Contractors Ass'n of Memphis*, Case 3:19MC80226 (N.D. Ca. June 12, 2020) (mentioning failed Ninth Circuit appeal).

52 *Id.*

53 *County settles lawsuit charging favoritism of minority-owned firms*, Tri-State Defender, Nov. 13, 2020, https://tri-statedefender.com/county-settles-lawsuit-charging-favoritism-of-minority-owned-firms/11/13/ ("'We had issues with our expert witness, so we thought that the best option this time was to move towards a settlement,' said Commissioner Van Turner, Jr., District-12, who sponsored the item.").

54 Final Report of John Vincent Eagen (June 6, 2019), *Mechanical Contractors Ass'n of Memphis*, 2:19-CV-02047.

55 *Settlement Agreement and Release of Claims* (Nov. 23, 2020) (signed by Lee Harris, Mayor of Shelby County).

56 *Id.* To try to defend the rest of the MWBE program with a disparity study the county regarded as unreliable would have only led to further litigation and expense.

57 Ryan Poe, *The 901: Shelby County can't seem to figure out minority contracting*, Memphis Commercial Appeal, Nov. 10, 2020, https://www.commercialappeal.com/story/news/local/the-901/2020/11/10/shelby-county-cant-seem-figure-out-minority-contracting-901/6231603002/.

58 Mason Tillman Associates, Our Services, https://masontillman.com/our-services.

59 *Croson*, 488 U.S. at 509.

use of disparity studies to prop up race and gender preferential contracting programs.[60] If we cannot distinguish between real discrimination and politically motivated rhetoric, then our country will become even more racially polarized. Furthermore, persons who think of themselves as marginalized will be discouraged from competing for top positions in our society.

In seeking relevant data, few scholars will have access to the powerful tools of court-sanctioned discovery, subpoenas, and testimony under oath. In 2019, when David Randall of the National Association of Scholars wrote the U.S. Department of Transportation asking that federally-funded state DBE disparity studies make their underlying study data publicly available, he received no reply, and there was no policy change.[61] Still, many governments are subject to open records acts and freedom of information requests, and they hold hearings on various race conscious initiatives. If underlying study data are not forthcoming, it will be difficult for a government to prove it had a compelling interest to use racial preferences on the basis of missing or secret evidence.

Scholars can request data and expose flawed assumptions, missing variables, and inappropriate samples in ways that will improve accuracy and transparency, inform public officials, and help to identify and eliminate discrimination where it has actually occurred. As Justice O'Connor said in *Croson*, disparities are meaningful only when differences in qualifications, willingness, and ability are controlled for, and even then they only create an inference that must be further investigated to justify preferences. The history of procurement disparity litigation demonstrates that even very expensive studies completed with the full cooperation of the governments that commissioned them rarely identify the perpetrator of discrimination or recommend remedies to its particular victims. The disparities found often do not reflect discrimination and can be alleviated through race neutral programs.

As *Croson* states, the Equal Protection Clause of the 14th Amendment and other civil rights laws permit race-based programs only as remedies where there is "deliberate exclusion."[62] More general disparities should be addressed with race-neutral programs.

60 *See supra* note 36.

61 Email from David Randall, Director of Research, NAS, to George R. La Noue, January 16, 2019.

62 *Croson*, 488 U.S. at 509.

Bureaucracy With Bumper Guards: Better Than It Rules?

By Ronald A. Cass

Administrative Law & Regulation Practice Group

A Review of:

Law & Leviathan: Redeeming the Administrative State, by Cass Sunstein & Adrian Vermeule, https://www.hup.harvard.edu/catalog.php?isbn=9780674247536

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Note from the Editor:

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Other Views:

• Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721 (2002), *available at* https://chicagounbound.uchicago.edu/journal_articles/1732/.

• Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000), *available at* https://chicagounbound.uchicago.edu/uclrev/vol67/iss2/1/.

• Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. Chi. L. Rev. 297 (2017), *available at* https://chicagounbound.uchicago.edu/uclrev/vol84/iss1/14/.

• Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016), *available* at https://www.gwlr.org/chevron-bias/ (arguing that deference violates Article III).

I. Beauty, Beast, Bureaucracy: Music to Whose Ear?

Mark Twain popularized the quip by Bill Nye (not *that* Bill Nye!) that Wagner's music is really much better than it sounds. Cass Sunstein and Adrian Vermeule, two of America's most notable professors of constitutional and administrative law, have produced a book whose central argument is that the modern administrative state is really much better than it rules.[1]

Unlike Twain and Nye's, Sunstein and Vermeule's is a serious argument, presented seriously. Their book offers a subtle, sophisticated, and in many ways soft presentation of reasons to put aside qualms about the administrative state.

For readers who wait interminably at the DMV or on the phone trying to connect with one of the agencies that rule our lives or who struggle to understand the complex morass of rules and regulations that control virtually every corner of our businesses, this may be a hard sell. So, too, for readers who have been thinking about the fit between our present administrative state and the constitutional structure that should govern it or who recognize that structure as the yardstick against which to measure the administrative state as it faces increasingly frequent legal challenges.

Sunstein and Vermeule don't avoid the headwinds faced by the administrative state. In fact, they start with a litany of complaints about the administrative state. And they make clear from the outset that their mission is not to refute them, but to reduce them—to pour oil on these troubled waters. (Okay, the metaphors are mixed, but the message should be clear.)

As fits both authors' style, *Law and Leviathan* isn't designed to bludgeon skeptical readers into submission, but instead to seduce them. The book isn't a straightforward explication of Sunstein and Vermeule's thesis. Instead, it's a blend of exploration, intrigue, and argument, presented through a series of overlapping discourses that mix anecdote, reflection, legal analysis, and jurisprudence, wrapped around a core of ideas associated with Lon Fuller's famous work, *The Morality of Law*. Fuller pushed back against the notion that law at its core is about keeping within the rules that constitute government and empower governing; instead, he argued that certain precepts about the character of rules, rulemaking, and rule enforcement matter critically to what should be regarded as properly within the framework of *law*. Most famously, Fuller articulated a set of concerns about law through which to judge legal systems—his eight ways legal systems can fail. For Fuller, avoiding these pitfalls defines the moral core of law.

Sunstein and Vermeule endeavor to persuade readers that the most important aspects of law and of a well-functioning, developed economy and society—and the broader organs of government that go with that—are best understood through reflecting on Fuller's concerns. In their telling, thinking about

1 Cass Sunstein & Adrian Vermeule, Law & Leviathan: Redeeming the Administrative State (2020).

these concerns and the ways courts and the administrative state have addressed them should give readers confidence that the most pressing problems of discretionary power are under control. Ultimately, the message is that, looked at in this manner, the administrative state not only isn't your nemesis, it's your friend. (Think of it as the administrative law version of "How to Train Your Dragon"—it's directed at making something scary into the kind of thing you'd be alright having at home.)

II. Fuller Morality: Law's (and Leviathan's) Core

Law and Leviathan's "Fullerian" core—its key to taming the administrative state—is evident throughout. The authors pay continuous homage to lessons drawn from Fuller's book on *The Morality of Law*,[2] building their discussions around Fuller's list of ways that law and legal systems can fail. Sunstein and Vermeule—with ample reason—see this list as the prototype for concerns all of us should have about law and legal systems. And they see it as the best explanation of what *law* is, especially what the law and practice of the American *administrative state* are.

Fuller's central argument, in opposition to positivists such as H.L.A. Hart,[3] is that law isn't simply whatever a legally constituted authority says or what people recognize as a binding command. Instead, *law* must meet requisites of an inner morality that reflects essential ingredients of the rule of law. For example, to count as *law*, legal requirements must inhere in rules, must be accessible to those who are to be bound by law, must not be changed so often (or so unpredictably) as to be difficult to know, and must not demand things that cannot reasonably be expected.

All of these are reasonable requirements for law. All are reasonable demands to make of whatever government entity is authorized to *make* law. It is reasonable as well to demand that no government entity *enforcing* or *implementing* the law should act in ways that contravene these essential elements of what, for Fuller, counts as *law*. Whether Fuller or Hart had the better argument on how to *define* law, Fuller certainly was right that each element he identified with the morality of law *should be required* of a well-functioning legal system.

III. Surrogate Safeguards: Stories of Law's Stand-Ins

The rub, however, is that a good deal turns on the judgments that must be made in applying Sunstein and Vermeule's translation of Fuller to *legal* decisions respecting the administrative state. The terms emphasized in the paragraph above matter. *Making* law isn't the same as *enforcing* or *implementing* the law, even if some discretion inevitably inheres in enforcement or implementation. What *defines* legal rules is not the same question as asking what ideally *should* be required of the law (a point reprised later in this review). The same distinction recurs repeatedly in law. For instance, in *Marbury v. Madison*'s famous phrase, the judge's job is "to say what the law is"[4]—and judges frequently remind us that this task is not the same as saying what it *should* be.[5] For Sunstein and Vermeule, that distinction is intentionally blurred.

The crux of *Law and Leviathan*'s explicit message is that what we have today in the American legal canon and the practical implementation of the administrative state represents a workable, laudable set of "*surrogate safeguards*" against the dangers of excessive administrative discretion—dangers that are fodder for many critics of the administrative state. That message is repeated through a series of nuanced discussions of specific cases and doctrines. Those discussions occupy the bulk of this not-bulky book.

Sunstein and Vermeule discuss, among other things, presidential control over the bureaucracy, procedural protections in administrative adjudications, process choices in policy formation, and limitations on judicial understanding of complex trade-offs that must be made in administering laws respecting allocation of economic resources. None of these discussions is tendentious or unreasonable. Quite the opposite. The authors not only write well; they also display understanding of the weak points in their inclinations and repeatedly disclaim overly strong assertions in discussing cases.

The doctrines and settings addressed touch on a formidable sweep of cases that will be known to administrative law mavens: *Vermont Yankee*,[6] *Whitman v. American Trucking Associations*,[7] *Costle*,[8] *Portland Audubon*,[9] *Bowen v. Georgetown University Hospital*,[10] *Accardi*,[11] *Brand X*,[12] *Auer*,[13] *Kisor*,[14] *Chevron*,[15] *City of Arlington*,[16] *Fox Television Stations*,[17] *Smiley v. Citibank*,[18]

2 Lon L. Fuller, The Morality of Law (1964; rev. ed. 1969).

3 *See* H.L.A. Hart, The Concept of Law (1961). *Compare* Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958), *with* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958).

4 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the Judicial Department to say what the law is.").

5 *See, e.g.*, Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (Amy Gutmann ed. 1997); Brett M. Kavanaugh, *The Judge as Umpire: Ten Principles*, 65 Cath. U. L. Rev. 683 (2016).

6 Vermont Yankee Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978).

7 531 U.S. 457 (2001).

8 Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

9 Portland Audubon Soc'y v. Endangered Species, 984 F.2d 1534 (9th Cir. 1993).

10 488 U.S. 204 (1988).

11 United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954).

12 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

13 Auer v. Robbins, 519 U.S. 452, 462 (1997).

14 Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

15 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

16 City of Arlington v. FCC, 569 U.S. 290 (2013).

17 FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

18 Smiley v. Citibank (S.D.), N.A., 517 U.S. 735 (1996).

Encino Motorcars,[19] *Gundy*,[20] and *Department of Commerce*,[21] among others. Each discussion provides an interesting capsule of significant issues of administrative law, and each provides a thoughtful connection of doctrine to practice.

Notably, almost all of these discussions include a recognition by the authors that the outcomes they favor—reached in judicial decisions they applaud—are not truly explainable by virtue of the text of legal frameworks that come closest to embodying the core judgments that Sunstein and Vermeule approve. Most often, these potentially-supporting legal frameworks are the Constitution's due process clauses or the Administrative Procedure Act (APA), and, as the authors acknowledge, neither of them quite serves to command the additional administrative procedures or judicial requirements that many of their favored decisions demand.

IV. Better than Text?

The textual weakness of the decisions Sunstein and Vermeule approve, however, is not for them the important point in these discussions. What matters isn't text. Instead, it's the internal morality—in Fuller's sense—of decisions, the fit between decisions and outcomes that the authors think strike the right balance between facilitating desirable government activity and constraining excessive discretion. Because that is the authors' priority, at each turn—even while nodding to concerns about the administrative state—the book subtly tilts the argument in a direction that at least one set of critics of the current administrative state and legal doctrines supporting it will reject.

The message of *Law and Leviathan* is that acceptance of our present set of surrogate safeguards—protections against too much discretionary power in the hands of the president, administrators, or judges—is better than demanding safeguards found in the text of the Constitution or the laws as written. On Sunstein and Vermeule's telling, reliance on surrogate safeguards is particularly better than demanding safeguards that conform to the original meaning of authoritative legal texts. Textualism and originalism—at least of the sort that produce criticisms of the administrative state—are the real beasts to be slain in this book.

To be fair, in part this may reflect the authors' judgment that much of what textualists and originalists demand is simply too difficult to obtain. For a very long time, courts' decisions have demonstrated scant willingness to impose the sort of limitations on delegation or deference that textualist-originalist writers argue are the best readings of the Constitution or the APA. For example, adherents to textualism and originalism argue that the Constitution limits how much legislative authority Congress may delegate to the executive branch, but arguably that ship sailed with the *Hampton* case in 1928,[22] and the Supreme Court has been reluctant to insist on real constraints on delegation for at least the last fifty years. For deference issues, especially under the APA (and similar statutes),[23] the picture is more complicated, with pronouncements from the Supreme Court that range from acceptance of broad deference to agency decisions (even on matters of law) to far less deferential positions.

Given their reading of the current state of Supreme Court doctrine on both of these topics, Sunstein and Vermeule place their bets against acceptance of textualist-originalist challenges. The position they stake out is that, assuming these challenges are doomed to failure, the nation is better off sticking with the surrogate safeguards that have been adopted, letting agencies develop rules that limit their discretion, and counting on doctrines that make agencies accountable for sticking with their rules. That is, if the Court won't bar agencies from exercising authority under a broad legislative delegation, the Court shouldn't limit constraints on the agencies to those found in the APA, strictly read.

The key case for this argument is *Vermont Yankee*.[24] *Vermont Yankee* directed courts not to require agencies to adopt procedures beyond those that are specified in the law, which Sunstein and Vermeule accept is consistent with a plausible, textualist reading of the APA. But, at the same time, they regard it as a bad decision because it prevented (or at least slowed or diverted) courts from developing additional safeguards against excessive discretionary administrative authority.

V. Where's the Law?: Eliding Law on Purpose

The argument against decisions such as *Vermont Yankee*—predicated on the assumption that extratextual surrogate safeguards are better than no substantial safeguards at all—is a sensible, practical argument for a second-best set of court decisions, something that the authors announce as one of their goals for *Law and Leviathan*. It faces two difficulties, however, that do not fully get their due in the book.

First, the argument requires some grounding in *law*. After all, courts are not supposed to be free-form deciders on what is best for society. They are supposed to determine what the law is when called on to resolve legal disputes. That was *Marbury*'s declaration, repeated frequently by judges and scholars alike.

While Sunstein and Vermeule argue that Fuller's concerns over law's inner morality are keys to what can *count* as law, they acknowledge that morality standing alone cannot *be* law. Morality of the sort they champion can be necessary to law, but it cannot be sufficient. Recognizing this point, although not really focusing attention on it, *Law and Leviathan* does not argue that morality should stand alone. Instead, the book urges that constructions consistent with the inner morality of law can be fashioned with reference to the relevant law's *purpose*. The message is that law, not morality, must govern, but that law governs through its *purpose* more than its *text*, and its purpose should be implemented consistent with a Fullerian understanding of the inner morality of law.

19 Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016).

20 Gundy v. United States, 139 S. Ct. 2116 (2019).

21 Dep't of Commerce v. New York, 139 S. Ct. 2551 (2019).

22 J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928).

23 *Chevron* actually was not decided under the APA, but instead under a provision of the Clean Air Act that repeated—almost verbatim—the relevant scope-of-review language from APA section 706.

24 *Vermont Yankee*, 435 U.S. 519.

This raises the *second* difficulty, which can be summed up in two related questions: How is the law's purpose divined? And how is its application in a specific context determined?

Consider the authors' view of the APA, which governs many of administrative law's process issues. A central assertion of the book is that the APA's purpose was to create a modus vivendi between proponents of strong administrative governance structures and proponents of constraint on administrative discretion. That purpose, articulated not in the APA but in Justice Robert Jackson's opinion for the Court in *Wong Yang Sung v. McGrath*,[25] is what Sunstein and Vermeule suggest as the touchstone for judicial decisions on administrative process. But however thoughtful Jackson's description of the APA as a whole may be, it doesn't suggest obvious means to find the relevant purpose and to translate it into a suitable legal rule. *Wong Yang Sung* is an example of the difficulty.

Wong Yang Sung was a challenge to rules permitting immigration officers to investigate immigration issues in some cases and to adjudicate disputes in others. Jackson admitted that the APA did not by its terms generally forbid such commingling of duties. The APA's rules for formal adjudication *do* provide for separating adjudicators from functions that might present a conflict with independent adjudication. Jackson acknowledged that this provision applied only to adjudications "*required by statute* to be determined on the record after opportunity for an agency hearing."[26] He also noted that the immigration statute at issue in *Wong Yang Sung* contained no such requirement. Nor did the statute elsewhere command a separation of functions that would prohibit immigration officers from investigating some alleged violations of the immigration law and adjudicating others. In short, the text of the statute at issue did not support a required separation of functions in the setting presented in *Wong Yang Sung*, and the APA's text did not support it in the absence of a statutory command particularized to that setting. If judges are supposed to adhere to statutory text, that should have been game, set, and match.

Jackson, however, put aside text in favor of legislative history; and he put aside legislative history of the standard sort in favor of a wider set of materials not directly part of Congress's creation of law. The materials cited are reports of a variety of governmental and bar committees that worked on or suggested or commented on reforms to administrative procedure over the decade preceding the law's passage, not the usual makings of legislative history. Comments that Jackson mined from these reports expressed enough concern over commingling of functions for him to declare that eliminating commingling of functions was a purpose of the APA. He was able to discern such a purpose behind the APA even though its only mention of separating functions is its requirement that on-the-record adjudications "required by statute" use a formal adjudicative process including this feature—which points back to the textual barrier to imposing that requirement in *Wong Yang Sung*.

After locating this unstated separation-of-functions purpose behind APA adjudication, Jackson then put the onus on the government to explain why an immigration hearing should be "exempt" from requirements that didn't by the words of any relevant statute apply to that hearing. Jackson found the requirement for a hearing—which is not to say a formal, on-the-record hearing—supplied by a prior decision under a prior law in a different setting stating that the Due Process Clause of the Fifth Amendment required *some* sort of hearing. In other words, a constitutional requirement that arguably created a hearing requirement different from what would mandate the separation of functions essential to *Wong Yang Sung*'s result and a statute that by its terms did not apply were stitched together to fit the deeper, unarticulated purpose the Justices found in materials that were not part of the actual legislative process for adopting the APA. These legal acrobatics are impressive. Molding such creativity into a Supreme Court decision is testament to Jackson's willingness to follow his own sense of right and wrong as well as his ability to weave his way around the impediments law placed in his way—impediments that would have stymied lesser legal athletes. Yet, much as these moves must have impressed Sunstein and Vermeule, they are not a stellar model of operating under the rule of law, which requires that judges implement the commands of law written by those to whom law-making power is constitutionally given.[27]

Sunstein and Vermeule do not go into the details of *Wong Yang Sung* and are not defending its particular application of the principles they find central to good administrative law. Yet they make clear their view that the essence of good administrative law is conformity to the inner morality of law embraced by Fuller and Jackson. The startling creativity of Jackson's approach—especially it's sharp divorce from the text of the laws that supposedly governed the case—should be striking to lawyers accustomed (in no small part, thanks to Justice Antonin Scalia) to reading texts and relying on them instead of tossing them overboard in favor of principles not found in the law though favored by judges and academic commentators. *Law and Leviathan*'s warm embrace of Jackson and the approach his opinion in *Wong Yang Sung* represents should be similarly striking.

The details of *Wong Yang Sung* provide an important insight into *Law and Leviathan*. Sunstein and Vermeule are not simply providing a way of constraining administrative discretion that may be deployed when other means are unavailing. They are endorsing a form of *judicial* discretion that is used to support the administrative state even more than it is used to control it. Consider questions respecting delegation and deference, discussed in the next two sections.

25 339 U.S. 33, 40–45 (1950).

26 5 U.S.C. §554(d) (2018) (emphasis added) (cited by Jackson in *Wong Yang Sung*, 339 U.S. at 48, 50).

27 For explanation of the basic requirements of the rule of law, see, e.g., Ronald A. Cass, The Rule of Law in America 2–19 (2001); F. A. Hayek, The Road to Serfdom 80–81 (1994); Michael Oakeshott, *The Rule of Law*, *in* On History and Other Essays 1 (1983); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179–80 (1989).

VI. Delegation: Is the Constitution at Home on Free-Range?

A critical issue for the administrative state is how courts decide whether authority given to administrators amounts to a constitutionally impermissible delegation of legislative power. To answer that question, Sunstein and Vermeule propose looking beyond the Constitution's text to its deeper purpose; and they suggest that the Constitution's purpose was to *facilitate*, more than to constrain, national government. In their words, it is important to appreciate that "members of the Founding Generation wanted a strong national government, not a weak one."[28] This purpose, then, informs judgments about the national government, including Sunstein and Vermeule's emphatic declaration that strict limits on delegation must be rejected because they would gravely impair that purpose.

The statement quoted above about what members of the Founding generation wanted may be true as written. Plainly, some members of the Founding generation undeniably wanted a strong national government. But the statement's phrasing is seriously misleading if taken to suggest that all or most of the Founding generation cared more about empowering the national government than constraining it. The Constitution did strengthen national government as compared to the Articles of Confederation, but the Founding generation's writings and speeches are replete with concerns about too-strong government. Virtually all the argument during the ratification debates focused on whether the new Constitution confined national power enough.[29] More important, the Constitution is overwhelmingly devoted to framing a very seriously constrained national government.

Lawmaking is the centerpiece of the Constitution and the activity that is most constrained, both in the construction of *who* makes the law and in the specifics of *how* law is made. Even a quick look at the Constitution's text shows how much space is devoted to these subjects. Both the document and the understanding of it expressed at the time emphasize the Framers concern with lawmaking and how to constrain it.

First, the Constitution requires that laws be made by Congress. That is Article I, section 1's first clause. It is where the Constitution's functional work begins.

Second, the lawmaking power is not vested in a single body selected at a single time in a single manner. Instead, laws can only be enacted by a combination of officials selected at different times, for different lengths of service, in different ways, representing different sizes and types of constituencies. This undoubtedly complicates lawmaking and frustrates many lawmaking efforts. That was exactly the goal of the Framers, who feared lawmaking by a body too easily persuaded by a transient, if widespread, sentiment or by a faction that intensely pushed for a law serving its own interest.[30] Just for good measure, every law needs to be passed by both houses of Congress in the same session and presented to the president to sign or veto. In the case of a veto, a law could only be passed by a supermajority of both houses acting to override the veto.

The *who* and *how* of lawmaking were central concerns of the Framers, clearly spelled out in the Constitution, and clearly designed to slow down and complicate the lawmaking process in ways that served to check the national lawmaking power, sacrificing effectiveness to ensure protections against infringements on liberty. Of course, compared to the Articles of Confederation, the Constitution represented a decided step toward more effective national authority. After all, the Articles were styled as a confederation of states (rather than a united republic); they required consent of more than two-thirds of the states to enact a law; and they authorized only a narrow ambit of authority for national governance. But to view strengthening national government as the purpose of the document as a whole—such that disputes are always resolved in favor of more national power—would take substantial liberties with its history as well as its text.

Law and Leviathan's authors, viewing matters through their purposive lens, take a decidedly different view of the Constitution's meaning than I have expressed here. Sunstein and Vermeule see the Constitution as providing authority for Congress to turn over to administrators *any* scope of authority it chooses, viewing that act itself as exhausting the legislative power.[31] This view makes *any* act of administrators, by definition, an exercise of the executive power.

The authors rely as well on a version of the history of delegations from Congress to administrators that is seriously contested. The book paints arguments against broad delegations of governing authority as recent inventions, but the historical works cited by Sunstein and Vermeule constitute the more recent, revisionist accounts. These accounts support what might be termed a doctrine of "free-range delegation," but many serious scholars sharply disagree with the historical and analytical claims that provide the underpinnings for Sunstein and Vermeule's approach.[32]

The summary discussion here is not intended to rebut the book's contentions about delegation (or nondelegation) doctrine.

28 Sunstein & Vermeule, *supra* note 1, at 23.

29 *See generally* The Federalist; The Anti-Federalist Papers and the Constitutional Convention Debates (Ralph Ketcham ed., 1986).

30 The famous exposition of this point is The Federalist No. 10 (James Madison). *See also id.* Nos. 47–51 (Madison).

31 This argument is spelled out in Eric Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721 (2002). Narrower arguments based on practical difficulties of enforcement are presented in Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 326–28 (2000).

32 *See*, *e.g.*, Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 Va. L. Rev. 1035 (2007); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 Harv. J.L. & Pub. Pol'y 147 (2016) (*Delegation Reconsidered*); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & Liberty 475, 478–91 (2016); Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327 (2002); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 Colum. L. Rev. 2097, 2165–81 (2004); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463 (2015); David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 Am. U. L. Rev. 355 (1987); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223 (1985); Ilan Wurman, *As-Applied Nondelegation*, 96 Tex.

Rather, the relevant point is that on this issue the argument presented in the book is heavily weighted on the side of the current, expansive administrative state. The authors' position that a nondelegation doctrine is less helpful than a "second-best" set of surrogate safeguards may be valid as a practical matter (though I am doubtful on that score), but it is difficult to take at face value given its tension with their "first-order" position opposing any legal restraints on delegation.[33]

VII. Deference: Who Decides? And Why?

Similarly, on questions respecting the appropriate scope of deference to administrative interpretations of statutes and agency regulations, Sunstein and Vermeule support broader authority for the administrative state. They also support judicial frameworks that are relatively short on legal grounding and long on discretion for courts and agencies alike.

The most famous deference decision is *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*.[34] It has spawned a cottage industry of both legal application and academic commentary.[35] Much of the case law and commentary reveals divisions in the way the *Chevron* decision is interpreted. Some judges and scholars have read the decision as commanding judicial deference to administrative interpretations of statutes whenever the judge finds no absolutely precise and definite meaning to the relevant statute.[36] Deference in accordance with this view treats administrators effectively as substitute judges for the set of cases involving provisions with no clear determinate meaning.

A second group, including Justice Scalia, has read *Chevron* as leaving largely undisturbed prior law that understood that courts *interpret* law and agencies *implement* it, although broadening the default rule on agencies' discretionary authority over implementation.[37] This group sees *Chevron* directing courts to interpret the law in traditional ways. When there is a natural, best reading to a statutory provision, courts should give the law that meaning. But when an agency administers a complex regulatory statute and the terms framing that agency's authority are ambiguous in some respect, the courts generally should understand the law as permitting the agency to make policy decisions implementing the law that do not conflict with the courts' view of the law's bounds around agency authority. In other words, the court determines the *meaning* of the law, and the agency decides how best to *implement* it when the meaning is "do anything reasonable to accomplish this goal within this sphere of authority." Read this way, *Chevron* is consistent with a conceptual division between *interpretation* and *implementation*. It also is consistent with the text of the APA (and the Clean Air Act, which was actually the law at issue in *Chevron*), with case-law predating the APA, and with the most natural reading of the Constitution's vesting clauses.

Sunstein and Vermeule focus much of their discussion on rebutting attacks on *Chevron*. They quite sensibly treat *Chevron*'s rule of deference as concerning delegation of authority. While they characterize *Chevron* as dealing with *interpretive* authority, they recognize that the framework that has grown up around *Chevron* is consistent with disparate visions of what it commands. *Law and Leviathan*, after reviewing some of the major disputes, cases, and lines of demarcation under the *Chevron* banner, characterizes the decision and the cases applying it this way: "*Chevron* continues to serve as a kind of governing regime, a broad and open-ended mini-constitution for judicial deference, one that tolerates and incorporates a diversity of approaches in a modus vivendi."[38]

In general, Sunstein and Vermeule's treatment of *Chevron* is thoughtful, measured, and even consistent with approaches taken by critics of the administrative state. Yet their emphasis differs from that of approaches anchored in specific textual commands and constitutional structure. The important point for this book is not the cases' fit with specific legal texts, but the flexibility the *Chevron* framework leaves for judges and administrators. It lets judges work out when it is better to defer and when it is better to override administrative decisions that are framed in terms that either assert interpretive conclusions or announce policy decisions in language that parallels such determinations. And to the extent administrators are given discretion to implement the law, they have what for Sunstein and Vermeule is a salutary tractability to apply the law according to their own judgments.

L. Rev. 975 (2018); Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. (forthcoming 2021). For works that more broadly contest the sort of approaches underlying the conception of a broadly empowered national government, and especially a government operating through discretionary administrative authority, see generally Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (2004); Philip Hamburger, Is Administrative Law Unlawful? (2014).

33 In addition to their argument about delegation in Chapter 3, Sunstein and Vermeule explain their "first-order" narrative on delegation in Chapter 5. *See* Sunstein & Vermeule, *supra* note 1, at 121–22.

34 467 U.S. 837.

35 For helpful overviews of the arguments and positions regarding deference, see, e.g., Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779 (2010); Peter L. Strauss, *"Deference" Is Too Confusing--Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 Colum. L. Rev. 1143 (2012); Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 Geo. J.L. & Pub. Pol'y 103 (2018).

36 *See, e.g.*, Babbitt v. Sweet Home Chapter of Cmties. for a Great Oregon, 515 U.S. 687 (1995); E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 Vill. Envtl. L.J. 1 (2005); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452 (1989); Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 Vand. L. Rev. 301 (1988).

37 *See, e.g.*, *Brand X*, 545 U.S. at 1016–19 (Scalia, J., dissenting); *Smiley*, 517 U.S. 735; Ronald A. Cass, *Vive la Deference? Rethinking the Balance Between Administrative and Judicial Discretion*, 83 Geo. Wash. L. Rev. 1294 (2015) (*Rethinking*); Gary Lawson & Stephen Kam, *Making Law Our of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 Admin. L. Rev. 1, 2 (2013); Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 Nw. U. L. Rev. 551 (2012); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511. *See also* Ronald A. Cass, Colin S. Diver, Jack M. Beermann, & Jody Freeman, Administrative Law: Cases and Materials 187–244 (8th ed. 2020).

38 Sunstein & Vermeule, at 137–38.

Law and Leviathan's key message on deference is that the Supreme Court should not substitute a less generous, more court-centric rule of statutory interpretation for *Chevron*'s general acceptance of agencies' discretion to work out ways to implement statutes they administer.

The book's treatment of *Auer* deference—deference to agencies' interpretations of their own ambiguous rules—also supports giving leeway to the agencies, subject to a few safeguards of the sort Fuller and Jackson would likely approve. The safeguards, which have been incorporated into a new "*Chevron*ized" version of *Auer* after the Court's decision in *Kisor v. Wilkie*,[39] are intended to prevent too rapid or unpredictable changes in rules' meaning, to make sure that the elaborations of rules' meanings are reasoned and attended to by appropriate agency personnel, and to limit deference to apply only to interpretations that utilize the agency's expertise.

The authors discuss and disagree with virtually all of the criticisms of *Auer*. They rightly note that many of the criticisms prove too much, notably the assertion that letting an agency interpret its own rule mixes adjudicative and legislative or administrative types of authority in violation of due process or of the vesting clauses that separate powers among the branches of government.[40] They also rightly point out that it is both plausible and (within certain bounds not spelled out in their discussion) constitutionally permissible for Congress to grant an agency discretion to make rules *and* to interpret those rules.

Their view of *Auer*, however, as with their treatment of delegation, is faulty because it provides an essentially open field. Just as, in their view, Congress can grant administrators any scope of authority so long as it does this by law, so, too, it can require courts to defer to administrators' judgments without limitation. This position may be correct in a general sense—after all, Congress could deprive the courts of jurisdiction over the challenges to administrative determinations on any terms.[41] At some point, however, deference becomes tantamount to conferring a power on administrators that exceeds constitutional limits.[42]

Sunstein and Vermeule's *Auer* deference argument fails as well because it lacks a requirement of an actual textual delegation of authority; for them, it's enough that it makes sense to read the delegation of authority as giving an agency discretion over how to interpret its own rules. The authors do not note one of the key differences between *Auer* and *Chevron* deference. *Chevron* turns on what authority is reasonable to infer from an ambiguous statutory provision, asking when courts can deem that the ambiguity confers additional discretionary power on agencies. Obviously, Congress can choose to confer some degree of discretionary power on agencies. But can *Auer* sensibly ask whether the *agency's* ambiguity confers deference on the agency itself? That is the import of—and the problem with—the rule embraced in *Auer*.[43]

What *Law and Leviathan* proposes is acceptance not of the rule announced in *Auer* (or its ancestor, *Seminole Rock*)[44] but of a revised rule that lets courts pour into statutes whatever delegations and commitments of discretionary authority make sense to the judges. The book's linkage of both *Chevron* and *Auer* deference to legislative delegations of authority makes constitutional sense. But the delegation in Sunstein and Vermeule's construct doesn't have to be real. It doesn't have to have been expressed in a statute or in the Constitution or even reasonably inferred from them. Delegation, for these purposes, only needs to provide a plausible framework for letting agencies operate—subject only to rules courts create to assign discretion where they think it fits, and procedures courts fashion to provide the freedom or the constraint they deem appropriate. The book's treatment of deference thus ultimately founders on the same ground as its treatment of delegation: it yields too much power to the least accountable actors in our constitutional system.

VIII. Of Vesting Interests: Taking Divided Government Seriously

Framing legal doctrines to set bounds around administrative actions requires giving practical effect to the Constitution's separation of powers among the branches, captured most clearly in the three vesting clauses of Articles I, II, and III. From the beginning, James Madison, John Marshall, and others recognized that the boundaries between the powers assigned to the three branches are not capable of being drawn with absolute precision,[45] but they recognized as well that maintaining distinctions among these powers and keeping them separate is critical to the Constitution's design.[46]

In line with these lessons, Justice Scalia's dissent in *Mistretta v. United States* notes both sides of the constitutional argument.

39 139 S. Ct. 2400.

40 For contrasting arguments on this issue, see, e.g., John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996). *See also* Paul J. Larkin, Jr. & Elizabeth H. Slattery, *The World After* Seminole Rock *and* Auer, 42 Harv. J. L. & Pub. Pol'y 625 (2019) (addressing *Auer*/*Seminole Rock* deference's conflicts with due process and related requirements of fair and impartial decision-making by biasing both agency interpretation and judicial review).

41 *See*, *e.g.*, *Dep't of Commerce*, 139 S. Ct. at 2603 (Alito, J., concurring in part and dissenting in part); Webster v. Doe, 486 U.S. 592, 600 (1988); *id.* at 608–10 (Scalia, J., dissenting); Heckler v. Chaney, 470 U.S. 821, 837–38 (1985).

42 *See*, *e.g.*, Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defects*, 87 Fordham L. Rev. 531, 536 (2018) (Auer *Deference*).

43 *See*, *e.g.*, Ronald A. Cass, *Deference to Agency Rule Interpretations: Problems of Expanding Constitutionally Questionable Authority in the Administrative State*, 19 Federalist Soc'y Rev. 54 (2018), *available at* https://fedsoc.org/commentary/publications/deference-to-agency-rule-interpretations-problems-of-expanding-constitutionally-questionable-authority-in-the-administrative-state.

44 Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

45 *See*, *e.g.*, Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43, 46 (1825); The Federalist No. 37, at 228 (James Madison) (Clinton Rossiter ed., 1961).

46 *See*, *e.g.*, The Federalist No. 47, at 301–03 (James Madison) (Clinton Rossiter ed., 1961); The Federalist Nos. 48 & 51 (James Madison). For more recent appreciation of this understanding, see, e.g., *Gundy*, 139 S. Ct. at 2138–40 (Gorsuch, J., dissenting); Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 57–66 (2015) (Alito, J., concurring); *id.* at 66–91 (Thomas, J., concurring in the judgment); Stern v. Marshall, 564 U.S. 462 (2011); Clinton v. New York, 524 U.S. 417 (1998); Loving v. United States, 517 U.S. 748, 757–58 (1996); Northern Pipeline

First, he recognizes the difficulty of devising a formula to limit precisely how much discretion lawmakers can allocate to agencies before those agencies' administrative actions become lawmaking.[47] But then he also identifies a key distinction. His opinion draws a sharp line between different *kinds* of rulemaking: (i) application of articulated policy to particular factual circumstances and prescription of rules for future application by the same authority and (ii) prescription of rules pure and simple. The former could be an exercise of executive power (the province of the president and administrative agencies) or, when done in the context of cases that come within Article III's bounds, judicial power (the province of the courts). But, Scalia declares, where the rulemaking power stands alone, as in *Mistretta*, its exercise is a legislative function.[48] What Congress had done in that case in effect created "a sort of junior-varsity Congress."[49] A dozen years later, writing for the Court in *American Trucking*, Scalia expressly ties the permissible ambit of administrative discretion to the importance of the authority granted by law, noting that more important commitments of authority require more statutory direction.[50] This, essentially, reprises the test articulated by Chief Justice Marshall 176 years earlier.[51]

Quite a few scholars have proposed understanding constitutional separation of powers (and doctrines respecting delegation and deference that can serve related functions) in a conceptual framework that divides government actions into a few basic categories.[52] The Supreme Court has followed a similar approach in deciding whether issues are within the judicial function assigned to Article III courts or whether a particular legislative or executive action constitutes lawmaking that must go through the constitutionally prescribed process.[53] For deference issues, this approach separates questions into those dealing with *interpretation of law* and those dealing with matters of *administrative discretion*. Courts have authority over interpretation of law, including saying what scope of authority administrators enjoy under the law. That is essentially *Chevron*'s Step One and its "traditional tools" direction. Agencies either have unreviewable discretion (when a matter is clearly committed to agency discretion by law), or they have discretion that is subject to review for reasonableness (*Chevron*'s Step Two). This approach makes *Chevron* fit the constitutional scheme and also fit the APA (and related statutes), and it avoids complications from potential conflicts between agencies' and courts' interpretations of law.[54]

Sunstein and Vermeule, however, resist a conceptual-categorical division between making *law* and making *policy decisions* in the course of enforcing or implementing law (the closest analogue to lawmaking in the administrator's legitimate domain), even where that distinction is generally in line with their interpretation of the law, as with *Chevron*. They base their resistance primarily on the difficulty of making the conceptual division required. That's a reasonable basis for rejecting some conceptual divisions, but it is a fairly weak argument here. The argument is especially unconvincing given that Sunstein and Vermeule's surrogate-safeguards/inner-morality approach calls for judgments that are at least as difficult to make and considerably more difficult to ground in anything solid as a matter of law.

Their related argument is that the conceptual approach has been tried and failed, as courts have rejected or abandoned it. The argument treats judges as neutral, dispositive arbiters of best approaches. That's a fair assumption in many circumstances, but it's at odds with much of the argumentation in the book. Further, courts have not in fact broadly rejected the conceptual division offered in the contexts relevant here. Sunstein and Vermeule's assertion rests on judicial reluctance to follow the division between "jurisdictional" or "fundamental" facts and ordinary facts, famously set forth in *Crowell v. Benson*,[55] not the distinction between interpretating law and exercising discretion in policy or enforcement.

The more likely reason for the authors' reluctance to embrace the conceptual division described above is that it doesn't fit their view that the Constitution's vesting clauses are mere definitional conveniences. On Sunstein and Vermeule's reading of the Constitution, whatever Congress does is, by definition, an exercise of legislative power. Nothing conceptual is needed. So, too, they see whatever courts do, by definition, as an exercise of

Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Alexander & Prakash, *supra* note 32; Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 Admin. L.J. 255, 262–63, 266–67 (1988); Cass, *Delegation Reconsidered*, *supra* note 32; Ronald A. Cass, *Is* Chevron*'s Game Worth the Candle? Burning Interpretation at Both Ends*, *in* Liberty's Nemesis: The Unchecked Expansion of the State 57 (Dean Reuter & John Yoo eds., 2016) (*Worth the Candle?*); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 131, 189–211 (1998); Farina, *supra* note 36, at 472–73; Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 Admin. L.J. Am. U. 187, 187–90 (1992); Lawson, *supra* note 32, at 341–42; Manning, *supra* note 40.

47 Mistretta v. United States, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting).

48 *Id.* at 417–22 (Scalia, J., dissenting).

49 *Id.* at 427 (Scalia, J., dissenting).

50 *Whitman*, 531 U.S. at 475.

51 *See*, *e.g.*, Wayman, 23 U.S. (10 Wheat.) at 41–43.

52 *See*, *e.g.*, Alexander & Prakash, *supra* note 32; Byse, *supra* note 46; Cass, *Delegation Reconsidered*, *supra* note 32; Cass, *Worth the Candle?*, *supra* note 46; Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale. L.J. 1672, 1679–1726 (2012); Herz, *supra* note 46; Lawson, *supra* note 32, at 341–42; Jeffrey Pojanowski, *Neoclassical Administrative Law*, 133 Harv. L. Rev. 852, 882–95 (2020). *See also* Hamburger, *supra* note 32.

53 *See*, *e.g.*, *Clinton*, 524 U.S. 417; *Loving*, 517 U.S. 748; INS v. Chadha, 462 U.S. 919 (1983); *Northern Pipeline*, 458 U.S. 50.

54 This approach, in various linguistic formulations, has been advanced in many of the discussions of *Chevron*. *See*, *e.g.*, Byse, *supra* note 46; Cass, Auer *Deference*, *supra* note 42; Cass, *Rethinking*, *supra* note 37, at 1314; Duffy, *supra* note 46, at 189–211; Herz, *supra* note 46; Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 Chi.-Kent L. Rev. 1253, 1257–58 (1997); Pierce, *supra* note 36, at 310–12; Pojanowski, *supra* note 52, at 858–59, 884–94, 900–02; Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 Yale J. on Reg. 283, 284 (1986).

55 285 U.S. 22, 55–57 (1932).

judicial power. On this view, anything that administrators do is executive power. And on this view, there is no delegation issue. Nor can there be a constitutional question of excessive deference.

This reductive view of the vesting clauses and the divisions of power that follow them requires justification. It does not obviously make sense to read the Constitution's principal provisions as a set of nearly tautological definitions. Explanation for the book's dismissal of conceptual-categorical approaches—and for the authors' embrace of definitional approaches to constitutional questions—demands something more.

While it is fair enough for Sunstein and Vermeule to emphasize the difficulty of making distinctions between conceptually imprecise categories such as lawmaking and implementation or legal interpretation and implementation, their preference for a different approach here seems rooted in other grounds. Two alternatives are plausible. One plausible basis is their rejection of textualism and originalism as methods of interpretation. Sunstein and Vermeule make plain that they prefer looking to purpose instead of text. The reasons for that are complex, and giving the arguments (these authors' arguments and those put forward in related academic debates) their due would take more space than is reasonable for a book review. It is, however, a plausible reading. The other plausible reason for rejecting the conceptual option is that it seems more likely to threaten the current form of the administrative state. That, too, seems a fair reading of the book. Either way, the rationales offered in the book, on this and other scores, will be more congenial to readers who are not dissatisfied with the size and shape of today's administrative state.

IX. Conclusion

Ultimately, this is a book that should be read by everyone interested in the law, theory, and practice of the administrative state. It is thoughtful, interesting, well-presented, and, despite its relative brevity (for many academics, a 145-page work is mere throat-clearing!), it is also quite capacious, covering a substantial part of the administrative law landscape. The book provides enough meat in sprightly enough fashion to become a talked-about, written-about, and resorted-to reference. Moreover, without being doctrinaire, it will please great parts of the academic, pundit, and policy community with its defenses of much that is essential to maintaining a large and powerful administrative state. None of this should surprise anyone familiar with Cass Sunstein and Adrian Vermeule or the very large and well-respected bodies of work they have produced.

Readers who come to *Law and Leviathan* without a background in these works or the debates they intersect also can find this a quite readable volume. But they should understand that the point of much of the book is not so much to examine or critique the administrative state as to explain ways to preserve it. This will involve placing limits on the administrative state in some instances, but that doesn't have to be done through hard limits on the bureaucracy, much less on congressional delegation of authority to it. The book's message is that soft limits are better, more flexible, more pragmatic, and have generally been formed by and are implemented by people who can be trusted to stop bad things and facilitate good things. Arguments to the contrary are derided under the label of "New Coke"—ostensibly a reference to 17th century jurist and scholar Sir Edward Coke, but also no doubt a pun on the notoriously failed 1980s effort of the Coca-Cola company to change its flagship product to something sweeter.

The major argument throughout draws an unspoken parallel to the historic success of classic Coke. Sunstein and Vermeule's overarching theme is that courts generally have used their discretion to strike the right balance between creating process constraints and enabling agencies to function effectively, and that agencies have done the same. The stress is on preventing law from getting in the way of properly shaped discretion. The volume starts with observations about the assault against the administrative state, ends with a return to that theme, and reprises the importance of celebrating the way that advertence to the inner morality of law can bridge the divide between enabling and constraining the administrative state. Notably, however, many of *Law and Leviathan*'s most pointed arguments focus not on the *constraint* side but on the *enabling* side of the divide.

Sunstein and Vermeule's vision of the administrative state is a generally rosy one. It sees the state making water cleaner, air more breathable, working conditions less dangerous, indefensible discrimination less common, pharmaceuticals safer, and financial stumbles more bearable. Theirs is not a vision of too many rules, too many regulations, too much red tape, or too much interference with private enterprise, private initiative, and private lives. The project here, as the book's subtitle says, is "redeeming the administrative state."

Much of what Sunstein and Vermeule urge in this book is at odds with the more obvious ways of reining in excesses and constraining grants of authority that strain constitutionally articulated limits—obvious ways of adherence to text, to original meaning, and to holding each branch of government to the conceptually distinctive tasks the Constitution assigns. Yet *Law and Leviathan* also offers pointers on how law can be used to soften some of the less savory byproducts of a large state brimming with regulations and requirements. Anyone concerned about the administrative state should hope that this side of the book's discourses is taken seriously by judges and administrators alike. Almost certainly, the other side will be—with or without Wagner playing in the background.

The Establishment Clause: Its Original Public Meaning and What We Can Learn From the Plain Text

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Other Views:

- Everson v. Board of Education, 330 U.S. 1 (1947), *available at* https://www.oyez.org/cases/1940-1955/330us1.
- School District of Abington Township v. Schempp, 374 U.S. 203 (1963), *available at* https://www.oyez.org/cases/1962/142.
- Steven D. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom (1995), *available at* https://www.amazon.com/Foreordained-Failure-Constitutional-Principle-Religious/dp/B002C7L73I.
- Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation*, 8 U. Pa. J. Const. L. 585 (2006), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=963447.

Modern times in church-state relations began in 1947 with the Supreme Court's decision in *Everson v. Board of Education*.[1] The Justices in both the majority and the dissent said they were interpreting the Establishment Clause based on the intent of the founding generation. However, rather than examine the 1789 congressional lawmaking that directly led to the First Amendment, the Justices relied on the Virginia disestablishment experience from 1784 to early 1786, as well as the extended efforts of just two statesmen from among the founders, James Madison and Thomas Jefferson.[2] The devotees of this off-centered version of the pertinent history took on the appellation of "strict separationists." Throughout the 1960s and 70s, the Virginia experience was more or less read into the Establishment Clause.

A rough collection of alternative theories concerning the relevant history and what it showed formed in opposition and travelled under the broad heading of "accommodationism."[3] Although accommodationists never coalesced behind a single alternative interpretation of the Establishment Clause, they rallied behind allowing nonsectarian prayer to solemnize civic occasions, traditional government displays and other symbols with religious content, and funding for "nonsectarian" curricula and programs at religious schools, colleges, and charities. Accommodationism faced an uphill struggle. By the early 1980s, however, all but the most hardline separationists conceded that, as a matter of avoiding viewpoint discrimination that would violate the Free Speech Clause, private expression of religious content ought to be granted equal access to public forums.[4] And while accommodationists had

1 330 U.S. 1 (1947). By a vote of 5 to 4, the Court upheld a local government plan of reimbursing parents for bus fare paid to transport their children to K-12 public and private schools, including religious schools. While otherwise divided on the merits, the Justices all agreed that the Establishment Clause should be incorporated through the Fourteenth Amendment and be binding on state and local governments. *Id.* at 14-15.

2 *Id.* at 11-13 (Black, J., for the Court); *id.* at 28-62 (Rutledge, J., author of the principal dissent). In a chapter with "Premeditated Law Office History" in the title, research professor Donald Drakeman dismembers the *Everson* Court's linking of the Virginia disestablishment, along with Madison and Jefferson, with the adoption of the First Amendment. *See* Donald L. Drakeman, Church, State, and Original Intent 74-148 (2010) [hereafter Drakeman, Church, State].

3 Among accommodationists, the most prominent school of thought was nonpreferentialism. This interpretive theory would permit government to aid religion, provided that all religions were assisted without preference. Drakeman ably summarizes the scholarly debate over nonpreferentialism in Drakeman, Church, State, at 156-95, and ultimately deems the theory implausible. *Id.* at 249-58. Supreme Court majorities have consistently rejected nonpreferentialism since *McCollum v. Board of Education*, 333 U.S. 203, 211 (1948), although a few dissenting opinions have adopted it.

4 *See* Widmar v. Vincent, 454 U.S. 263 (1981) (8 to 1 decision striking down speech restrictions on religious groups meeting in state university buildings).

only a few outright victories in the Supreme Court,[5] bright line separationism slipped to minority status upon the rise of Justice Sandra Day O'Connor's no-endorsement test as an accretion to the three prongs of *Lemon v. Kurtzman*.[6]

These were the battle lines until the late 1990s when, as least as to government programs involving grants and other financial assistance, the presumption favoring separationists collapsed under the banner of government "neutrality" regarding religion.[7] The basic appeal of neutrality theory was that religious providers serve the common good (e.g., providing education, health care, or charitable services) and ought not to be discriminated against. Neutrality found historical support in the founding era's upholding of "the right of private judgment" in matters of religious conscience. The relevant "private judgment" now being exercised lay with the parents of students who wanted to choose a religious school, welfare recipients freely selecting faith-based charities to deliver their welfare services, and patients desiring admission to religious clinics to secure government underwritten health services. It helped, of course, that neutrality theory could marshal to its cause the powerful rhetoric of "nondiscrimination" and "freedom of choice."

To the extent the High Court relied on history to advance or oppose the foregoing interpretations of the Establishment Clause, it was professed to be a search for events and principles reflecting the original *intent* of the founding generation. This is now regarded as Old Originalism. It had a few basic problems. Lawmaking is a collective task, so there was no singular intent, and sometimes the various aims of the founders conflicted. Further, there was the problem of how long a timespan is relevant as one goes about collecting the lawmakers' intent. For example, were the writings of Madison during an intense debate before the Virginia House of Delegates in 1784-1785 to be uncritically read into Madison's work four years later as a member the U.S. Congress involved in composing what we now know as the First Amendment?

Jurisprudential conservatives have long urged an interpretation of the U.S. Constitution that is faithful to the time of its inception. As more defensible than original intent, they increasingly look to New Originalism. This is an interpretive principle that adheres to the original *public meaning* of the words on which the authors of the law finally settled. "Public" means that the final words of a law should mean today what literate people would have understood them to mean at the time the words were adopted. It is quite appropriate, for example, to consult dictionaries from the period of the lawmaking.[8]

It is now apparent that the American disestablishment story is far more multisided and complex than the story featuring only Madison and his Revolutionary Virginia.[9] And Jefferson was not even in the country when the Constitution and bill of rights were debated and adopted; he was at best a distant player, attending to American foreign interests in Revolutionary France as the First Amendment was birthed on this side of the North Atlantic.[10]

Reliance on the Virginia disestablishment experience, even when supplemented by Madison's broader work, is inadequate to understanding the original public meaning of the Establishment Clause. *Everson* and its progeny are looking in the wrong place at the wrong time. The First Amendment is from an altogether different time (summer 1789) and source (Congress sitting in New York City) than the dramatic events in the Virginia legislature sitting in Richmond during 1784-1785. James Madison is the one common denominator, but his purposes and his power to shape the law emerging from these events were altogether different in the two instances. New Originalism moves the focus elsewhere.

Criticizing past mistakes is one thing. There is still the question before New Originalist interpreters: What was the original public meaning of "make no law respecting an establishment of religion"? And what evidence is informative about the events of the day that puts in context the meaning of these words when composed by members of the House and Senate during the First Federal Congress from June through September of 1789? And how does the state ratification of the federal amendments during 1789-1791 contribute to original meaning, especially given that states had to take the text of the bill of rights as presented and could only vote entire amendments up or down?

New Originalism looks at a narrower slice of the historical record, maintaining a laser-like focus on the September 1789 meaning of the final words of the Establishment Clause. Still, this interpretative theory requires some knowledge of a wider context

5 *See, e.g.*, Marsh v. Chambers, 463 U.S. 783 (1983) (upholding practice of state employment of chaplain to offer prayers at beginning of legislative day); Hunt v. McNair, 413 U.S. 734 (1973) (upholding government issuance of revenue bonds for construction of secular-use buildings at religious colleges).

6 403 U.S. 602 (1971). The Court in *Lemon* said that a law violated the Establishment Clause if it had a religious purpose, if its primary effect was to advance religion, or if it created excessive entanglement between church and state. *Id.* at 612-13. Unhappy with *Lemon*, in *Lynch v. Donnelly*, 465 U.S. 668 (1984), Justice O'Connor wrote an impactful concurring opinion arguing that *Lemon* should be modified to ask whether the law in question endorsed religion in the view of an objective observer. *Id.* at 687, 691-94 (O'Connor, J., concurring). Interest in the no-endorsement test ended with Justice O'Connor's retirement in 2006.

7 *See* Agostini v. Felton, 521 U.S. 203 (1997) (holding that traveling special education teachers employed by the government may deliver services in area schools, including religious schools); Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion) (upholding federal aid to primary and secondary schools, including religious schools); Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding K-12 school funding plan where parents were free to use vouchers at a variety of schools, including religious schools).

8 The late Associate Justice Antonin Scalia was a proponent of New Originalism. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws* in A Matter of Interpretation: Federal Courts and the Law 3, 16-25, 29-41 (Amy Gutmann ed. 1997).

9 Carl H. Esbeck & Jonathan J. Den Hartog eds., Disestablishment and Religious Dissent: Church-State Relations in the New American States, 1776 - 1833 8-12 (2019) (finding that the church establishments in the early American states varied widely, and that no one state's process of disestablishment set a pattern for the other states) [hereafter Disestablishment and Religious Dissent].

10 *See* Mark David Hall, *Madison's Memorial and Remonstrance, Jefferson's Statute for Religious Liberty, and the Creation of the First Amendment*, 3 American Political Thought 36, 57-58 (Spring 2014) ("If jurists and scholars are really interested in the 'generating history' of the Establishment Clause, it is a mistake to assume that Jefferson's and Madison's approaches to these issues reflect the views of their peers.").

to understand what the First Federal Congress was trying to do in settling on this text. Stated a little differently, the authors of a law choose their words to fit the task. How did those in control at the First Congress conceive of their task? And were there restraints on what they could do?

Answering these questions requires first going back and briefly exploring the task of the delegates to the 1787 Constitutional Convention, which is the topic of Part I. Then Part II takes up the task of the First Congress in composing and sending amendments to the states, and in particular the Establishment Clause of what became the First Amendment. In doing so, we look at some of the day-to-day debates in the House and Senate concerning the establishment question, not with the aim of determining the original intent of the framers, but with the aim of getting insight into the meaning of the words they chose to fit the task. Part III then hazards what we have learned concerning the original public meaning of the First Amendment text "respecting an establishment of religion," and what we still do not know. Finally, no interpretive rule is required when the text alone is definitive. Thus, Part IV turns to consider what we can know from the grammar and plain text of the Religion Clauses. Whether one is an originalist or not, such a textual investigation allows us to put to bed some longstanding myths, such as the claim that the two clauses are in tension and sometimes conflict.

I. The Overall Theory of (and Limitations to) the 1787 Constitution

As convention delegates began to gather in Philadelphia in May 1787, both religion and religious liberty were sensitive and sometimes contentious matters. But such disagreements were manageable if religion was left to the states. The Congregational church was still firmly established in all New England except Rhode Island, and South Carolina and Maryland were still working toward disestablishment of the Anglican church in the South. If the Constitution had granted to the federal government power over religion in any plenary sense, that could easily have prevented agreement in Philadelphia, and it certainly would have stirred enough trouble to prevent ratification of the Constitution by the designated minimum of nine states.

A republic's constitution can do three things. First, it can organize the government's frame, form offices and assign them competencies, and carefully diffuse authority among multiple departments to avoid concentrations of power. Second, it can define the relationship between the government, on the one hand, and the people and their nongovernmental organizations, on the other, including the vesting of select rights in the latter. And third, it can declare those first principles around which the body politic is drawn together and the nation-state is founded. However, a constitution need not do all of these things, nor do any of them in a comprehensive way. Certainly, the U.S. Constitution of 1787 sought primarily to accomplish only the first of these objectives in a thorough manner. A bill of rights was added two years later in apparent response to the second of these three tasks. However, the original Constitution's near silence with respect to the nation's founding principles was in large part calculated. In significant measure, the gap reflects the difficulty of achieving agreement on first principles at the Philadelphia convention. In the face of such disagreement, a common way to get contending parties to sign a single document is to avoid topics on which there is no hope of consensus. Religion was one of those topics. Moreover, religion was doubly easy to avoid when constituting the federal government because otherwise disputing parties agreed that it was a matter for each state.

What is most apparent from the Constitution as agreed to on September 17, 1787, is that the frame of the new central government was a constitutional federalist republic of limited, delegated powers. The atom of sovereignty had been split, creating a new national government of enumerated powers with the preexisting states retaining their residual sovereignty. A republic had never in history succeeded for very long. James Madison's solution was for the republic to unite states that spanned an extended geographic area. He believed that volatile factions in one part of the county would be dissipated over this vast expanse of land.[11] To achieve the Madisonian vision, the constitutional design was to prevent the concentration of power in any one branch. Rather, power was balanced and checked by others, with an underlying assumption that unmitigated power invites abuse and corruption.

Beyond these features, the first principles on which the government is founded are not altogether evident from the text.[12] It is true that the Preamble famously says that "We the people" are the ones who "do ordain and establish" this new government. But elsewhere the operative provisions of the 1787 Constitution indicate that matters of U.S. citizenship and who gets to vote in federal elections were left to each state to decide. Which is to say that giving definition to "the people" who are doing all this "ordaining" and "establishing" is a power vested not in the central government but residing in the several states. This was no small matter for female citizens denied the right to vote or slaves denied citizenship, voting rights, and even recognition of their full inclusion in the human race.

Historian Richard Beeman attributes the Preamble's silence on religion and first principles more generally, other than republicanism and federalism, to Edmund Randolph of Virginia. He was chair of the Committee of Detail and the initial drafter of a provisional Constitution during the Philadelphia Convention's recess from July 27 to August 6, 1787.[13] The Committee of Detail was given the task of assembling all the decisions the Convention had made to date into a coherent document. Within the Committee, to Randolph fell the task of putting pen to paper and producing a first draft. Concerning Randolph's view on the

11 The Federalist No. 10, *available at* https://guides.loc.gov/federalist-papers/text-1-10.

12 Americans frequently point to the Declaration of Independence, or at least its second paragraph ("We hold these truths to be self-evident . . . ."), in a search for the nation's first principles that are absent in the 1787 Constitution. 1 The Founders' Constitution 9-11 (Philip B. Kurland & Ralph Lerner eds., 1987) (Declaration of Independence) [hereafter Founders' Constitution]. President Lincoln did this when reaching for the line "dedicated to the proposition that all men are created equal" in his 1863 Gettysburg Address.

13 Richard Beeman, Plain, Honest Men: The Making of the Constitution of the United States of America 255-56, 278 (2009).

proper role of the Constitution as a whole, and the Preamble in particular, Beeman writes:

> The other notable aspect of Randolph's approach to the task of constitution writing was his insistence that a lengthy preamble similar to that contained in the Declaration of Independence was not necessary. He considered the Constitution to be a legal, rather than a philosophical, document, and by his reasoning, "a preamble seems proper not for the purpose of designing the ends of government and human polities." Randolph believed that elaborate displays of theory, though perhaps necessary in the drafting of the state constitutions, were inappropriate to the task now at hand. For Randolph, the business of constitution making was not an excursion back to fundamental principles or an articulation of the natural rights of man. Rather, it was a matter of taking those fundamental principles and natural rights already articulated in the Revolutionary state constitutions and interweaving them with the delegated powers written into a federal constitution. . . . Although what we call the "preamble" . . . went through several different transformations . . . [,] in the end, the framers of the Constitution supported Randolph's fundamental premise.[14]

We learn from this that the absence of any explicitly stated religious presupposition undergirding the new nation's charter was in character with the quietude concerning first principles generally. This goes a long way to dispelling the "Godless Constitution" thesis.[15]

Religion did get some explicit acknowledgment in the Constitution's body.[16] The absence of any comprehensive mention of religion makes sense when one appreciates that in 1787, church-government relations (as distinct from safeguarding private religious conscience) were highly divisive, were widely regarded as a state-level matter, and varied considerably from state to state.[17] One can easily imagine the delegates thinking, "Why take up religious establishments when we have more than enough to disagree about when it comes to the basic frame and powers of the new central government?"

In the waning days of the Philadelphia Convention, there was an effort by George Mason of Virginia and a handful of others to add a bill of rights.[18] This was strongly resisted for multiple reasons, including that it was feared that such a bill could not be agreed upon and that the delegates were exhausted and wanted to return home.[19] Both reasons were understandable, but the decision came back to haunt proponents of the 1787 Constitution halfway through the process of state ratification.

Between December 1787 and July 1788, eleven of the thirteen states did ratify the Constitution (North Carolina and Rhode Island declined). Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut quickly did so. Momentum slowed with Massachusetts, although eventually the Bay State did narrowly ratify. So did Maryland, South Carolina, New Hampshire, Virginia, and finally New York. However, to secure these latter votes, James Madison and others were forced (starting with Massachusetts) to promise that the federal government would adopt a bill of rights.[20]

The refusal by the Philadelphia Convention to take up the addition of a bill of rights shows that its members understood their task was limited. They were not about to attempt a declaration of the fundamental rights of humankind, and in particular they were not about to undertake the task of defining religious liberty and the proper scope of church-government relations. As we shall see below, that consensus concerning a limited federal role in matters of religion carried into the thinking of the First Federal Congress as it worked to create a bill of rights.

II. The First Federal Congress, May – September 1789

As directed by the Confederation Congress, national elections of presidential electors and representatives in the House were held in the winter of 1788. Senators were chosen by the legislature in each state. The implementation of the new government was set to begin in April 1789 as the First Federal Congress and George Washington's administration congregated at a temporary capital in New York City.

The First Congress was overwhelmingly comprised of Federalists, at this point meaning those who had supported ratification of the Constitution, as distinct from Antifederalists who had opposed ratification. The House had forty-nine Federalists and ten Antifederalists; the Senate had twenty Federalists and only two Antifederalists.[21] However, at the time there were no political parties in the formal sense, only tendencies to favor power in the central government or to desire retaining more power in the states. It was not until President Washington's second term that parties calling themselves Federalists and

14 *Id.* at 271.

15 *Compare* Isaac Kramnick & R. Laurence Moore, The Godless Constitution: The Case against Religious Correctness (1996) *with* Steven Waldman, Founding Faith: Providence, Politics, and the birth of Religious Freedom in America 129-32 (2008) [hereafter Waldman, Founding Faith].

16 U.S. Const. Art. VI, cl. 3 prohibits a religious test for federal public office. The president has just ten days to exercise his veto power, Sundays excepted. U.S. Const. Art. I, sec. 7, cl. 2. Finally, all oaths may be sworn or affirmed. U.S. Const. Art. I, sec. 3, cl. 6; Art. II, sec. 1, cl. 9; Art. VI, cl. 3; amend. IV. A sworn oath was understood to be in God's name, an act prohibited to Quakers and Anabaptists.

17 *See* Disestablishment and Religious Dissent at 4, 10-11, 12 (recounting the half-century process of disestablishment in the original thirteen states, along with the evolution of church-state relations in newly admitted states like Vermont, Tennessee, and Ohio). There never was a federal religious establishment, hence there was no federal disestablishment. Thus, what we know about the principles driving the process of disestablishment has to be learned from what took place in the states.

18 Richard Labunski, James Madison and the Struggle for the Bill of Rights 8-12 (2006) [hereafter Labunski, Struggle for Bill of Rights].

19 *Id.* at 9 (fatigue and wanting to return home); Frank Lambert, The Founding Fathers and the Place of Religion in America 241-46 (2003) (religious factions a threat to union).

20 Robert A. Goldwin, From Parchment to Power: How James Madison Used the Bill to Rights to Save the Constitution 36-48 (1997) [hereafter Goldwin, Parchment to Power].

21 *Id.* at 144.

Republicans began to coalesce. Accordingly, the congressional debates in the summer of 1789 over what would eventually be called the bill of rights were not partisan in the modern sense. The leading figure, James Madison, later a Republican and ally of Thomas Jefferson, was at this point in the forefront of those Federalists working to pass constitutional amendments to submit for state ratification.

Throughout the debates over the 1787 Constitution, Federalists had insisted that a bill of rights was unnecessary and that Antifederalist fears were overblown. As James Wilson, a convention delegate from Pennsylvania, argued early in the ratification period, the central government simply was not delegated enough power in the first place to disturb unalienable rights.[22] In April 1789, this was still the view of Federalists attending the First Federal Congress.

While James Madison was a major figure in shaping the coming deliberations, it would fall to Fisher Ames of Massachusetts and Samuel Livermore of New Hampshire to propose the determinative word choices for the final religious liberty phrases. Indeed, it is fair to say that Madison lost more debates than he won over the fate of the religious freedom amendments. Further, it would be a mistake to take views that Madison expressed in other venues and at other times and read them into the Religion Clauses, or to refer to the Religion Clauses as primarily the work of Madison.

As Congress assembled, Madison's position had shifted. He still did not agree that a bill of rights was needed to thwart potential abuses by the national government. On the other hand, he now urged the adoption of a bill of rights to blunt the Antifederalist's call for a second constitutional convention, to fulfill the demands of the five states that ratified the Constitution on the promise that a bill of rights be added, to entice North Carolina and Rhode Island to ratify and thus join the Union, and to fulfill his campaign promise to Baptists back in his congressional district.[23]

With Old Originalism, one looks for the intent of the lawmakers, and hence one places high importance on the unenacted drafts that lead up to a law, as well as the point-by-point debate over the various wordings culminating in the final text. Not so with New Originalism, which frees the interpreter from the greater subjectivity of the legislative process and focuses just on the final product. Still, what the lawmaking body thought it was doing (and what it was not doing because of outside restraints) does matter. This is because words are chosen to suit the agreed task. With that in mind, let us turn to the deliberations in the First Federal Congress that eventually yielded what we call the bill of rights, in particular the Establishment Clause.

On June 8, 1789, James Madison introduced his proposed amendments in the House. He said that the task before Congress was "to limit and qualify the powers of the Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode."[24] Accordingly, from the very start, the defined task was made politically feasible because the effort was not to agree on a comprehensive list of unalienable human rights.[25] Rather, the undertaking was the more modest task of agreeing on what powers were not vested (Federalists would have said, "were never vested") in the national government by the 1787 Constitution.[26] That meant the amendments would be stating negatives, that is, identifying what the federal government had no power to do. This tack is further borne out by Madison seeking to interlineate the amendments into Article I, Section 9 of the Constitution, which is where negatives on national power are cataloged.

A. Before the House of Representatives

Madison's June 8 draft amendments dealt separately with religious pacifists and military service, as well as separately protecting religious conscience from the states. Neither effort survived in the Senate. But Madison's central proposal stated, "nor shall any national religion be established."[27] Madison's amendment was referred to a Select Committee. On July 28, the Committee recommended, "no religion shall be established by law."[28]

August 15 was the longest day for debate in the House over religious freedom. An Antifederalist from Massachusetts, Elbridge Gerry, attempted to narrow the sweep of the no-establishment phrase to merely, "no religious doctrine shall be established."[29] The suggestion was ignored by the Federalists. Roger Sherman, a Federalist from Connecticut, said that the amendment was redundant because "Congress had no authority whatever delegated to them by the constitution to make religious establishments; he would, therefore, move to have it struck out."[30] In response to a question from a member, James Madison gave his understanding of the Select Committee's words to be

> that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship

22 1 Founders' Constitution at 449 (Wilson's speech delivered October 6, 1787).

23 *See* Labunski, Struggle for Bill of Rights at 159-67. In Virginia, Madison received Baptist backing for the Constitution by promising a bill of rights that would protect religious freedom from the new central government. Waldman, Founding Faith at 136–37.

24 1 Annals of Cong. 454 (June 8, 1789) (Joseph Gales ed., 1834).

25 Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 193-94 (1986); *see* Mark DeWolfe Howe, The Garden and the Wilderness: Religion and Government in American Constitutional History 19-23 (1965); Drakeman, Church, State at 212-14; Fergus M. Bordewich, The First Congress: How James Madison, George Washington, and a Group of Extraordinary Men Invented the Government 115-19 (2016) [hereafter Bordewich, First Congress].

26 Some suggest that the task was to codify Lockean natural rights or fundamental rights of autonomy and moral agency. *See, e.g.*, Vincent Phillip Muñoz, *Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion*, 110 Am. Pol. Sci. Rev. 369 (2016). However, no member of Congress suggested this was the defined task, and Madison openly stated a less ambitious goal. Madison's statement is quoted in the text, *infra*, at note 31.

27 1 Annals of Cong. 450–51 (June 8, 1789).

28 *Id.* at 699 (July 28, 1789) (internal quotation marks omitted).

29 *Id.* at 757 (Aug. 15, 1789).

30 *Id.* This is a repeat of the James Wilson claim, and the attitude of House Federalists generally.

> God in any manner contrary to their conscience. . . . [T]he words . . . had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws, necessary and proper . . . [, Congress was] enabled . . . to make laws of such a nature as might infringe the rights of conscience and establish a national religion; to prevent these effects he presumed the amendment was intended . . . .[31]

Benjamin Huntington, a Federalist from Connecticut, expressed concern that the amendment might upend the laws in his state levying religious taxes to pay ministers.[32] Huntington failed to understand that the amendments ran only against the federal government. A motion was made by Samuel Livermore, a Federalist from New Hampshire, to revise the text to, "Congress shall make no laws touching religion . . . ."[33] The revision made it clear the amendment was not directed at the states. This eased Huntington's concern, but it created another over the wide sweep of "laws touching religion." Many a facially neutral federal law could inadvertently touch religion.

This hazard was waylaid on August 20 when Fisher Ames, a Federalist from Massachusetts, suggested trimming the impossibly broad "no laws touching religion" to "no law establishing religion." He did not elaborate on what he meant by "establishing." Ames also introduced for the first time the "free exercise" phrase. Both features passed without comment. The Third Article now read: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."[34]

On August 24, the Resolve of the House passed with seventeen Articles of Amendment—including Ames's text—and was delivered to the Senate.[35]

B. Before the Senate

The Senate met in secret. The motions and amendments from the *Senate Journal* are available, but the debate is not.

On September 3, numerous proposals bearing on religious liberty were entertained.[36] The Senate returned to the matter on September 9. The Senate sharply limited the restraint on an establishment to "articles of faith and a mode of worship." The amendment now read: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion . . . ."[37] The restraint on establishments was now so narrow it would not even prohibit a federal tax earmarked to pay the salaries of religious ministers. The Senate also reduced the number of Articles of Amendment to twelve from the House's seventeen.

C. Committee of Conference

Because the House and Senate versions differed, the matter went to a Committee of Conference. The Conference faced a choice between a narrow Senate disempowerment ("no law establishing articles of faith or a mode of worship") and a broader House disempowerment ("no law establishing religion"). No record exists of negotiations in the Committee of Conference. Without explanation, the Conference proposed that the Third Article read: "Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof . . . ."[38]

The Conference Committee's "no law respecting an establishment" was close to the broader-in-scope House version. However, the Conference favored the Senate when it came to adopting the stand-alone "free exercise" text rather than the broader House protection for both "free exercise" and "rights of conscience."[39]

The Conference Committee alteration did expand the sweep of the no-establishment prohibition. Period dictionaries indicate that the introduction of the participle "respecting" meant "in relation to," "concerning," or simply "about."[40] Hence, under the text, Congress was prohibited from making a law *about* an establishment. That is, in use of its powers delegated elsewhere in the Constitution, Congress could neither establish religion nor *disestablish* religion. Hence, the text prevented congressional authority not only from establishing a national religion, but also from hindering or disbanding the remaining state establishments[41]—a federalism feature.

This has led to speculation as to why "respecting" was added in Conference Committee. During the House debate, Huntington had expressed fear that the no-establishment phrase might be binding on states. The object of his fear was enforcement by the federal judiciary against states. But that was clarified to

31 *Id.* at 758.

32 *Id.* at 758-59.

33 *Id.* at 759.

34 *Id.* at 795-96 (Aug. 20, 1789).

35 *Id.* at 807-08 (Aug. 24, 1789).

36 S. Journal, 1st Cong., 1st Sess. 116-17 (Sept. 3, 1789).

37 *Id.* 129 (Sept. 9, 1789).

38 The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins 8 (Neil H. Cogan ed., 1997).

39 *See* Gary Glenn, *Forgotten Purposes of the First Amendment Religion Clauses*, 49 Review of Politics 340 (Summer 1987) (summarizing the evidence that Madison unsuccessfully sought to protect the consciences of the nonreligious as well as of religious believers).

40 Donald L. Drakeman, *Which Original Meaning of the Establishment Clause Is the Right One?* 365, 385 & n.88, in The Cambridge Companion to the First Amendment and Religious Liberty (Michael D. Breidenbach & Owen Anderson eds., 2020) [hereafter Drakeman, *Original Meaning*]. *See also* Drakeman, Church, State at 245 n.153 (the argument for a different and even broader definition of "respecting" as meaning "tending toward" is not supported by dictionaries from the period).

41 As Congress gathered in April 1789, there remained taxpayer-funded establishments in the New England states of New Hampshire, Connecticut, and Massachusetts (as well as Vermont, soon to be admitted as a state), and to the south there lingered Anglican establishments in South Carolina and Maryland. *See* Disestablishment and Religious Dissent at 181-201, 327-86, 399-424, 309-26. In 1790, South Carolina adopted a new constitution that removed the last vestiges of its Anglican establishment. *Id.* at 196. In 1810, Maryland finally removed from its constitution the allowance for a religious assessment. *Id.* at 320.

Huntington's satisfaction by beginning the amendment with "Congress shall . . . ." However, the version still did not prevent Congress from exercising its enumerated powers in such a way as to do away with religious establishments in states like Connecticut. The use of "respecting" changed that. Yet, never in the debate in the House or Senate did anyone voice a fear that Congress would make such a bold move. Thus, the evidence that the Conference Committee's addition of "respecting" was motivated by federalism is thin. That said, lack of evidence concerning the Conference's intent does not matter under New Originalism. Rather, the mere fact that the plain text uses the word "respecting" means that the Establishment Clause as passed—whether intended or not—has a federalism feature.

In summary, as of September 1789, the plain text of the Establishment Clause restrained Congress in two directions. First, Congress had no power to disestablish religion in the five or six states that still had established churches. Second, Congress had no authority to use its powers otherwise enumerated in the 1787 Constitution to establish a national religion.[42]

D. Final Action, September 24-29

The House considered the Report of the Committee of Conference on September 24, and it passed by a vote of thirty-seven to fourteen.[43] The Senate concurred on September 25.[44] Two-thirds of both the House and the Senate had now agreed on twelve amendments to submit to the states.

On September 29, a preamble explaining the impetus behind passing the twelve proposed Articles of Amendment was inserted into the record of the *Senate Journal*:

> The Conventions of a Number of States having, at the Time of their adopting the Constitution, expressed a Desire, in order to prevent misconstruction or abuse of its Powers, that further declaratory and restrictive Clauses should be added: And as extending the Ground of public Confidence in the Government, will best insure the beneficent Ends of its Institution— . . . .[45]

The preamble speaks to Congress's limited purpose in producing the amendments. The stated task was to make it clear that the new central government had no power as to certain subject matters. This leaves it beyond doubt that the amendments vested no new powers in the federal government. On the contrary, the bill of rights was merely to reassure Americans that the 1787 Constitution was not to be misconstrued so as to impute powers that were not delegated. The Third Article would have been understood by the public as saying that the federal government was delegated no power to "make [a] law" about "an establishment of religion." That left such power where it always had been: in the states.

E. Summing Up: A Limited Task in the First Congress

Relations between government and church in the American states was a highly contested matter in 1789. Just a few years earlier, the states of New York and Virginia had thrown off their church establishments in widely reported contests,[46] as had other southern states with less notoriety.[47] On the other hand, despite well-organized resistance, in 1780 the Commonwealth of Massachusetts had decided by popular referendum to keep its Congregational church establishment.[48] In Connecticut and New Hampshire, the Congregational establishments were even more secure.[49] And in the south, Maryland and South Carolina still had their Anglican establishments, albeit both in slow decline.[50]

Because of the pressing business of setting up a new government, many Federalists did not want to take the time to pass a bill of rights.[51] Historians have puzzled over how the First Congress could reach agreement on the matter of establishment with so little effort and debate.[52] Indeed, there was no discussion in Congress on the merits or demerits of an established church, only modest concern that the Third Article should not be binding on the states. Huntington, a staunch establishmentarian, said he agreed with Madison, a staunch separationist, on the meaning of the text prohibiting an establishment. Huntington's only worry was that others might attribute to the words some meaning other than what Madison and he agreed upon.[53] The obvious answer to this riddle is that the First Congress fully understood that the task before them was quite limited, to wit: to say only that the federal government had no authority concerning the subject of an establishment of religion. This could be done effortlessly, for it

42 A handful of scholars argue that the addition of "respecting" meant that the Establishment Clause is exclusively federalist. That is, they argue the Establishment Clause only prohibits Congress from disturbing the establishments in the five or six states that still had them—nothing more. These writers do not explain how the plain text of the Establishment Clause also restrains Congress in its use of delegated powers with respect to overseeing federal lands and the District of Columbia, military and foreign relations, approval of treaties, operation of bankruptcy courts and post offices, patents and copyrights, Indian affairs, and so forth. For the case that no-establishment is exclusively federalist, see Steven D. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom (1995); Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation*, 8 U. Pa. J. Const. L. 585 (2006). *See also* Drakeman, Church, State at 229-49 (summarizing the pros and cons of the view that the Establishment Clause was intended to operate solely to protect existing state establishments from Congress and concluding that the evidence for the claim is weak).

43 H. Journal, 1st Cong., 1st Sess. 121 (Sept. 24, 1789).

44 S. Journal, 1st Cong., 1st Sess. 150-51 (Sept. 25, 1789).

45 *Id.* at 163 (Sept. 29, 1789).

46 Disestablishment and Religious Dissent at 127-34 (New York), 148-65 (Virginia).

47 *Id.* at 106-07 (North Carolina), 234-40 (Georgia).

48 *Id.* at 403-14.

49 *Id.* at 333-39 (Connecticut), 357-66 (New Hampshire).

50 *Id.* at 189-99 (South Carolina), 314-21 (Maryland).

51 *See* Labunski, Struggle for Bill of Rights at 195.

52 Leonard W. Levy, The Establishment Clause: Religion and the First Amendment 66-67 (1986) [hereafter Levy, The Establishment Clause]; Thomas J. Curry, The First Freedom: Church and State in America to the Passage of the First Amendment 199 (1986); Drakeman, *Original Intent* at 374-75, 377.

53 1 Annals of Cong. 758-59 (Aug. 15, 1789).

did not require the resolution of any existing disagreements. This was the thinking of not only the Federalists, who were firmly in control, but of the Antifederalists, who agreed for other reasons on this limited task.[54]

The general public appeared to have been aware of the limited object of the Third Article, and their quiescence on the matter shows that they apparently agreed. The public was informed of this modest purpose by Madison's public remarks in the House and by the Senate's preamble. As the First Congress did its work, there were no petitions or letters appearing in newspapers.[55] There was some private correspondence by Federalists in Congress that described the overall work on the bill of rights as tossing "a tub to the whale" or "frothy and full of wind."[56] That is, the bill's words were reputed to be chosen to fool the public into thinking that their concerns were being addressed. However, these private letters—while cynical—are fully consistent with a good faith effort to adopt a text leaving jurisdiction concerning church-state relations in the hands of the states, a placement of authority on which both Federalists and Antifederalists agreed. The non-cynics would say the amendments were to reassure the American people that the new central government was not a danger to their interests. In this the Federalists succeeded: the reporting out of the twelve proposed amendments put an end to any serious talk about convening a second constitutional convention.

We can also say a little more about what the words "an establishment" meant to the members of Congress (if not the general public) at that time. On August 15, the House ignored the Antifederalist Elbridge Gerry's proposal to narrow their scope to merely "no religious doctrine." Gerry's line of thinking surfaced again in the final Senate version of September 9 that prohibited only legislation adopting "articles of faith or a mode of worship." The establishment of the Church of England entailed Parliament prescribing as doctrine *The Thirty-Nine Articles of Faith* and for order of worship *The Book of Common Prayer*. The narrower disempowerment of the Senate version ultimately was rejected in favor of the broader House restraint on all federal "law[s] respecting an establishment of religion." At least for Congress, if not for the wider public, there was more to the Church of England establishment than dogma and liturgy, just as it would seem there is more to the words "an establishment of religion" than "doctrine," "articles of faith," and "mode of worship." The final text therefore constrained Congress from establishing a religion something like the Church of England in Great Britain.

F. State Ratification

Once reported out by Congress in late September 1789, the twelve proposed amendments were sent to the states for ratification. The first and second proposals did not receive the requisite three-fourths affirmation, thus the Third Article was renumbered as the "First Article of Amendment" or just First Amendment. The ratification process bears on how we understand the original public meaning of constitutional provisions. It should be acknowledged, however, that while states could approve some of the twelve amendments and not others, they could not alter the text of any given amendment.

Yet there is little surviving history of the debates in state legislatures that sheds light on the meaning of the Establishment Clause. There are records from only two states. Massachusetts did not record any discussion about the Establishment Clause and ultimately did not ratify the Third Article. The Virginia record, while scant and complex, is clouded by the posturing of Antifederalist state senators vaguely asserting that the amendments were inadequate to protect religious freedom. The criticism was never made any more specific. The senators were stalling, and the complaints are dismissed by historians as a last stand by Antifederalists disgruntled over the loss of state powers.[57] After some delay, Virginia ratified the Third Article without further comment.

The absence of popular pushback in the states to ratification of the Third Article is consistent with the understanding that the American public viewed the text as prohibiting any federal involvement in an establishment of religion, be it at the state or federal level.

III. The Original Public Meaning of "Respecting an Establishment of Religion"

In the First Congress, Federalists from New England and Federalists from elsewhere differed sharply concerning establishmentarianism.[58] Accordingly, it is certainly true that the Federalists in control of the House and Senate from June to September of 1789 did not have in mind a unified theory of church-government relations which they were pouring into the amendment process. But they did not need one. That was never the task Congress had set for its members. The Establishment Clause would be binding only on the federal government, and Federalists did not envision the federal government having many dealings with the subject of religion. Given the religious

54 The 1800 presidential election between John Adams and Thomas Jefferson was heated, with Jefferson opposed, among other reasons, because he was thought to be irreligious. Once elected, Jefferson sought to reassure his opponents that he would not use his power to disturb church-state relations in the states. Assisted by James Madison, Jefferson's inaugural address said the following about the First Amendment: "In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the General Government. I have therefore undertaken on no occasion to prescribe the religious exercises suited to it, but have left them, as the Constitution found them, under the direction and discipline of the Church or State authorities acknowledged by the several religious societies." Drakeman, Church, State at 75 & n.2.

55 Levy, The Establishment Clause at 67, 73; Drakeman, *Original Intent* at 374.

56 *See* Kenneth R. Bowling, *"A Tub to the Whale": The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 J. Early Republic 244, 250 (1988); *see also* First Congress at 138-40.

57 Records retained by Massachusetts and Virginia are discussed in Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 Utah L. Rev. 489, 575-83 (2011); Labunski, Struggle for Bill of Rights at 245-55; Drakeman, Church, State at 214-16.

58 Disestablishment and Religious Dissent at 8-12, 16-17. It was religious dissenters who were the primary actors in the successful struggle for disestablishment. *Id.* at 11-12; *see generally* John A. Ragosta, Wellspring of Liberty: How Virginia's Religious Dissenters Helped Win the American Revolution and Secured Religious Liberty (2010).

pluralism across the thirteen states, there was no chance that a national religion would be established.[59] Sure, they were experienced enough to anticipate that religious liberty issues would occasionally surface—hiring congressional chaplains, pacifists refusing military service—but in the big picture, they thought such occasions would be few and minor. The real action concerning church-government relations was in the hands of the states, and all parties—especially the Federalists—anticipated that such relations would remain with the states. That is the only reason Congress could have agreed so easily on a text concerning church-government relations and reported it out as a constitutional amendment that Congress could realistically expect three-quarters of the states would ratify.

The Establishment Clause did two things, both thought to be rather modest at the time. First, it denied that there was power in the federal government to interfere with the remaining establishments in the states; structurally speaking, this made a vertical separation between the federal government and state-level religious establishments. Second, it denied that there was power in the federal government to make law about "an establishment of religion"; structurally speaking, this made a horizontal separation between the federal government and religious institutions it might otherwise establish. The latter was not controversial because no one wanted an established church at the national level. Even back then, there were too many religious differences across the thirteen states to make possible a full-on national establishment of religion.

In this understanding of the limited task taken up by the First Congress with respect to religious establishment, a search for a detailed set of substantive rules governing church-government relations in the text "an establishment of religion" is a fool's errand. Nevertheless, there is substance in these words. The vertical restraint was federalist in character, telling Congress it could not disturb what the states did with respect to their church-state relations. That restraint was destroyed in 1947 when *Everson* incorporated the Establishment Clause. However, the horizonal restraint meant Congress cannot use its powers enumerated elsewhere in the 1787 Constitution to "make [a] law" about "an establishment." This was (and, New Originalists would say, still is) a substantive restraint on Congress's powers to regulate federal lands, territories, and the District of Columbia; to make treaties and conduct foreign affairs; to legislate with respect to the military; to relate with the Indian tribes; to oversee patents, post offices, bankruptcy courts; to regulate interstate commerce; and so on.

To determine original public meaning, New Originalism draws on the ordinary sense of the words at the law's inception. Research professor Donald Drakeman conducted a search of American founding-era documents for the phrases "establishing religion" (the House version) and "an establishment of religion" (the Conference Committee version).[60] He found that, of the two, "establishing religion" was used far less frequently. Further, "establishing religion" was sometimes considered synonymous with "an establishment of religion," both meaning a formal legal establishment. At other times "establishing religion" was broader in referring to laws auxiliary to but short of a formal establishment.

Drakeman's quantitative research probes whether founding-era references to an establishment were confined to laws solely about a formal national church, or if such references also include laws that supported or were auxiliary to a formal establishment. There were many examples of supporting or auxiliary laws in England—laws that were not directly about ordering or governing the Church of England, but that supported it indirectly. For example, one had to be a member of the Church of England to receive a military commission or obtain a faculty appointment at Oxford or Cambridge. Certain Protestants outside the Church of England (nonconformists) were legally tolerated, but nonetheless were "second class"; clergy of these nonconforming sects had to secure a license to preach, and their meeting houses had to secure a license to hold worship services. Nonconforming clergy could not officiate at a marriage. These laws were clearly designed to support the Church of England establishment, but they were not part of the formal governance structure of the Church of England that entailed doctrine, liturgy, polity, administration of the sacraments, membership, sources of revenue, and property holdings.

Law professor Stephanie Barclay has taken a somewhat different approach to a corpus linguistics analysis of founding-era documents that referenced an "establishment of religion." For each document that referenced religious establishment, she determined the salient characteristic of an establishment that was implicated by the document.[61] By sifting the results, Professor Barclay found that the most commonly occurring characteristics of the phrase "an establishment" were: (1) government compelling individuals to engage in a religious practice favored by the established church; (2) government interfering with the internal operations of the established church or of nonconforming churches; (3) government aiding the established church, particularly in the form of taxes earmarked for the state church; and (4) government imposing a religious test to hold public office, vote, or receive a post such as a faculty appointment.[62]

We have already acknowledged that because of the introduction of the participle "respecting" by the Conference Committee, the text prohibits Congress from using its enumerated powers either to make a law establishing religion or to make a law *disestablishing* religion in a state. "Like the Church of England, the colonial establishments were supported, not by a single act of comprehensive legislation, but by a network of laws and policies. And the full web of these laws was the object of resistance by America's religious dissenters. In other words, the religious dissent was not just directed to the formal establishment of Congregational and Anglican churches, but also to the auxiliary laws that directly affected nonconforming Protestants. It was the full web of laws that prevented these Protestant clergy from preaching without a state license, preaching anywhere but at a government-approved meeting house, and officiating at a marriage

59 *See* Drakeman, Church, State at 198-202. To be sure, the religious differences were mostly across types of Protestantism, but they were deeply held differences nevertheless. *Id.* at 253-55.

60 Drakeman, *Original Meaning* at 386-88.

61 Stephanie H. Barclay, Brady Earley & Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistic Analysis*, 61 Ariz. L. Rev. 505 (2019) [hereafter Barclay, *Corpus Linguistic Analysis*].

62 *Id.* at 535-36, 538, 541, 548, 556.

of congregants.[63] The formal establishment together with the wider supports can be profiled as follows:

1. Government financial support of the state church, including assessments to pay ministers' salaries and rent on glebe lands.
2. Government control over creeds, order of worship, polity, and clerical appointments of the state church; the licensure of dissenting or nonconformist clerics; and licenses tethered to particular meeting houses, which prevent itinerant preaching by nonconformists.
3. Mandatory attendance at worship services in the state church, prohibitions on services by others, and required licensure to open a meeting house for tolerated nonconformists.
4. Use of the state church to record births; to perform all marriages and funerals; and to administer tax revenues to care for the poor and widowed. Today we regard these tasks as civil functions, but in the British-like establishments of eighteenth-century America, these matters were within the jurisdiction of the established church.
5. Confining public office and voting rights to members of the state church, or using a broader religious test to include only select nonconformists. Religious tests and preferences for granting military commissions, government contracts, admission to university, and faculty appointments.[64]

To see how this understanding of the original public meaning would play out today, suppose we apply a few from this list of establishmentarian laws to a current setting. Assume Congress directed that federal lands in the Western U.S. be set aside as a glebe, and that the rents paid by ranchers grazing cattle on the land are earmarked to defray expenses incurred by the National Cathedral in the District of Columbia, an Episcopal church. Such a law would violate the Establishment Clause, even though the stand-alone glebe falls well short of fully establishing a national church.

Assume the U.S. military academies required cadets to attend worship services each Sunday morning at the campus churches. Or suppose that any student at an academy who sought permission to get married was required to have his or her wedding ceremony, including the content of the vows, conducted by a military chaplain. These two hypothetical policies are parallel to laws and practices that supported the state-level established churches in colonial America. It would follow that they ought to be struck down today as prohibited by the Establishment Clause, albeit these two policies at the military academies fall well short of fully establishing a national church.

Now consider a different set of hypotheticals. Assume the local postmaster general invited a rabbi to lead a prayer at the dedication of a new post office building. Or assume the Department of Defense allowed the erection of a stand-alone Latin cross as a war memorial in a cemetery for veterans of World War I. Or assume a city located in the Virgin Islands, a federal territory, celebrates Christmas by placing a stand-alone nativity of Jesus Christ in a municipal park. If the original meaning of the Establishment Clause was to prohibit the federal government[65] from making laws parallel to the laws and practices that supported the colonial-era established churches, then prayer at a public building dedication, a Latin cross memorial, and a Christmas nativity would not be prohibited by the Establishment Clause.[66] Given that the modern Supreme Court has struggled intensely with cases like these, it would seem that New Originalism would point to a realignment as to some of its case law.

IV. How the Plain Text Gives Meaning to "an Establishment of Religion"

When the plain text is definitive, the courts need not resort to an interpretive rule, be it originalist or otherwise. In relevant part, the First Amendment text reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . .

Although it ends with a semicolon (the first of two semicolons in the amendment), this first clause of the First Amendment can stand alone as a complete sentence. The longstanding convention is to refer to the two phrases in this first clause as the Establishment

63 Professor Drakeman is correct that this limits the horizontal restraint to forbidding Congress to establish a national religion. *See* Drakeman, Church, State at 327-30. But such a restraint is on more than just the passage of an Act of Supremacy of the Church of America. Just as the Church of England was supported not by a single act, but by a network of laws, the horizontal restraint on Congress would be on each element in a similar network of laws.

64 Disestablishment and Religious Dissent at 6-7. The five definitional points set out here draw from the American colonial experience with the established Church of England. That definition of establishment carries a modestly broad meaning. Its use is justifiable here because this is how American religious dissenters thought about "an establishment," and they were the prevailing party in the American struggle to disestablish religion in the states. *Id.* at 10-12. Professor Michael McConnell has compiled a similar profile for what constituted an established church at the founding. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131-81 (2003).

65 Because of *Everson*'s incorporation of the Establishment Clause in 1947, the modern situation is more complicated with respect to state governments. *See infra* at Section V for discussion of *Everson*'s effect and the role of stare decisis.

66 Professor Barclay also notes certain contemporary church-state disputes that were absent from the founding-era documents she examined: (1) government display of memorials and other symbols with religious content; (2) closing of retail outlets on Sundays; (3) prayers and other religious practices at public schools; and (4) government laws that prefer religion in general over nonreligion. Barclay, *Corpus Linguistic Analysis* at 536-37, 538, 541, 548, 555-56. The absence of any reference to prayer in public schools is because there were no public schools at the time of the founding. While they are infrequent, the modern Court does strike down laws that prefer religion in general over secular interests. *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (disallowing state law providing private sector employees an absolute right to be excused from work on their Sabbath); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (disallowing ordinance granting houses of worship absolute veto power over issuance of nearby liquor licenses).

Clause and the Free Exercise Clause. However, this nomenclature mistakes phrases for clauses. While there is but one clause addressing religious freedom, there are two participial phrases ("respecting an establishment" and "prohibiting the free exercise") modifying the object ("no law") of the verb ("shall make").

The grammar is such that the two participial phrases are of equal rank, and thus each carries a meaning independent of the other phrase. It is therefore entirely proper—as the convention has it—to think in terms of two separate disempowerments on the subject ("Congress") of the sentence. This is not to say that the two restraints can never overlap. The government might transgress both participial phrases—much like a law might violate a person's rights to both free speech and due process. However, notwithstanding an occasional overlap, the establishment restraint and the free exercise restraint give rise to separate and independent writs.

The First Amendment, along with the other provisions of the bill of rights, was meant to bind only the new national government—not the states.[67] The states were already bound by their own constitutions, which in post-Revolutionary times Americans thought sufficient. Moreover, the Religion Clauses restrain Congress as to all of its enumerated powers. That is, rights trump powers, as they teach in law school. For example, the two participial phrases restrain the federal government as it regulates the territories and District of Columbia, when it adopts treaties and conducts foreign relations, in military affairs, when it deals with Indian tribes, in regulating interstate commerce, in operating post offices and bankruptcy courts, in issuing patents, and so on.

A. The Vertical and Horizontal Dimensions to the Establishment Clause

As a result of a seemingly minor change in the Conference Committee text as reported September 24, 1779, the Establishment Clause reads, "Congress shall make no law *respecting* an establishment of religion." Hence, by the phrase's express terms, federal laws could neither establish nor *disestablish* religion. This meant that Congress could not abolish the remaining state establishments in Massachusetts, Connecticut, New Hampshire, soon-to-be-admitted Vermont, South Carolina, or Maryland.

The Establishment Clause therefore limits Congress in its use of power with respect to *both* the residual powers held by the several states and the enumerated federal powers. Congress is prohibited from interfering with state laws about "an establishment of religion" (the vertical dimension). And Congress is prohibited from enacting laws about "an establishment of religion" concerning matters within its enumerated powers (the horizontal dimension).

Because the operative words are the same, the scope of the disempowerment is the *same* with respect to both dimensions of congressional authority, vertical (state) and horizontal (federal). Accordingly, overblown claims that the Establishment Clause means that the federal government cannot interfere with existing establishments in the states (vertical) but that the Establishment Clause means only that Congress cannot formally establish a national church (horizontal), rely on an asymmetry that defies the plain text.

Consider a scenario in which Congress amends the Primary and Secondary Education Act by directing that federal funds be withheld from local public schools that have teacher-led prayer at the beginning of the classroom day. A religiously conservative advocate complains, arguing that the Establishment Clause denies authority to Congress to use its power to interfere with state and local practices about "an establishment of religion," and that this is what the new amendment is doing: interfering with a local "establishment of religion."[68] Our advocate would be entirely correct that the Supreme Court has deemed teacher-led prayer in public schools as falling within the definition of "an establishment," and that here Congress is interfering with a state establishment via its Spending Power.

Now continue the scenario with the same advocate responding to a longstanding practice of collective prayer before meals at U.S. Military Academies. Assume that having considered complaints from a few cadets, military authorities announce that they will discontinue the collective prayer, citing the Establishment Clause. Our conservative advocate objects, arguing that when it comes to the federal government's exercise of its own enumerated powers, the Establishment Clause only prohibits an act establishing a national church. The clause does not reach this century-long tradition of prayer at the nation's military academies, argues our advocate, because the academies have nothing to do with the operation of an established national church.

Our advocate's claims are asymmetrical. If teacher-led prayer at a local public school is protected from congressional legislation because it comes within the sweep of "an establishment," then the prayer at federal military schools was rightly halted because also within the sweep of "an establishment." The point is not that the Supreme Court's school prayer decisions back in the early 1960s were right or wrong.[69] The point is that the words "an establishment" define an identical sweep of congressional disempowerment—here, with respect to prayer at government schools—in both the vertical and horizontal dimensions.

B. The Establishment Clause Permits Discretionary Regulatory Exemptions

Consider again just the text. It does not deny Congress power to "make [a] law" about religion. Rather, it more narrowly denies Congress the power to "make [a] law" about "an establishment of religion." So legislation that touches on religion is allowed,

67 More than a half century passed before the question of the applicability of the bill of rights to state and local governments reached the Supreme Court. In *Permoli v. Municipality No. 1 of the City of New Orleans*, 44 U.S. (3 How.) 174 (1844), the Court confirmed the original understanding that the bill of rights binds only the federal government. The specific issue in the case was whether the religious freedom right embodied in the First Amendment was binding on the City of New Orleans.

68 Our fictional advocate would have a point, but for the incorporation of the Establishment Clause in *Everson* back in 1947—a holding that our advocate thinks was wrong as a matter of original meaning.

69 *See* School Dist. of Abington Twp. v. Schempp, 374 U.S. 398 (1963) (holding that teacher-led classroom prayer and devotional Bible reading violate the Establishment Clause); Engel v. Vitale, 370 U.S. 421 (1962) (holding that teacher-led classroom prayer violates the Establishment Clause).

except when it is respecting an establishment of religion. There is no command that government never take religion into account.

Assume, for example, that soon after the bill of rights was ratified Congress enacted a comprehensive act regulating the Army and Navy. In exercising its constitutional power to oversee the armed forces, Congress provides for a military draft but exempts religious pacifists. Nothing in the Establishment Clause prohibits such an exemption. In adopting the exemption Congress certainly does "make [a] law respecting" religion, but it does not more narrowly "make [a] law respecting an establishment of religion." The draft exemption is designed to allow religious pacifists to follow certain practices born of their religious conscience. That is, the object of the exemption is not to advance religion (the affected pacifists are already religious) but to advance religious liberty.

This scenario raises a larger issue regarding the constitutionality of discretionary religious exemptions from regulatory and tax burdens. It is a categorical mistake to presume that a statutory religious exemption is a form of unconstitutional preference. Look again at the text. Although the government cannot "make [a] law" in support of "an establishment of religion," it may "make [a] law" in support of religious freedom. Indeed, that would have to be so because the Free Exercise Clause is itself a law in support of religious freedom. The First Amendment would not make any sense if the Free Exercise Clause violates the Establishment Clause. Moreover, there are clauses in the 1787 Constitution that expressly exempt independent acts of religious observance. These are provisions permitting an affirmation in lieu of an oath,[70] specifically designed to accommodate Quakers and Anabaptists.[71] The Establishment Clause would not make any sense if it nullified the affirmation option that accommodates these religious minorities.

Another way of stating the matter is: Government does not establish religion by leaving its private exercise alone—which is exactly what a legislative religious exemption does.[72] Discretionary exemptions not only allow for private acts of religious exercise to continue, but they also reinforce the desired nonentanglement between church and state. Hence, it is entirely proper that the Supreme Court has held in the ten exemption cases to come before it that the act of the legislature in question did not violate the Establishment Clause.[73] The Court's specific rationale in these cases has not always been a model of clarity, but the Justices have consistently reached the correct result—a result fully in harmony with the text of the Establishment Clause.

C. The Impossibility of Conflict Between the Religion Clauses

As the Senate concurred on September 25, 1789, in the House Resolution and the final draft of what became the bill of rights, a Preamble was added.[74] The Preamble makes clear that the proposed amendments did not vest any new power in the federal government. Rather, the amendments were designed to negate an assumption of power by the national government being wrongly implied from the 1787 Constitution. That is why provisions in the bill of rights are often referred to as "negative rights." They tell the national government what it has no power to do. If you have two clauses from the bill of rights, you have two disempowerments. If the two overlap in their application, then you have a two-fold negation of governmental power. They reinforce each other. What you do not have, indeed cannot have, is a conflict between the clauses.

This has direct implications for correcting a present-day misunderstanding that is alarmingly widespread.[75] It is still common to find those who believe that the Establishment and Free Exercise Clauses are in unavoidable tension and that they occasionally conflict, as if the Free Exercise Clause is pro-religion and the Establishment Clause is there to hold religion in check. This reading of the text presumes that the Free Exercise Clause and the Establishment Clause sometimes run in opposing directions, and hence that they will clash. If this were true, it would be the Supreme Court's task to determine whether the constitutionally questionable legislation is rightly "neutral"—neither too pro-religion nor too anti-religion. Not only is this contrary to the plain text as well as common sense, but it concedes too much power to the judiciary.[76]

Consider the Free Speech and Free Press Clauses. These two clauses negating federal power over speech and press sometimes

70 *See, e.g.*, U.S. Const. Art. I, sec. 3, cl. 6 (during trial on articles of impeachment, all Senators shall sit only on oath or affirmation).

71 To the founding generation, it was known that Quakers and Anabaptists interpreted Matthew 5:33-37 as prohibiting the swearing of oaths.

72 The leading cases are *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (employment nondiscrimination exemption) and *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (property tax exemption). Both cases turned back challenges under the Establishment Clause. *See* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793 (2002) (search of founding-era documents shows religious exemptions were not regarded as an establishment).

73 *See* Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?* 106 Ky. L. J. 603, 609-11 (2017-2018). On rejecting the argument that religious exemptions sometimes cause harm to third-parties and ought to be declared unconstitutional when they do, see *id.* at 606-07, 626-30.

74 *See supra* note 45 and accompanying text.

75 *See Walz*, 397 U.S. at 668-69 (Burger, C.J.) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.").

76 For a recent example, see Justice Breyer dissenting in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020):

> This Court has long recognized that an overly rigid application of the Clauses could bring their mandates into conflict and defeat their basic purposes.
>
> . . .
>
> The inherent tension between the Establishment and Free Exercise Clauses means . . . that the course of constitutional neutrality in this area cannot be an absolutely straight line . . . . Indeed, rigidity could well defeat the basic purpose of these provisions, which is to insure [sic] that no religion be sponsored or favored, none commended, and none inhibited.
>
> . . .
>
> . . . The problem . . . is that the interaction of the Establishment and Free Exercise Clauses makes it particularly difficult to design a test that vindicates the Clauses' competing interests in all—or even most—cases.

overlap and thus reinforce one another, but they cannot conflict. Simply put, while the government can simultaneously violate both clauses, it is impossible for these two overlapping negatives on the government's power to be in conflict. Similarly, the Free Exercise and the Establishment Clauses may occasionally overlap and thereby doubly negate the field of action otherwise permissible to the government, but they cannot conflict.[77] To be sure, the Religion Clauses, each in its own way, work to protect religious freedom. But when circumstances are such that the scope of the phrases overlap, they complement each other rather than conflict.

By way of illustration, consider a fourth-grade public school teacher who has twenty-five students in her classroom. Assume the teacher requires the students to recite in unison the Lord's Prayer to begin the school day. A Muslim student sues under the Free Exercise Clause claiming that her rights are violated and offers evidence that reciting the Christian prayer is a violation of her conscience because its content contradicts the beliefs of Islam. The student will prevail, and the remedy will be that our Muslim fourth-grader may now opt out of the prayer while her classmates and teacher continue the daily recitation.[78] Assume a second suit is filed, this time alleging that teacher-directed prayer violates the Establishment Clause. Once again, our Muslim student will prevail, but this time the remedy will be to enjoin the recitation of the classroom prayer altogether.[79] While the remedies in the two lawsuits differ, both clauses are violated by the teacher-required prayer. The two clauses overlap and complement each other. They do not conflict.

Finally, assume that a third lawsuit is filed invoking the Free Exercise Clause. This claim is brought by three Christian students in the classroom who ask that the teacher-led recitation of the Lord's Prayer be allowed to continue on a voluntary basis. With reference to the limits on the government's power negated by the Establishment Clause, the court will deny relief to these three students. There is no right under the Free Exercise Clause to capture the engines of government and put its machinery to use advancing the students' Christianity.[80] If the Christian faith is to be advanced, it must rely on the voluntary acts of Christians.[81] In this third lawsuit, there is no conflict between the clauses. Rather, the three students failed to state a claim under the Free Exercise Clause.

D. A Structural Establishment Clause

As we saw in the historical background to the bill of rights, the congressional drafters did not mean to imply that Congress, in the absence of the Establishment Clause, had power to "establish[] . . . [a] religion" under the 1787 Constitution. Alexander Hamilton warned against such inferences from negations.[82] Federalists were in complete control of the drafting process, and as we have seen from James Wilson's speech forward, the Federalists (including Madison) repeatedly denied that the 1787 Constitution vested in Congress any such power. Rather, the drafters of the Establishment Clause meant only to reassure readers of the 1787 Constitution that Congress had no power to make laws concerning a religious establishment.

That said, it must be conceded that the text of the first participial phrase ("respecting an establishment") is different in nature from the two rights-based participial phrases ("prohibiting the free exercise" and "abridging the freedom of speech, or of the press"). The latter two forbid "prohibiting" and "abridging" and thus disempower the government with respect to a person's free exercise or free expression. The objects of these two phrases could be understood to acknowledge that people have self-evident, unalienable, or natural rights to free exercise and free expression. In any event, they imply a moral autonomy. On the other hand, the object of the participial phrase "respecting an establishment" is not about acknowledging an intrinsic human right, but is a reference to a discrete subject matter ("an establishment of religion") that is being placed off limits to or outside the government's authority. (It would sound silly to say that people have a natural right to a nation that does not have an established religion.) This difference in the nature of these participial phrases leads to a difference in their function: creating a structural relationship versus acknowledging an intrinsic right.

The Establishment Clause operates like a structural distancing of two centers of authority. Constitutional structure delegates, separates, and limits power. A happy consequence of good constitutional structure is the prevention of concentrations of power that lead to a loss of liberty. In the text of the Establishment Clause, we have a separation of the authority of government and the authority of organized religion. All persons

Id. at 2281, 2282, 2290 (citations and quotations omitted). Justices Breyer's solution is subjective and would make the line between church and state impossible to draw with consistency.

77 Moreover, the proposition that the Federal Congress of 1789 intentionally placed side-by-side two constitutional clauses that contradict and work against one another is implausible.

78 *See* W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). In *Barnette*, the Court struck down a state public school requirement that all students begin the school day by saluting the United States flag and reciting the Pledge of Allegiance. The claim was brought by a group of Jehovah's Witnesses, who regard the flag salute and pledge as worship of a graven image, which violates their religious tenets. *Id.* at 628-29, 642. The basis for the ruling was the Free Speech Clause, and that clause protects, inter alia, freedom of belief. *Id.* at 634-36, 640-42. The remedy permitted the Jehovah's Witnesses was to remain quietly seated at their desks while the remainder of the students and their teacher continued the exercise. *Id.* at 628-30, 642.

79 *See Schempp*, 374 U.S. at 224-27 (holding that public school practice of daily classroom prayer and devotional Bible reading was support for religion in violation of the Establishment Clause; the remedy was to enjoin the prayer and Bible reading altogether); *Engel*, 370 U.S. at 421-24 (holding that public school practice of daily classroom prayer was support for religion in violation of the Establishment Clause; the remedy was to enjoin the prayer altogether).

80 *Schempp*, 374 U.S. at 226 ("While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs.").

81 What the Christian students may do is form a school-recognized club and pray at the club meetings. *See Widmar*, 454 U.S. 263 (upholding equal access to school facilities for student religious organizations).

82 In *Federalist 84* (July 1788), Alexander Hamilton argued that by denying powers never granted, a bill of rights could be dangerous by suggesting the presence of other implied powers. The later addition of the Tenth Amendment was meant to address this danger. The Federalist No. 84, *available at* https://guides.loc.gov/federalist-papers/text-81-85.

within the jurisdiction of the federal republic benefit when the government cannot exercise power respecting "an establishment of religion." A complainant cannot waive this separation of powers any more than she can waive a federal court's lack of subject matter jurisdiction. Rather, the separation is there to benefit more than just the party-plaintiff before the court. This is much like the three-branch structuring we call "separation of powers"; the separation of the branches is there not just for the benefit of the complainant, but for all persons subject to the government's jurisdiction.

Given the different natures of the Establishment Clause (structural in function) and the Free Exercise and Free Speech Clauses (rights-based in function), the modern Supreme Court is correct when it applies the Establishment Clause as structural, separating the two centers of authority we call church and government. The Court envisions the Establishment Clause as policing the boundary between church and state, and it understands its judicial task as keeping governmental power from trespassing in a space delineated as "an establishment of religion."

This separation must not be exaggerated. This is a separation of the institutions of religion from the institutions of the republic. While the institutions of church and government can be separated, religion and politics cannot. The latter would be quite impossible, for it would mean requiring religious people to cleave themselves in two. And, of course, churches appropriately speak to how their teachings bear on social issues, consistent with their right to freedom of speech.[83]

That the Establishment Clause is regarded by the federal judiciary as structural explains several features in the case law.[84] For example, when it comes to the Establishment Clause, there are special rules concerning standing to sue because in structural cases there are often no parties with individualized harm.[85] In contrast to free exercise claims that remedy religious injuries, the Establishment Clause additionally provides a remedy for nonreligious harms such as economic damages and loss of academic freedom.[86] This also accounts for why federal courts sometimes frame the operation of the Establishment Clause as a limit on their subject matter jurisdiction.[87] Whereas free exercise lawsuits yield a conditional right that is subject to strict scrutiny, a prima facie Establishment Clause claim is not subject to a balancing test that weighs governmental interests against a claimant's interests. Either the Establishment Clause is violated or it is not; no balancing. And both the prohibition on courts answering religious question and the ministerial exception are largely rooted in the no-establishment principle, as befitting rules that derive from church autonomy and the separating of matters of internal church governance from civil regulation.[88]

V. Conclusion

Without any analysis, the Supreme Court in *Everson v. Board of Education* held that the Establishment Clause should be incorporated through the Fourteenth Amendment and made applicable to state and local governments.[89] With *Everson*, the Supreme Court made the policing of the church-state boundary much more energetic than was ever contemplated in 1789. In part, this was because incorporating the Establishment Clause meant that thereafter the boundary keeping had to take place in a myriad of state and local governmental arenas, not just with respect to the limited precincts of the federal government. This line drawing became even more difficult with the modern increase in the size and regulatory activity of government, as well as how government money (with strings attached) increasingly marks out much of our common life together. Lastly, the boundary keeping has become harder because the American people and their religious allegiances have become far more pluralistic.

Everson's incorporation of the Establishment Clause was a mistake if one follows the interpretive rules of original public meaning. Nonetheless, New Originalists should accept incorporation as settled law by virtue of stare decisis. Americans have already worked their way through incorporation's many difficulties, many citizens have come to rely on it, and its reversal would be disruptive. Moreover, such a proposition is not a one-sided bargain; the Establishment Clause often serves to protect religious freedom when it comes to matters such as the prohibition on courts becoming entangled in religious questions and the resurgent protection of church autonomy.[90]

If we proceed with an Establishment Clause that is binding not only on the federal government but also state and local governments, where does that leave New Originalism? What remains is a disempowerment of government at all levels to "make [a] law about an establishment of religion." The original public meaning of "an establishment" encompasses the full network of colonial laws, broken down into the five points in Part III.[91] This web of laws comprises more than just a formal religious establishment, but also those laws auxiliary to the Anglican and

83 On the free speech rights of clergy and churches to speak on political matters, see Justice Brennan's separate concurring opinion in *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (plurality opinion) (striking down law disqualifying clergy from holding public office).

84 These and other features of the Establishment Clause as structural are collected in Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J. L. & Politics (UVA) 445 (2002).

85 *Id.* at 456-58 (collecting cases where the Court has fashioned special rules of standing just for the Establishment Clause).

86 *See, e.g.*, *Caldor*, 472 U.S. 703 (the harm done by an Establishment Clause violation is increased labor cost); Epperson v. Arkansas, 393 U.S.97 (1968) (the harm done by an Establishment Clause violation is loss of academic freedom).

87 *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1, 42–51 (1998) (collecting cases where the Court dismissed for lack of subject matter jurisdiction).

88 On church autonomy in the form of a "ministerial exception" from employment antidiscrimination legislation, see *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) (principles of church autonomy call for extending ministerial exception to employment civil rights claims against religious schools brought by elementary school teachers).

89 330 U.S. at 14-15.

90 *See* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171 (2012) (holding that churches and other religious organizations are autonomous with respect to matters of their internal governance); *supra* note 88 and accompanying text.

91 *See supra* text accompanying note 64.

Congregational churches at the time of America's disestablishment in the states that were contemporaneous with the work of the First Congress. This is an Establishment Clause of modest breadth, yet one that is well distant from the high watermark of strict separationism.

How the Founders' Natural Law Theory Illuminates the Original Meaning of Free Exercise

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Other Views:

- Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990), *available at* https://chicagounbound.uchicago.edu/journal_articles/8713/.
- Philip Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992), *available at* https://heinonline.org/HOL/LandingPage?handle=hein.journals/gwlr60&div=38&id=&page=.
- Brief for Center for Constitutional Jurisprudence as Amicus Curiae in Support of Petitioners, Fulton v. City of Philadelphia, No. 19-123 (June 3, 2020), *available at* https://www.supremecourt.gov/DocketPDF/19/19-123/144684/20200602142513866_19-123%20CCJ%20tsac.pdf.
- Planned Parenthood v. Casey, 505 U.S. 833 (1992), *available at* https://www.oyez.org/cases/1991/91-744.

In *Fulton v. City of Philadelphia*, the Supreme Court will consider whether Philadelphia's 2018 policy of excluding Catholic Social Services from continued participation in the placement of children in need of foster homes violates the First Amendment of the Constitution.[1] The case raises questions about the meaning of the free exercise of religion.

Catholic Social Services (CSS) is one of more than two dozen private entities that contract with the city to serve children in need. The entities are private contractors who are charged with recruiting and certifying foster homes, which involves engaging in intimate home studies. CSS will do home studies for single parents regardless of sexual orientation. But it will not certify unmarried cohabiting couples of any sexual orientation or same-sex married couples because such arrangements are inconsistent with its religious beliefs concerning marriage and family.

The city has argued that CSS and affiliated foster parents have engaged in invidious discrimination against LGBTQ persons under the "guise of religion." The City of Philadelphia claims that its Fair Practices Ordinance (FPO) forbids any contractor from denying or interfering with public accommodations based on a range of protected characteristics, including sexual orientation. Petitioners reply that CSS is an institution with a two-hundred-year career of serving the city's children in need of foster care, and that the city's actions have harmed children and Catholic foster parents in part by violating of their religious liberty.

I. Free Exercise of Religion and the *Smith* Standard

Petitioners in this case contend that the Supreme Court's 1990 decision in *Employment Division v. Smith* should be overturned, but that they should win even under *Smith*. *Smith* held that the government does not violate the Free Exercise Clause when its laws burden religion, but only if those laws are neutral and generally applicable.[2] A law that singles out religious practice or discriminates among religions is subject to strict scrutiny.[3] Petitioners allege that the city violated *Smith*'s standards of neutrality and general applicability for two main reasons. First, they contend that there is a history of statements by city officials that suggest intentional targeting of CSS for its faith. In *Masterpiece Cakeshop*, the Court held that public statements of animus toward religious persons were evidence of a lack of neutrality.[4] Second, petitioners contend that the city itself does not consistently abide by the FPO, since it sometimes

1 No. 19-123 (U.S. argued Nov. 4, 2020).

2 Employment Division v. Smith, 494 U.S. 872 (1990).

3 *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (holding that city ordinance prohibiting animal sacrifices violated the Free Exercise Clause because there was evidence the city council targeted religious practice).

4 Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018).

discriminates on the basis of disability and race in placing children in foster homes.[5] *Smith* and *Church of Lukumi v. Hialeah* both indicated, and a number of circuit courts have held, that when a policy treats secular and religious conduct differently when they implicate the same governmental interest, or when it grants exemptions for secular but not religious reasons, then it is not generally applicable, and strict scrutiny applies.[6]

Regarding the first contention, petitioners point out that Commissioner Cynthia Figueroa told CSS in a meeting that it "should be following the teachings of Pope Francis rather than the . . . Archbishop of the Diocese," and that "times have changed" and "it's not 100 years ago."[7] In questioning the Archbishop's interpretation of the Catholic Faith and advocating the Pope's allegedly more progressive interpretation of Catholic doctrine, these statements are arguably an example of what James Madison called an "arrogant pretension" to civil competence over religious doctrine.[8] They at least arguably cross the line between civil and ecclesiastical authority, according to the Court's own Establishment Clause precedent.[9] But the city's defense—that Commissioner Figueroa is Catholic and invoked Pope Francis in the spirit of trying to find common ground—is not implausible. Moreover, these statements do not seem to be blatantly disparaging like those made against Jack Phillips in *Masterpiece Cakeshop*.[10]

With regard to general applicability, the city defends its inconsistent exemptions by distinguishing between two stages of the foster parent process: the pool stage, in which they argue no exceptions are granted to its nondiscrimination policy, and the placement stage, in which it sometimes does make exceptions. The latter decisions, the city emphasizes, are for the best interest of the child. Yet this distinction is not persuasive. The reason that the pool stage seeks to identify healthy homes is precisely to ensure the well-being of foster children. The placement stage thus does not introduce a distinct governmental interest. In other words, the constant object of both stages is the best interest of the child.[11] There is no non-arbitrary reason the city refuses to grant a religious exemption to the nondiscrimination rule for religious reasons at the stage concerned with the well-being of children in general when it already does so for secular reasons at the stage concerned with the well-being of children in particular. Both stages concern the same governmental interest, and therefore disparate treatment of religious and secular reasons for exemption from the FPO should trigger strict scrutiny. This inconsistent exemption scheme will likely doom the policy because it requires the application of strict scrutiny under *Smith*, and even if the interest asserted is compelling, the means used are not the least restrictive available.

II. The Debate Over the Original Meaning of the Free Exercise Clause

But is *Smith* sound precedent? If not, should it be overruled? *Fulton* raises these important questions, even as the petitioners argue that they should prevail under current law.

Employment Division v. Smith set off a firestorm and a bipartisan political backlash that led to the passage of the Religious Freedom Restoration Act, which reinstated stronger religious freedom protection. In spite of pressure to reverse course, in *Boerne v. Flores*, the Court upheld *Smith* and struck down the part of RFRA that applied it to the states.[12] In *Boerne*, Justices Sandra Day O'Connor and Antonin Scalia debated the original meaning of the Free Exercise Clause.[13]

Their exchange was another flashpoint in the rich scholarly debate inaugurated by Michael McConnell's landmark essay arguing that the Framers had a "freedom-protective" view of religious liberty that would have required exemptions from generally applicable laws. Philip Hamburger responded in defense of a nonexemption interpretation of free exercise, touching off the debate that continues to the present.[14]

5 Sometimes the city will not place children with parents with disabilities or of a certain race depending on the specific needs or circumstances of the child. Such discrimination may be justified, but petitioners claim it shows that the city is willing to make exceptions to a strict non-discrimination rule if it thinks the reasons are important enough, and that it does not consider religious reasons to be as important as secular reasons.

6 *See, e.g.*, Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004), Ward v. Polite, 667 F.3d 727 (6th Cir. 2012). For a discussion, see Brief for The Rutherford Institute as Amicus Curiae Supporting Petitioners, *Fulton*, No. 19-123 (June 3, 2020), *available at* https://www.supremecourt.gov/DocketPDF/19/19-123/144798/20200603150655788_19-123.amicus.Rutherford.final.pdf.

7 Joint App. at 186, 188, 366, *Fulton*, No. 19-123.

8 James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in Writings 32 (Jack N. Rakove ed. 1999).

9 As the Court pointed out in *Kedroff v. Saint Nicholas Cathedral*, the First Amendment protects a "spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." 344 U.S. 94, 116 (1952). *See also* Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929); Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171 (2012).

10 Still, the remarks suggest at least an implicit bias against traditional Catholic beliefs. Hence, as Philip Hamburger has pointed out, the deeper problem than overt malice toward religion is one of systemic administrative bias against religious persons, in which policies are the product of the determinations of unelected bureaucrats in a rationalist and scientist endeavor, who therefore tend to be indifferent or hostile to and insulated from meaningful input from and accountability to religious minorities. *See* Brief for New Civil Liberties Alliance as Amicus Curiae Supporting Petitioners, *Fulton*, No. 19-123 (June 3, 2020), *available at* https://www.supremecourt.gov/DocketPDF/19/19-123/144805/20200603151951198_NCLA%20amicus%20brief%20Fulton%20v%20City%20of%20Philadelphia%2019-123.pdf.

11 A point that Justice Thomas suggests in oral argument.

12 521 U.S. 507 (1997).

13 *See id.* at 548 (O'Connor, J., dissenting) (arguing that *Smith* was wrongly decided based on the original understanding of the Free Exercise Clause); *id.* at 537 (Scalia, J., concurring in part) (responding to Justice O'Connor's claim that "historical materials support a result contrary to the one reached in [*Smith*]").

14 *See* Twelfth Annual Rosenkranz Debate & Luncheon, Federalist Society 2019 National Lawyers Convention, *available at* https://fedsoc.org/conferences/2019national-lawyers-convention#agenda-item-twelfth-annual-rosenkranz-debate-luncheon (debate between Profs. McConnell

Professor McConnell's argument draws a distinction between a narrow Lockean understanding of religious freedom as merely a nondiscrimination principle and a broader understanding of religious liberty that includes a right to exemption from at least some generally applicable laws, even if they only incidentally burden free exercise. In McConnell's view, Thomas Jefferson adopted a version of the Lockean view, which was "extraordinarily restrictive for his day."[15]

In contrast, McConnell argues, the principles Madison articulated in the *Memorial and Remonstrance Against Religious Assessments* are more consonant with the freedom-protective view. Madison's language suggests that religious duty is prior to civil law such that the believer's view of his religious duty determines the scope of constitutionally protected religious freedom that is otherwise in accord with public peace. McConnell argues that Madison's view is the one the Framers in general adopted. He says the "most direct evidence" for this interpretation of original meaning is in the language of state constitutions and bills of rights adopted in the years following 1776, since "it is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it had meant in their states."[16]

McConnell recounts that state constitutional provisions protecting free exercise of religion often included a proviso that the protected conduct must be "peaceable," i.e., it must not disturb the peace and safety of the state. According to McConnell, the provisos are "the most revealing and important feature of the state constitutions," since they show free exercise was not confined merely to belief, but also extended to external actions—otherwise the provisos would not have been necessary at all.[17] In short, the state constitutional language guaranteed free exercise, *in spite of* generally applicable laws regulating peaceful conduct.

In his reply to McConnell, Professor Hamburger argues that the nonexemption view is actually the original public meaning of the Free Exercise Clause. Hamburger disputes McConnell's reading of key individual Founders like Madison who, on Hamburger's view, affirmed a nonexemption approach. And he maintains that the provisos actually implied there was no free exercise right to exemption. Hamburger argues that this is the case because the provisos did not limit the *extent* of free exercise but its *availability*. In other words, for Hamburger, the state constitutional language guaranteed free exercise *provided citizens obeyed generally applicable laws*. For Hamburger, the class of actions that would count as non-peaceful was much broader than McConnell lets on; he maintains that for the Founders "every breach of law is against peace."[18] In subsequent discussion, scholars have staked out positions along the spectrum between McConnell's freedom-protective and Hamburger's nonexemption positions.[19]

In one recent contribution to the debate, Professor John C. Eastman suggests that the McConnell-Hamburger debate looked in the wrong place for evidence of original public meaning. Instead of looking to state constitutional language, originalists should look to the language of *state ratifying convention proposals* for amendments to the federal Constitution. None of those proposals, Eastman points out, came with public peace provisos. For example, New York proposed "That the People have an equal, natural and unalienable right, freely and peaceably to Exercise their Religion according to the dictates of Conscience."[20] From the lack of any proviso in the language in this and most other state proposals, Eastman infers that the federal right to free exercise is an "unqualified" right.[21]

III. Another Look at the Historical Meaning of Free Exercise

A. How the Founders' Natural Law Theory Informs the Meaning of Free Exercise

The *Fulton* petitioners' call for revisiting *Smith* is welcome because the Court in that case didn't inquire into the original meaning of the Free Exercise Clause. While a comprehensive inquiry into original meaning cannot be attempted here, the Free Exercise Clause discussion can be illuminated by placing it in the larger context of the Founders' natural law theory. As is evident in the Declaration of Independence and across the Founders' writings, natural rights were grounded in the "Laws of Nature," that is, the natural law.[22] As James Wilson put it, "Order, proportion, and fitness pervade the universe. Around

and Hamburger over whether "The Free Exercise Clause guarantees a constitutional right of religious exemption from general laws when such an exemption would not endanger public peace and good order.").

15 Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1452 (1990), *available at* https://chicagounbound.uchicago.edu/journal_articles/8713/.

16 *Id.* at 1456.

17 *Id.* at 1462.

18 Philip Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915, 918 (1992), *available at* https://heinonline.org/HOL/LandingPage?handle=hein.journals/gwlr60&div=38&id=&page=.

19 For scholarly critiques of *Smith* in the spirit of McConnell's work, see Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 16; John Witte, Jr. & Joel A. Nichols, Religion and the American Constitutional Experiment (2016); Michael Stokes Paulsen, *Justice Scalia's Worst Opinion*, The Public Discourse, *available at* https://www.thepublicdiscourse.com/2015/04/14844/. For scholarly arguments in the spirit of Hamburger, see Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L. Rev. 245 (1991); Vincent Phillip Muñoz, *Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion*, 110 American Pol. Sci. Rev. 369, 374 (2016).

20 The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins 12 (Neil H. Cogan ed. 1997).

21 *See* Brief for Center for Constitutional Jurisprudence as Amicus Curiae in Support of Petitioners, *Fulton*, No. 19-123 (June 3, 2020), *available at* https://www.supremecourt.gov/DocketPDF/19/19-123/144684/20200602142513866_19-123%20CCJ%20tsac.pdf.

22 For a discussion of Jefferson's theistic natural law theory, see generally Kody W. Cooper & Justin B. Dyer, *Thomas Jefferson, Nature's God, and the Theological Foundations of Natural-Rights Republicanism*, 10 Politics & Religion 662 (2017).

us, we see; within us, we feel; above us, we admire a rule, from which a deviation cannot, or should not, or will not be made."[23] This order, proceeding from God and known by human reason, is the natural law, and it is the transcendent criterion of the moral validity of all human laws. As Alexander Hamilton put it, "the deity, from the relations, we stand in, to himself and to each other, has constituted an eternal and immutable law, which is, indispensibly, obligatory upon all mankind, prior to any human institution whatever."[24]

For the Founders, the content of natural law, manifest in the consciences of persons with a functioning power of reason, consisted of a set of natural duties. These included the duty of self-preservation, the duty of maintenance and care of one's household and family (and therefore the right to acquire and possess property, the reciprocal rights and duties between spouses, parents and children, etc.), duties connected to social peace related to not injuring or offending one's fellows, and spiritual duties to pursue truth and to honor God.[25]

Some scholars claim that the Founders derived duties from rights. They argue that the Founders assumed, in the spirit of Thomas Hobbes, that in a state of nature persons have natural rights prior to any obligations, and that obligations are the mere creation of the social contract.[26] Such narratives have the story exactly backwards. The Founders believed the natural right to free exercise of religion was grounded in the natural duties connected to the good of religion. Madison wrote that religion is antecedent to civil law; it is "the duty which we owe to our Creator and the manner of discharging it."[27] For Madison, the rights of conscience that the civil authority was bound to respect flowed from a prior duty to God that transcended civil competence and the fundamental equality of persons as natural rights-bearers. This prior duty grounded a fundamental feature of religious freedom: the equal right of every person to worship according to the dictates of his or her own conscience. In his letter to the Danbury Baptists, Jefferson also tethered the meaning of the right to free exercise to moral duty:

> Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.[28]

Jefferson harbored heterodox views of Christianity and shared Enlightenment skepticism of divine revelation; Wilson held more recognizably orthodox Christian beliefs; Madison and Hamilton were somewhere in between. Yet they all expressed principles consonant with classical Christian natural law theory, namely, that natural rights are tethered to the moral law and teleologically oriented toward genuine human flourishing.

The Founders would therefore have rejected liberal neutrality and indifferentist understandings of the good life. But they also denied to the civil authority—both federal and state—competence to coerce citizens to accept its judgment as to the content and meaning of revelation. They believed religion was essential to the public good in a constitutional republic. Even the more disestablishmentarian Jefferson rhetorically asked, "can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?"[29] Jefferson, Madison, and their allies among religious dissenters like the Baptists insisted that state establishments were actually corruptive of religion. On the other hand, various Founders espoused a civic republican argument that the state had a role in supporting religion for its utilitarian value in promoting virtue. But even defenders of a plural establishment like Patrick Henry would have maintained that church and state were institutionally and functionally separate and that the maintenance of religious exercise was primarily the purview of civil society. Moreover, virtually no Founders wanted a *national* religious establishment.

Hence, most Founders agreed on a common set of principles: liberty of conscience, or the freedom of belief; free exercise, or the right to put those beliefs into practice; religious equality, or nondiscrimination; institutional separation of church and state; and disestablishment at the federal level.[30] George Washington spoke for most Founders when he said he saw these principles as compatible with government encouragement and support for religion. As he put it in his Farewell Address,

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked: Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of

23 1 Collected Works of James Wilson 464 (Kermit L. Hall & Mark David Hall eds. 2007).

24 Alexander Hamilton, *The Farmer Refuted &c.* (Feb. 23, 1775), Founders Online, National Archives, https://founders.archives.gov/documents/Hamilton/01-01-02-0057.

25 For an able scholarly discussion of the Founders' natural law theory, see Thomas G. West, The Political Theory of the American Founding (2017).

26 *See, e.g.*, Walter Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 Sup. Ct. Rev. 49 (1982). In addition to my critique of this view of the Founders, I also challenge this reading of Hobbes in Kody W. Cooper, Thomas Hobbes and the Natural Law (2018).

27 Madison, *supra* note 8, at 30.

28 Thomas Jefferson, *Letter to the Danbury Baptist Association* 258 in 36 The Papers of Thomas Jefferson (Barbara B. Oberg ed. 2009).

29 Thomas Jefferson, *Notes on the State of Virginia*, Query XVIII.

30 *See* Witte and Nichols, *supra* note 19, at 41-63.

> refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.[31]

While Washington and John Adams were more willing than Jefferson to support religion through things like presidential proclamations of days of prayer, they were all in agreement that free exercise of religion was harmonious with the performance of one's social duties, like truth telling in courts of law.

Washington explicitly underspecified the good and natural duty of "religion" for both principled and pragmatic reasons. Not only was this position a deduction from natural law and natural rights philosophy, but it was also a recognition that the United States was in fact marked by a pluralism of publicly reasonable religious practices. The principles of liberty of conscience, nondiscrimination, institutional separation, federal disestablishment, and de facto pluralism provided the conditions for robust free exercise as well as social peace and civic unity. It made possible civic friendship among Protestant sects and even between Protestants and non-Protestants.[32]

The upshot is that the Founding understanding of the free exercise of religion was rooted in the precepts of natural law. The Founders understood positive law to be grounded in the natural moral law, which included natural duties to God. Accordingly, the North Carolina state ratifying convention echoed Madison's language: the manner of discharging the natural duty of religion was to be directed by "reason and conviction" rather than "force or violence."[33] The language of reason and conviction is important—it suggests both an objective and subjective component that are not without some tension. Subjectively, religion must be an individual's own conscientious conviction. Objectively, reasonable pursuits of religion will abide by the precepts of natural law.

The immediate legal deductions from the dictates of natural law, such as criminal laws proscribing murder, theft, slander, and the like, were essential to the protection of natural rights and would set the standard of reasonable conduct that diverse religious practitioners would be expected to adhere to. In the same way, the positive law translated natural rights into the civil rights of persons and citizens. As Thomas G. West puts it, for the Founders, securing protection against "intentional injuries to life, liberty, and property" was the "government's single most important domestic policy."[34] In other words, civil enactments reflective of the first precepts of natural law, and their enforcement, were the essential constituents of peace and good order. Accordingly, James Wilson, echoing Anglican theologian Richard Hooker, held that the natural law is the "mother of . . . peace."[35]

As Wilson explains further, it isn't sufficient for the natural law to be promulgated by God to the consciences of men and women. The natural law must be translated into positive law with credible authoritative threats of sanction for their breach, because of the ineradicable spark of passion and therefore dangerous potential in man for evil:

> Without laws, what would be the state of society? The more ingenious and artful the twolegged animal, man, is, the more dangerous he would become to his equals: his ingenuity would degenerate into cunning; and his art would be employed for the purposes of malice. He would be deprived of all the benefits and pleasures of peaceful and social life: he would become a prey to all the distractions of licentiousness and war.[36]

Wilson intimates here what Madison memorably stated: men are not angels. The Founders thus accepted the axiom from classical Christian philosophy that human beings are dangerous animals insofar as their unruly passions are ungoverned by reason (a disorder in the powers of the soul that the scholastics sometimes referred to under the general term "concupiscence"). Laws rooted in natural law and combined with credible threats of sanction for noncompliance are therefore the necessary supports of public peace and the antidote to licentiousness and war.

In this light, consider the proviso of the New York Constitution of 1777 (South Carolina's 1790 Constitution used similar language):

> free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.[37]

"Licentiousness" referred to disordered acts of will. In Shakespeare, for example, the licentious man makes his own will the "scope of

31 George Washington, *Farewell Address, 19 September 1796*, Founders Online, National Archives, https://founders.archives.gov/documents/Washington/99-01-02-00963.

32 As Pope Leo XIII recounted a century later:

> [A]t the very time when the popular suffrage placed the great Washington at the helm of the Republic, the first bishop was set by apostolic authority over the American Church. The well-known friendship and familiar intercourse which subsisted between these two men seems to be an evidence that the United States ought to be conjoined in concord and amity with the Catholic Church. And not without cause; for without morality the State cannot endure—a truth which that illustrious citizen of yours, whom We have just mentioned, with a keenness of insight worthy of his genius and statesmanship perceived and proclaimed.

Longinqua, Encyclical of Pope Leo XIII On Catholicism In The United States (1895), *available at* http://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_06011895_longinqua.html. How could the Pope suggest that the American experiment sought to create interreligious civic amity in an overwhelmingly Protestant country with a dark history of discrimination against Catholics? It was because he perceived that the Founders tethered the principles already outlined and the underspecified conception of good of religion to "morality," i.e., the moral law, without which, as in the Catholic natural law tradition, Americans believed "the State cannot endure." *Id.*

33 The Complete Bill of Rights, *supra* note 20, at 12.

34 West, *supra* note 25, at 151.

35 Collected Works of James Wilson, *supra* note 23, at 465.

36 *Id.* at 505; *cf. id.* at 690, 704.

37 The Complete Bill of Rights, *supra* note 20, at 26.

justice."[38] Similarly, Locke distinguished between liberty, which was a condition of enjoyment of all of one's natural rights within the bounds of the moral law, and license, which equated liberty with power and which the Founders associated with Hobbes.[39] For the Founders, acts of licentiousness were behaviors flowing from unruly passions as opposed to "sober reason."[40] "Licentiousness" thus often referred to overt violations of precepts of natural law in disturbance of the peace, as distinct from acts of ordered liberty. The term included a range of behaviors, such as rioting,[41] theft,[42] slander and libel,[43] trespasses of frontiersmen on people of other nations,[44] movements to break up states and form new ones,[45] and resistance to paying taxes on whiskey,[46] to name just some.[47] Blackstone included sexual activity outside of man-woman wedlock as a form of licentiousness.[48]

With regard to the latter, the Founders saw the man-woman union of marriage as of a piece with their natural law philosophy. In John Witherspoon's words, marriage is "part of natural law" and "holds a place of first importance in the social compact."[49] Hence it was commonplace for the law to sanction behaviors destructive of marriage, like adultery. In New York, adultery was grounds for divorce, but New York sought to deter it by making it unlawful for the adulterer to remarry. There was opposition to this law—but notably the opponents made their protest *in the name of chastity*, believing that, by punishing adulterers in this way, they would simply flout the marriage norm and engage in open licentiousness with a "pernicious influence on public morals."[50]

Given that they grounded religious freedom in the duties that arose from natural law, the Founders rejected out of hand any notion that religious freedom could become a shield for exemption from laws regulating licentious conduct or laws promoting virtue. If that happened, the natural right to religious freedom would then become twisted in subversion of the very precepts of natural law it was grounded upon.

This does not mean that the Founders were averse to any religious accommodations or exemptions. But those exemptions were granted for behaviors that did not contravene fundamental moral norms, or they were granted in a way that avoided subversion of the moral norm. Take for instance Washington's example of the religious duty undergirding oaths to tell the truth in courts of law. The underlying moral norm here is the requirement to tell the truth, and the governmental has a compelling interest in sanctioning false testimony. Quakers often sought exemptions from oath-swearing based on their interpretation of Christ's words on the subject, and indeed they were granted an exemption in Carolina in 1669. But the accommodation didn't relieve them of the duty of truth telling in courts of law. Rather, they were "allowed to enter pledges in a book in lieu of swearing."[51] The Founders incorporated this reasonable accommodation into the Constitution itself for such conscientious objections—without forswearing the need to foster loyalty to the constitutional order—by allowing elected officials to bind themselves to uphold it "by Oath or Affirmation."[52]

The example of exemptions from military service confirms the point. Washington addressed the Quakers' desire for exemption from military service:

> The liberty enjoyed by the People of these States, of worshipping Almighty God agreable [sic] to their Consciences, is not only among the choicest of their *Blessings,* but also of their *Rights*—While men perform their social Duties faithfully, they do all that Society or the State can with propriety demand or expect; and remain responsible only to their Maker for the Religion or modes of faith which they may prefer or profess.
>
> Your principles & conduct are well known to me—and it is doing the People called Quakers no more than Justice to say, that (except their declining to share with others the burthen of the common defence) there is no Denomination among us who are more exemplary and useful Citizens.[53]

38 William Shakespeare, Timon of Athens act 5, sc. IV.

39 John Locke, *Two Treatises of Government*, Second Treatise, Ch. 2, § 6; *cf.* Hamilton, *The Farmer Refuted*, *supra* note 24.

40 Hamilton, *The Farmer Refuted*, *supra* note 24, at n.2.

41 *Pennsylvania Assembly: Reply to the Governor* (Feb. 11, 1764), Founders Online, National Archives, *available at* https://founders.archives.gov/documents/Franklin/01-11-02-0013.

42 *To George Washington from Major General Philip Schuyler* (Aug. 29, 1776), Founders Online, National Archives, *available at* https://founders.archives.gov/documents/Washington/03-06-02-0134.

43 *From John Jay to Silas Deane* (Dec. 5, 1781), Founders Online, National Archives, *available at* https://founders.archives.gov/documents/Jay/01-02-02-0275.

44 *From James Madison to Richard Henry Lee* (Nov. 14, 1784), Founders Online, National Archives, *available at* https://founders.archives.gov/documents/Madison/01-09-02-0241.

45 *Abigail Adams to Thomas Jefferson* (Nov. 24, 1785), Founders Online, National Archives, *available at* https://founders.archives.gov/documents/Adams/04-06-02-0151.

46 *From John Adams to George Washington* (Nov. 22, 1794), Founders Online, National Archives, *available at* https://founders.archives.gov/documents/Adams/99-02-02-1598.

47 Some forms of conduct identified as licentious were more controversial. For example, some believed that the "African slave trade" was a form of licentiousness. *See An Address from the Quakers to George Washington, the Senate, and the House of Representatives in* 4 The Papers of George Washington, Presidential Series 265–269 n.1 (Dorothy Twohig ed. 1993).

48 1 William Blackstone, Commentaries *438.

49 John Witherspoon, *Queries, and Answers Thereto, Respecting Marriage*, *in* 4 The American Museum, or Repository 315-16 (1788) (quoted in West, *supra* note 25, at 222).

50 *New York Assembly. Remarks on an Act Directing a Mode of Trial and Allowing of Divorces in Cases of Adultery* (Mar. 28, 1787), Founders Online, National Archives, *available at* https://founders.archives.gov/documents/Hamilton/01-04-02-0066.

51 Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 56 (1987).

52 U.S. Const., art VI.

53 *From George Washington to the Society of Quakers* (Oct. 13, 1789), Founders Online, National Archives, *available at* https://founders.archives.gov/documents/Washington/05-04-02-0188.

Clearly, Washington understood the natural right of free exercise of religion to be in essential harmony with the moral norm that all citizens must contribute their share to the common defense. As New York's constitution put the moral norm, "it is the Duty of every Man who enjoys the Protection of Society to be prepared and willing to defend it."[54] When state legislatures faced the reality that some conscientious objectors would rather die than fight, they sometimes accommodated them with an exemption. But they accommodated them in a way that still required the exempted to shoulder a share of the burden of common defense through an alternative means. Hence, New Hampshire's Constitution provided, "No person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto, provided he will pay an equivalent."[55]

B. Implications of the Founders' Theory for the Modern Free Exercise Debate

From this evidence, we can draw the initial conclusion that Hamburger's nonexemption view is close to the mark insofar as it recognizes that the liberty of conscience protected by the Free Exercise Clause was not a license to make one's own will the standard of justice.

Eastman's suggestion that the language of the First Amendment reflects the "unqualified" state ratifying convention proposals and entails a free exercise right to be "free from government influence" is thus potentially misleading.[56] In light of the evidence presented so far, it seems unlikely that religious liberty was understood by the state ratifying conventions to be *unqualified* at the federal level, if that means untethered from the moral law. More likely, the unqualified language of the Free Exercise Clause was to be read in connection with the Establishment Clause. In the House debate over the language of the clauses, Madison said he "apprehended the meaning of the words to be that Congress should not establish a religion and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[57] If Madison was correct and the joint aim of the religion clauses was principally an unqualified proscription of the legal establishment of a national church, it would make sense for the language of the Free Exercise Clause to be unqualified, and yet this would not indicate that individuals have a general free exercise right to be free from government interference.[58] Moreover, Eastman's account suggests that Congress's police power over federal territories was limited by an unqualified individual right to free exercise, which is incompatible with the Founders' understanding of religious liberty as grounded in natural law.

On the other hand, the foregoing account of free exercise as grounded in natural law indicates that the freedom-protective view is correct insofar as it recognizes that the "scope of religious liberty is defined by religious duty."[59] But how broad is the scope of religious duty for the Founders? *At a minimum* it includes the following: First, freedom of conscience and the right to exercise one's individual convictions in the action of worship. Second, the right to act on religious reasons when carrying out one's natural moral obligations (which can ground or color the exercise of one's other civil liberties, such as speaking or publishing freely about the religious reasons for one's political convictions). Third, the right to put into action one's individual convictions about one's religious duties; this right *may* trump civil law in matters on which the natural law is indifferent, e.g., matters of *determinatio* and/or *mala prohibita*.[60] While more could be said about the scope of religious duty, it is impossible to define that scope with precision because the good of religion—and therefore the scope of religious duty—is underspecified. Matters of *determinatio*, in which legislative prudence is called for and religious exemptions may be appropriate, inhabit a sphere that is similarly underspecified.

This account is open on the question of the constitutionality and prudence of the proper *locus* for religious exemption claims: legislatures or courts. But judicially crafted exemptions are at least not antithetical to original meaning.[61] Moreover, it is well known that the modern policymaking process is increasingly removed from the give and take of democratic politics that the Founders envisioned, and placed in the hands of an insulated bureaucratic and administrative elite. An originalist approach, therefore, might be supple enough to permit judicial exemptions to meet current challenges presented by the fact that religious minorities have a more difficult time influencing policymaking.

The Founders' view can be further illuminated by what it is *not*. As Phillip Muñoz has persuasively argued, however broad the Founders' approach to the scope of religious freedom was, it is *not* that offered by recent advocates of what he calls "autonomy exemptionism." This Rawlsian approach—given expression by both secular and religious philosophers including Martha Nussbaum and Charles Taylor—untethers free exercise from religious duty and reduces it to subjective self-expression and authenticity. As Muñoz points out, this approach inverts the teleological, God-directed religious freedom of the Founders into anthropocentric freedom to find one's own meaning as an autonomous being.[62]

54 The Complete Bill of Rights, *supra* note 20, at 183.

55 *Id.*

56 *See* Brief for Center for Constitutional Jurisprudence as Amicus Curiae, *supra* note 21.

57 *Id.* at 60.

58 For an argument that the Establishment Clause was originally understood principally as forbidding the establishment of a national church, *see* Donald L. Drakeman, Church, State, and Original Intent (2009).

59 McConnell, *supra* note 15, at 1453.

60 As Thomas Aquinas teaches, the positive law is grounded in the natural law in two ways: by deduction and by determination. That murder is a felony is a deduction from the moral precept forbidding murder. But how should murderers be punished? This is a question that admits of a range of legitimate answers within the scope of prudence, i.e., the field of *determinatio*. Within this sphere of human activity, the law can create *mala prohibita*, i.e., render behavior that is intrinsically indifferent (like driving on the left side of the road) criminal just in virtue of the law.

61 *See* Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 Notre Dame L. Rev. 55 (2020).

62 Muñoz, *supra* note 19.

Radical autonomous individualism was given jurisprudential expression in *Planned Parenthood v. Casey* in Justice Anthony Kennedy's famous line: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[63] The autonomous-individualist account of liberty of conscience radically expands the freedom of conscience beyond duties toward God to the more amorphous quest for meaning and dignity, untethered from the natural moral law and what the Founders would have considered religion, even under its broadest definition. In this way, the autonomous-individualist account of liberty effectively erases the distinctiveness of *religious* liberty that the Founders saw fit to set apart for special protection in the First Amendment. On this view, religious exercise has no more claim to special solicitude than any other conscientious practices framed under a practically reasonable pursuit of a plan of life. As this view of liberty spreads, the traditional religious person's lifestyle becomes more marginal, and selective indifference toward traditional religion on the part of civil authorities becomes more likely. Hence, during the COVID-19 pandemic, several jurisdictions treated religious gatherings as less important than gatherings to produce television and film, and churches as less essential than liquor stores and cannabis dispensaries.[64]

According to philosophers and jurists who subscribe to autonomous individualism, the state should foster the autonomous search for authentic meaning by providing what political philosopher John Rawls called the "social bases of self-respect."[65] Rawls ranked self-respect—the sense of one's own value and the worthiness of one's plan of life—as a crucially important good. Hence, self-esteem or the "lively sense" of one's worth as a person becomes an urgent priority of the liberal state.[66] The autonomous self then demands to be shielded from laws restrictive of those autonomous pursuits of self-discovery or self-creation. Failure to provide such exemptions or strike down such restrictions becomes an affront to the self-respect—the very dignity—of persons. This is one way to understand Justice Kennedy's gay rights jurisprudence, in which the threat of traditional morals legislation to the dignity of homosexuals is thematic.[67] If this account is correct, it goes some way in explaining the rise of zero-sum conflicts between religious traditionalist claims to free exercise rights and LGBTQ claims to a right to be free from dignitary harms.

In sum, the original understanding of free exercise of religion is narrower than some exemptionists claim insofar as subjective claims of religious liberty were thought to be cabined by objective moral law. On the other hand, it is broader than some nonexemptionists claim because religious duties were also grounded in the moral law in a way that civil authority must respect, since its own authority derives from that same moral law. Hence, on an originalist view, a key question in the *Fulton* case is not particularly difficult to answer. The free exercise of religion at least includes the freedom to believe, as the Founding generation did, that marriage is a man-woman union, that it is optimal for children to be raised by a mother and a father, that love of God and neighbor requires one to provide needy children with homes informed by these ideals, and that civil authorities act unjustly when they prohibit individuals and institutions from acting on these beliefs.

We should not dismiss Justice Scalia's worry in *Smith* that an exemptionist approach risks courting anarchy inasmuch as it risks permitting citizens to cloak their unlawful conduct in the garb of religious motivation or meaning. This worry is sharpened in a time in which Americans disagree about the most basic questions of existence and morality. But when the law reflects that moral dissensus about conduct by permitting individuals to choose whether to engage in the conduct, that does not necessarily trigger conflicts in which religious freedom is at stake. Justice Scalia's worries about the unworkability of greater judicial scrutiny have arguably proven to be exaggerated in RFRA cases. Moreover, there are good reasons to think that robust religious accommodation is a good idea when LGBTQ antidiscrimination rules conflict with religious traditionalists' exercise of traditional moral duties.

IV. Religious Accommodation and Social Peace

By way of conclusion, I argue that a ruling for the petitioners in *Fulton* would help foster social peace.[68] Today, this country is much more religiously diverse than it was at the Founding. While Christian affiliation has been on the decline for several years, about two-thirds of the country still identify as Christian (Protestants roughly double Catholics). The percentage of those who identify as "nothing in particular" has increased in recent years to 17%. The next largest groups include Agnostic (5%) and Atheist (4%). The smallest groups include 2% who identify as Jewish, 1% Muslim, 1% Buddhist, 1% Hindu, and 3% Other.[69] It is a testament to the American experiment in religious toleration that such a religiously diverse polity has endured so long. It is also apparent that religious affiliation is *not* what most deeply cleaves American culture. Neither is the divide primarily between the religious and the irreligious since less than 10% of the country identifies as agnostic or atheist (those who do not identify with a traditional religious sect are not necessarily irreligious).

63 505 U.S. 833, 851 (1992).

64 The Court recently granted partial injunctive relief to churches in California claiming that its COVID-19 lockdown amounted to unconstitutional disparate treatment. *See* South Bay United Pentecostal Church et al. v. Newsom, 592 U.S. __ (2021), *available at* https://www.supremecourt.gov/opinions/20pdf/20a136_bq7c.pdf.

65 John Rawls, A Theory of Justice 62 (1971).

66 John Rawls, Justice as Fairness: A Restatement 59 (Erin Kelly ed. 2001).

67 *See* Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2003); U.S. v. Windsor, 570 U.S. 744 (2013); Obergefell v. Hodges, 576 U.S. 644 (2015).

68 On this point, I agree with Douglas Laycock, who makes a similar argument in Brief for Christian Legal Society et al. as Amici Curiae Supporting Petitioners, *Fulton*, No. 19-123, *available at* https://www.supremecourt.gov/DocketPDF/19/19-123/144811/20200603161528534_19-123%20Christian%20Legal%20Socy%20Brief.pdf.

69 *In U.S., Decline of Christianity Continues at Rapid Pace*, Pew Research Center (Oct. 17, 2019), https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/.

Rather, as James Davison Hunter pointed out many years ago, the more salient cultural divide cuts across religious and secular lines: between the Orthodox and the Progressive. The Orthodox see morality as anchored in transcendent, fixed, and unchanging principles and attached to an external authority. In contrast, both nonreligious and religious Progressives see morality as unfolding through the flow of history and defined by a spirit of rationalism and subjectivism (and therefore religious Progressives believe sacred texts should be reinterpreted as moral understanding progresses). This fundamental metaphysical-moral divide over first principles continues to play out in our culture wars.[70]

Recent political science research suggests that the ideological identities of conservative and liberal (which correspond more or less to Orthodox and Progressive views of morality)—as well as a range of identities like race, ethnicity, gender, and even geography—have increasingly sorted along the lines of *political party*. Such polarization makes our party system very different from previous party systems, in which political coalitions were much more socially heterogenous. It also means that partisanship is now, in the words of political scientist Lilliana Mason, a "mega-identity," such that a single vote can be a signaling device for all the identities encompassed under it.[71]

When one combines this sort of social sorting with the psychological tendencies and pathologies associated with in-group and out-group dynamics, it is a recipe for political dysfunction, gridlock, and the decline of social and political stability. When these identities are increasingly lumped together and segregated, the rival team's mega-identity is more and more perceived as antithetical to one's own. One sign of this, as documented by Alan Abramovitz and Steven Webster, is the drastic increase in negative partisanship in recent decades. They look at data that asks voters to rank the opposite political party based on a "feelings thermometer"—1 being cold/negative and 100 being warm/positive. In 1980, respondents rated voters for the opposite party a 45; by 2016, that number had dropped to 29.[72] In other words, voters are more motivated by fear, resentment, and even hatred of the opposite political party than by love of their own.[73]

In such a state of affairs, it is no surprise that when one perceives a personal or institutional social signaling of any one identity associated with the rival mega-identity, it can trigger the perception of a threat to one's entire identity. Hence, our polarized party system exacerbates perceptions of dignitary harm in cases like *Fulton*, even when there is no such intention of animus or hatred, nor even an identity (Roman Catholic, gay) that can in reality be subsumed under a party label. As Professor Andrew Koppelman explains, baseline assumptions of invidious motives are spurious: "Many on each side think that their counterparts are evil and motivated by irrational hatred—either hatred of gay people or hatred of conservative Christians. That is . . . dangerous and false."[74] Just so, in the facts of the *Fulton* case we have seen no evidence of such motives. CSS will conduct home studies for anyone regardless of sexual orientation. It will not conduct home studies for persons living contrary to its conception of marriage, including cohabiting opposite-sex couples and same-sex married couples. Because CSS's actions do not intentionally discriminate against gay persons *just because* of their sexual orientation, it cannot be claimed that they are driven by irrational hatred toward LGBTQ persons. Such actions *would* be unjust, but CSS is acting from a bona fide belief about the nature and meaning of marriage over which Americans continue to have deep disagreement.

One could argue that an originalist attempt to discern whether the Free Exercise Clause includes a right to religious exemption (legislative, judicial, or otherwise) from neutral and generally applicable laws is a nonstarter in such a state of affairs. On this view, the Founders' vision simply could not foresee the degree of religious pluralism that characterizes our polity today. In my view, the Founders indeed would see the metaphysical and moral dissensus that marks the polity today as a radical challenge—but they would see it as a challenge which could be addressed in part through robust religious accommodation.

In *Federalist* 10, Madison famously argued that a free republic could not, consistent with its commitment to liberty, coerce its citizenry to adopt "the same opinions, the same passions, the same interests."[75] Such an endeavor would run up against human nature. Given the imperfection of the human intellect, as well as human concupiscence and therefore the tendency to disordered self-love—not to mention different natural gifts that naturally lead to differentiation in wealth—Americans would be marked by a diversity of opinion. Hence, Madison believed that a modern republic could flourish with some degree of dissensus.

Yet in the 1790s, Madison came to embrace the nascent Democratic-Republican party as an engine for the cultivation of greater civic unity. Madison argued that it would be desirable that "a consolidation should prevail in [the] interests and affections [of the people]." He outlined the benefits to civic health that would ensue: with greater mutual affection, political differences would be attended with more moderation, presidential elections would be less acrimonious, and the people would be able to come together to jealously guard the "public liberty."[76] One way of reading the evidence is that the Madison of the 1790s was essentially different than the Madison of 1788. But there is another possibility: perhaps Madison always believed that a healthy pluralism of lifestyle, opinion, and interest *presupposed* a more basic metaphysical-moral unity in common affirmation of the Declaration's principles of natural law and natural rights.

70 James Davison Hunter, Culture Wars 44 (1992). For a recent discussion, see Jason Willick, *The Man Who Discovered 'Culture Wars'*, Wall St. J., May 25, 2018, https://www.wsj.com/articles/the-man-who-discovered-culture-wars-1527286035.

71 Lilliana Mason, Uncivil Agreement: How Politics Became Our Identity (2018); *see also* Ezra Klein, Why We're Polarized (2020).

72 As quoted in Klein, *supra* note 71, at Ch. 1.

73 *See also* Brief for Christian Legal Society et al., *supra* note 68, at 15-19.

74 Andrew Koppelman, Gay Rights v. Religious Liberty? The Unnecessary Conflict 2 (2020).

75 The Federalist No. 10 (James Madison).

76 James Madison, *Consolidation*, Nat'l Gazette (Dec. 3, 1791), Founders Online, National Archives, *available at* https://founders.archives.gov/documents/Madison/01-14-02-0122.

If correct, then today's culture wars, rooted in metaphysical-moral dissensus, constitute a radical challenge to Madisonian constitutionalism.

One Madisonian solution to this problem would be a reinvigoration of federalism. The argument goes that, in our polarized era, returning greater authority to states and localities to pursue their respective visions of justice and the common good would de-escalate the stakes of national politics and thereby help facilitate social peace. An argument in this spirit is often made for overturning *Roe v. Wade* and its progeny. On this view, by constitutionalizing a particular solution to the divisive and difficult moral and political question of abortion, the Court exacerbated social and political discord that could be better diffused through the give and take of legislative debate and compromise.

There is much to recommend this argument. But there is an important difference between the case of abortion and the case of religious liberty. There is no evidence that the 14th Amendment was originally understood to establish a substantive due process right to contract abortions against state police powers.[77] On the other hand, there is substantial evidence that the right to free exercise of religion was understood to be a limitation on the federal government, and on the states after it was incorporated through the 14th Amendment.[78] In the former case, the most that could be plausibly said for the abortion-rights advocate, apart from Court-created precedents and the reliance interests they created, is that the Constitution is silent on abortion and therefore permits states to proscribe or permit it as the people of each state see fit.[79] In the latter case, the antidiscrimination advocate cannot claim that the Constitution is silent about the substantive right to free exercise of religion as a reason for broad judicial deference to states and localities when they infringe upon free exercise rights under the banner of antidiscrimination.

The constitutionalization of abortion rights has arguably poisoned our national politics precisely because many citizens and scholars (including many prochoice liberals) found it preposterous that the elaborate legislative prescriptions of the *Roe* and *Casey* Courts were "a common mandate rooted in the Constitution."[80] On the other hand, the tradition of the prime importance of religious free exercise and toleration in the United States is historically undeniable. The *Fulton* case is an example of how modern bureaucrats sometimes evince chronological snobbery or even outright historical ignorance about the robust role and protection of religion in public life afforded by our Constitution. This case therefore is an opportunity for the Court to perform a bit of civic education. The Court should make it clear that, as long as the Constitution remains our fundamental law, religious reasons for action are protected by the First Amendment because such protection is *actually mandated* by the text, logic, structure, and historical understanding of the Constitution.

Constitutionalizing a robust religious free exercise accommodation in this case could go some way in making clear that traditional religious persons cannot be treated as second-class citizens in places in which they are a political minority through policies that create or reinforce the perception that they are mere factious partisans hellbent on imposing their invidious bigotry under the "guise of religion," as Philadelphia suggested of CSS. On the other hand, such an accommodation would not result in LGBTQ persons experiencing discrimination in accessing goods, services, and other public accommodations; such discrimination is qualitatively different from merely encountering a civic group that declines to publicly and formally affirm conduct to which it conscientiously objects.

In short, accommodations in this area could go some way toward, in Koppelman's words, "end[ing] this war."[81] Such arrangements could then begin to foster Madison's vision of increased mutual affection and amicability between LGBTQ persons and religious traditionalists in that each could mutually recognize the interests they do share, including a principled moral consensus on natural rights, protected by the constitutionally-enshrined negative liberties to live out their lives unmolested by the state. It would not be a panacea, of course. For many people, the Constitution's commitment to limited government will always remain an obstacle to social justice. To others, the fears and resentments are already deeply entrenched. Still others will continue to find it in their partisan interests to stoke these passions. And undoubtedly, political partisans would attack such a decision as itself politicized. But the law is a tutor, and in the long run, it may help de-escalate social conflict in this area by lessening the fear and resentment that are rending the polity.

77 *See* Justin Dyer, Slavery, Abortion, and the Politics of Constitutional Meaning (2013).

78 Although incorporation is usually considered take place via the Due Process Clause of the 14th Amendment, many scholars and jurists think the Privileges or Immunities Clause is the proper vehicle for incorporation. For a powerful argument that the Privileges or Immunities Clause is the proper vehicle of incorporation, see Justice Thomas's concurrence in *McDonald v. Chicago,* 561 U.S. 742 (2010).

79 I say this is the *most* that could be said because an argument can be made that permissive abortion laws actually violate the Equal Protection Clause. For an argument along these lines, see Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 Notre Dame L. Rev. 329, 342-46 (1993).

80 *Casey*, 505 U.S. 833. *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf*, 82 Yale L.J. 920 (1973); Lucas A. Powe, The Supreme Court and the American Elite 278 (2009).

81 Koppelman, *supra* note 74, at 3.

Empowering the "Honest Broker": Lessons Learned from the National Security Council Under President Donald J. Trump

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Note from the Editor:

Other Views:

• *How The National Security Council Has Changed Under Trump*, All Things Considered, NPR, Sept. 11, 2019, https://www.npr.org/2019/09/11/759899351/how-the-national-security-council-has-changed-under-trump.

• John Gans, *Enacting Trump's Revenge Campaign*, Atlantic, Feb. 27, 2020, https://www.theatlantic.com/ideas/archive/2020/02/cuts-nsc-are-not-about-number-staffers/607144/.

• Susan Rice, *Reflecting on the National Security Council's Greatest Asset: Its People*, Obama White House Archives, Jan. 17, 2017, https://obamawhitehouse.archives.gov/blog/2017/01/17/reflecting-nscs-greatest-asset-its-people-0.

• Kathryn Dunn Tenpas, *Crippling the Capacity of the National Security Council*, Brookings, Jan. 21, 2020, https://www.brookings.edu/blog/fixgov/2020/01/21/crippling-the-capacity-of-the-national-security-council/.

On September 18, 2019, Robert O'Brien took over as President Donald J. Trump's National Security Advisor.[1] In so doing, O'Brien became the fourth person to hold the position in President Trump's Administration, following Michael Flynn, H.R. McMaster, and John Bolton. Flynn's tenure was brief: his 24-day term in the role was the shortest in the history of the presidency.[2] Both Bolton and McMaster served as National Security Advisor for far longer, making significant marks on the National Security Council (NSC), as did O'Brien, who served as the National Security Advisor through the end of President Trump's time in the White House. The proper role and structure of the NSC is an open question, as evidenced by the vastly different philosophies of Flynn, McMaster, Bolton, and O'Brien. This essay will tell the story of the NSC under President Trump and explore the ways in which the Council's structure and operations differed under each National Security Advisor.

The National Security Act of 1947, in which Congress established the NSC, laid out Congress' vision of the Council as an advisory entity. In the Act, the NSC was created under Title I, "Coordination for National Security."[3] The Act provided that the Council's function was "to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security."[4] At the time of the law's enactment, the Council was to be composed only of the President, the Secretary of State, the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, and the Chairman of the National Security Resources Board.[5] The Act empowered the President to also designate other Cabinet Secretaries to the Council "from time to time," as well as the Chairman of the Munitions Board and the Chairman of the Research and Development Board.[6] It further provided that for any additional member to be designated, the President would have to obtain the advice and consent of the Senate.[7]

1 *See* Vivian Salama, *Trump Names Robert O'Brien as National Security Adviser*, Wall Street J., Sept. 18, 2019, https://www.wsj.com/articles/trump-names-robert-o-brien-as-national-security-adviser-11568813464.

2 *See* Derek Hawkins, *Flynn Sets Record with Only 24 Days as National Security Adviser. The Average Tenure is About 2.6 Years.*, Washington Post, Feb. 14, 2017, https://www.washingtonpost.com/news/morning-mix/wp/2017/02/14/flynn-sets-record-with-only-24-days-as-nsc-chief-the-average-tenure-is-about-2-6-years/.

3 National Security Act of 1947, Pub. L. No. 80-235, 61 Stat. 496 (1947).

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

Congress created the NSC in 1947 "as part of a general reorganization of the U.S. national security apparatus."[8] In so doing, the legislature sought to coordinate American foreign policy with the nation's defense operations.[9] Various presidents have oriented and reoriented the NSC. The Council grew in both size and importance under President Richard Nixon's National Security Advisor, Henry Kissinger. Evan Thomas opines that while Congress created the NSC in 1947, "it didn't really become the true engine of foreign policy making until the Nixon years."[10] Kissinger expanded the NSC from an advisory entity to one that possessed "'the power to review and either approve or reject the bureaucracy's ideas; and if the options were still bad,' [Kissinger] authorized the NSC staff to 'develop new ones for the president.'"[11] He also bolstered the number of NSC staff from 12 to 34.[12] Kissinger's moves established the NSC as a power center in the executive branch (one which, conveniently, revolved around him). But perhaps the most significant reforms occurred under General Brent Scowcroft, who was National Security Advisor under President George H.W. Bush. Scowcroft instituted a system that featured a Principals Committee, a Deputies Committee, and interagency policy committees. It is from this system that "[t]he current [NSC] policy process has generally evolved."[13] Today, the Principals Committee "is the most senior interagency body of the national security process. It's the last stop before taking a major national-security decision to the president."[14] Most memorably, however, was how Scowcroft viewed his role—as National Security Advisor, he endeavored to be an "honest broker."[15]

The office of National Security Advisor itself is an outgrowth of the Executive Secretary position for which Congress provided in the original legislation.[16] The National Security Advisor heads the NSC staff (which has grown greatly in size since the Kissinger days) and, with the President's approval, organizes the Council in the way that she or he sees fit.[17] The position is not subject to Senate confirmation, though some argue that it should be, given the manifold responsibilities that Congress (and the President, through executive order) has conferred upon the office.[18] There is no doubt that the National Security Advisor role has accumulated more and more power since its inception, tracking generally with the NSC's evolution "from a statutorily-mandated meeting of cabinet-level officials into a complex system of coordination, adjudication, and in some instances formulation . . . of policies among relevant departments and agencies."[19]

Today, the NSC continues to occupy a significant place in the American foreign policy bureaucracy, particularly because the State Department and the Pentagon have typically been at odds with one another since Congress created the latter department. In the context of Secretary of State George Shultz and Defense Secretary Caspar Weinberger's disputes under President Ronald Reagan, *Foreign Policy* described the infighting as State and the Pentagon's "usual bureaucratic battles."[20] Moreover, "[t]ensions" between President George W. Bush's Secretary of State Colin Powell and Secretary of Defense Donald Rumsfeld were "a persistent feature of Bush administration deliberations."[21] These disagreements may frustrate the decision-making process for presidents, which is when the efficiency of the NSC may present an appealing contrast to a President looking for policy options. Often, while Cabinet Secretaries are busy managing their respective departments, participating in various ceremonial duties, testifying before Congress, and disagreeing with one another, the National Security Advisor is a single person just down the hall from the Oval Office, with a staff of hundreds under him in the White House ready to serve the President at a moment's notice. By the mid-1990s, the D.C. Circuit agreed that "successive presidents [had] expanded the NSC's responsibilities . . . to secure their personal control over the fragmented national security apparatus."[22]

In recent years, prior to the start of the Trump Administration, two major developments have helped to shape the modern NSC. First was the creation of the Homeland Security Council (HSC) under President George W. Bush on October 8, 2001, less than

8 *See History of the National Security Council 1947-1997*, Office of the Historian, Bureau of Pub. Affairs, U.S. Dep't of State, (1997), *available at* https://fas.org/irp/offdocs/NSChistory.htm.

9 *See id.*

10 Evan Thomas, *'Running the World': In the War Room*, N.Y. Times, June 26, 2005, https://www.nytimes.com/2005/06/26/books/review/running-the-world-in-the-war-room.html.

11 Daniel Bessner, *The Making of the Military-Intellectual Complex*, New Republic (May 29, 2019), https://www.newrepublic.com/article/153997/making-military-intellectual-complex.

12 *National Security Council Institutional Files (H-Files)*, Richard Nixon Presidential Libr., https://www.nixonlibrary.gov/finding-aids/national-security-council-institutional-files-h-files (last visited Feb. 21, 2021).

13 Charles P. Ries, Improving Decisionmaking in a Turbulent World 13 (2016), *available at* https://www.rand.org/content/dam/rand/pubs/perspectives/PE100/PE192/RAND_PE192.pdf.

14 Kelly Magsamen, *What Trump's Reshuffling of the National Security Council Means*, Atlantic (Jan. 30, 2017), https://www.theatlantic.com/politics/archive/2017/01/the-trump-national-security-council-an-analysis/514910/.

15 *Celebrating the 'Impeccable Integrity and Unbounded Courage' of Brent Scowcroft*, Atlantic Council, Sept. 10, 2020, https://www.atlanticcouncil.org/blogs/new-atlanticist/celebrating-the-impeccable-integrity-and-unbounded-courage-of-brent-scowcroft/.

16 *See* Richard A. Best Jr., *The National Security Council: An Organizational Assessment,* Cong. Research Serv., 6, 29-30 (2011), *available at* https://fas.org/sgp/crs/natsec/RL30840.pdf.

17 *See id.* at Summary.

18 *See id.* at 30.

19 Press Release, Senator Ron Johnson, Background on the National Security Council and the President's Recent Moves (July 17, 2017).

20 John Gans & Maya Gandhi, *Trump's National Security Council Is Replicating Reagan's Chaos*, Foreign Pol'y, June 21, 2019, https://www.foreignpolicy.com/2019/06/21/bolton-nsc/.

21 Gerald F. Seib & Carla Anne Robbins, *Powell-Rumsfeld Feud Is Now Hard to Ignore*, Wall Street J., Apr. 25, 2003, https://www.wsj.com/articles/SB105122331147126500.

22 Armstrong v. Executive Office of the President, 90 F.3d 553, 561 (D.C. Cir. 1996).

a month after the September 11 terrorist attacks.[23] President Bush established the HSC through executive order.[24] In the Bush White House, the HSC took over domestic security issues, while the NSC focused solely on international issues.[25] President Barack Obama did away with this delineation, merging the HSC and the NSC into one "National Security Staff."[26] The second major development was a provision that Congress passed in 2016, capping NSC staff at 200.[27] The number had grown from 50 under President George H.W. Bush to 100 under President Bill Clinton to 200 under President George W. Bush.[28] President Obama's NSC ballooned to over 400 staffers, drawing criticism for drifting into operations (as opposed to focusing on policy development); taking a "more granular approach to the issues"; and holding a "seemingly endless number of interagency meetings."[29] The key issue was that the Obama NSC was seen as micromanaging the departments.[30] Upon then-candidate Trump's victory in the 2016 presidential election, the stage was set for reform.

An analysis of the NSC under Flynn, McMaster, Bolton, and O'Brien paints a picture of a key bureaucratic institution in the executive branch, whose power can be wielded and whose structure can be shaped in numerous ways.

I. Three Weeks with Michael Flynn

Shortly after the election, President Trump announced that he would hire Flynn as National Security Advisor.[31] The choice of Flynn for the role did not come as much of a surprise—a three-star general, Flynn had been a key and early backer of the President's upstart White House bid, "campaigned alongside him, and developed a close and trusted relationship with the candidate and his senior aides at a time when few serious Republicans would agree to advise him."[32] When President Trump assumed office, Flynn set about cutting NSC staff by about 50 percent.[33]

Aside from Flynn's ultimate ouster, perhaps the most significant development during his short tenure was the invitation of White House Chief Strategist Steve Bannon to the NSC's meetings and Bannon's designation as a "regular attendee" at Principals Committee meetings.[34] Based on contemporary reporting, it seems that the decision to invite Bannon to the NSC meetings was likely the President's, not Flynn's.[35] In fact, the rationale appears to have been ensuring that Flynn actually carried out the new Administration's NSC objectives.[36] Although Bannon had served for seven years in the Navy,[37] he was primarily a political advisor to President Trump, and the President's decision to have a political strategist at the meetings drew backlash.[38]

From an institutional standpoint, the chief non-personal criticism of bringing Bannon in to the NSC was that political operatives should not play a role in Council decision-making.[39] Compounding this concern about elevating political considerations over military expertise was the fact that in President Trump's January 2017 National Security Presidential Memorandum (NSPM) 2, which reorganized the NSC and formalized Bannon's participation, the Director of National Intelligence and the Chairman of the Joint Chiefs of Staff were downgraded from among the NSC's "regular members" to "attend[ing only] when issues pertaining to their responsibilities

23 *See Homeland Security Council*, White House Archives: President George W. Bush, https://georgewbush-whitehouse.archives.gov/hsc/ (last visited Feb. 21, 2021).

24 *See id.*

25 *See* Kathleen J. McInnis & John W. Rollins, *Trump Administration Changes to the National Security Council: Frequently Asked Questions*, CRS Insight (Jan. 30, 2017), https://fas.org/sgp/crs/natsec/IN10640.pdf.

26 *See id.*

27 *See* Gregory Hellman & Bryan Bender, *Trump Team Building a Wall Inside National Security Council*, Politico, Feb. 2, 2017, https://www.politico.com/story/2017/02/trump-national-security-234526.

28 *See* Karen DeYoung, *Rice Favors 'Mean but Lean' National Security Council*, Washington Post, Jan. 17, 2017, https://www.washingtonpost.com/world/national-security/rice-favors-mean-but-lean-national-security-council/2017/01/16/6244aa3c-dc49-11e6-ad42-f3375f271c9c_story.html.

29 Daniel M. Gerstein & Sarah M. Gerstein, *Presidential Policy Directive One: Forming the National Security Council*, Hill, Dec. 2, 2016, https://thehill.com/blogs/pundits-blog/the-administration/308440-presidential-policy-directive-1-forming-the-national.

30 *See id.*

31 *See* Bryan Bender, *Trump Names Mike Flynn National Security Adviser*, Politico, Nov. 18, 2016, https://www.politico.com/story/2016/11/michael-flynn-national-security-adviser-231591.

32 Eliana Johnson et al., *Flynn's White House Influence Is Outliving His Short Tenure*, Politico, May 9, 2017, https://www.politico.com/story/2017/05/09/michael-flynn-trump-white-house-238139.

33 *See* Josh Siegel, *After Michael Flynn's Departure, How Trump Can Stabilize National Security Council, Avoid Leaks*, Daily Signal, Feb. 16, 2017, https://www.dailysignal.com/2017/02/16/after-michael-flynns-departure-how-trump-can-stabilize-national-security-council-avoid-leaks/.

34 *See* White House: Office of the Press Sec'y, National Security Presidential Memorandum – 2 (January 28, 2017), *available at* https://fas.org/irp/offdocs/nspm/nspm-2.pdf; Jordan Brunner, *Does Steve Bannon's Role on the Principals Committee Require Senate Confirmation?*, Lawfare, Jan. 31, 2017, https://www.lawfareblog.com/does-steve-bannons-role-principals-committee-require-senate-confirmation.

35 *See* Nicholas Schmidle, *Michael Flynn, General Chaos*, New Yorker, Feb. 18, 2017, https://www.newyorker.com/magazine/2017/02/27/michael-flynn-general-chaos.

36 *See* Carol E. Lee & Eli Stokols, *Steve Bannon Removed from National Security Council with Trump's Signoff*, Wall Street J., Apr. 5, 2017, https://www.wsj.com/articles/steve-bannon-removed-from-security-councils-principals-committee-1491407076 ("'Steve was put there as a check on [Mike] Flynn,' [a senior administration] official said.").

37 Mark D. Faram, *Steve Bannon and the National Security Council: What We Can Learn from His Navy Career*, Navy Times, Feb. 1, 2017, https://www.navytimes.com/news/your-navy/2017/02/01/steve-bannon-and-the-national-security-council-what-we-can-learn-from-his-navy-career/.

38 *See, e.g.*, Michael G. Mullen, *I Was on the National Security Council. Bannon Doesn't Belong There.*, N.Y. Times, Feb. 6, 2017, https://www.nytimes.com/2017/02/06/opinion/i-was-on-the-national-security-council-bannon-doesnt-belong-there.html.

39 *See* Yochi Dreazen, *Steve Bannon Now Gets to Help Decide War and Peace*, Vox, Jan. 31, 2017, https://www.vox.com/policy-and-politics/2017/1/31/14447394/steve-bannon-nsc-trump-white-house-flynn-terrorism-iran-islam-yemen.

and expertise are to be discussed."[40] Professor I.M. Destler speculated that this could have either been a "demotion, or . . . a practical acknowledgement that, say, economic issues don't require official military or intelligence community input."[41]

Some commentators put these moves in starker terms. "[A] political operative with zero national security or foreign policy experience will now have the same status as the heads of the Pentagon and State Department—and will in some ways outrank the nation's top military officer and the head of the entire intelligence community," read a *Vox* piece about Bannon published shortly after the issuance of NSPM 2.[42] A *New York Times* op-ed by former Chairman of the Joint Chiefs of Staff Michael Mullen lamented that "institutionalizing [Bannon's] attendance threatens to politicize national security decision making."[43] David Axelrod, a White House Senior Advisor under President Obama, wrote in a piece for *CNN* that "President Trump has blazed new ground. Bannon will exercise authority no political adviser has had before."[44]

The Axelrod essay was itself a response to the Trump White House justifying Bannon's invitation by pointing to Axelrod's and former Press Secretary Robert Gibbs's own attendance at NSC meetings during their time in the Obama Administration.[45] Axelrod defended his and Gibbs's participation, noting that the two simply "sat on the sidelines as . . . *silent* observer[s]" at a *limited* number of meetings, as opposed to the Bannon arrangement.[46] Still, the Bannon move seemed like the logical next step after having political staffers Axelrod and Gibbs "observe" NSC meetings. And it was not without historical precedent.[47]

40 I.M. Destler, *How to Read Trump's National Security Council Reboot*, Politico, Jan. 29, 2017, https://www.politico.com/magazine/story/2017/01/how-to-read-trumps-national-security-council-reboot-214709. NSPM 2 did not last very long before the White House amended it to reinstate a member of the intelligence community as a regular meeting attendee. Instead of the Director of National Intelligence (DNI), however, President Trump designated the Director of the Central Intelligence Agency (CIA), Mike Pompeo, as said attendee. *See* Eric Geller, *Trump Adding CIA Chief back to National Security Council*, Politico, Jan. 30, 2017, https://www.politico.com/story/2017/01/trump-national-security-council-cia-234381. Such a move likely reflected the President's unique admiration of Pompeo, rather than any desire to choose between the CIA and the Office of the DNI as institutions; indeed, Director Pompeo soon earned a promotion to Secretary of State. *See* Gardiner Harris & Thomas Kaplan, *Senate Confirms C.I.A. Chief Mike Pompeo to Be Secretary of State*, N.Y. Times, Apr. 26, 2018, https://www.nytimes.com/2018/04/26/us/politics/mike-pompeo-secretary-of-state.html.

41 Destler, *supra* note 40.

42 Dreazen, *supra* note 39.

43 Mullen, *supra* note 38.

44 David Axelrod, *David Axelrod: I Woke up This Morning as an Alternative Fact*, CNN, Jan. 31, 2017, https://www.cnn.com/2017/01/30/opinions/david-axelrod-i-woke-up-this-morning-as-an-alternative-fact/index.html.

45 *See id.*

46 *Id.* (emphasis added).

47 *See* Russell Spivak & Jordan Brunner, *Is Steve Bannon's Role on the National Security Council Actually Unprecedented?*, Lawfare, Feb. 2, 2017, https://www.lawfareblog.com/steve-bannons-role-national-security-council-actually-unprecedented.

Even Mullen acknowledged being "perfectly aware that political concerns color the national security decisions that any president makes," ticking off various major national security moves of President Obama and opining that they "were all informed—if not dominated—by political calculations."[48] Ultimately, Mullen's issue appears not to have been with the political realities of presidential decision-making, but with *where* political considerations get discussed: "[T]hose [political] decisions were made outside the confines of the Situation Room, where the security council meets. . . . That's the way it should be."[49]

Is this argument particularly compelling? After all, the Situation Room is not a holy sanctuary; it is another office space in the White House in which executive branch officials work to assist the President in the execution of his or her duties as Commander in Chief. And having a political advisor in the room does not give that advisor plenary power; she or he can offer worthwhile perspective on policy options that the NSC is considering presenting to the President, who will undoubtedly have politics in mind when considering those options. Part of the National Security Advisor's role as an "honest broker" is to be a filter—certain policy prescriptions are just not politically feasible, and if an advisor like Axelrod or Bannon can flag that issue at the development stage, it saves the President time and sharpens the recommendations coming out of the NSC. Ideally, the political advisor would cover the National Security Advisor's blind spots, preparing her or him for potential differences of opinion in the Oval Office.

A legitimate issue may arise if the political advisor leverages NSC invitee status to build out a policy-driving apparatus, expanding his role past providing strategic counsel to running a shadow Council. Some in the media alleged that Bannon was attempting to do something like this, reporting that Bannon established a "Strategic Initiatives Group" within the NSC.[50] The White House, however, later indicated that Senior Advisor Jared Kushner's Office of American Innovation (a standalone White House component that was not cabined within the NSC or anywhere else) became the more significant "internal policy shop" after its March 2017 inception.[51] But whether Bannon's Strategic Initiatives Group actually existed, and whether it was actually as powerful as Bannon's detractors feared it was, the Chief Strategist's maneuvering caught the attention of Flynn. Although Flynn originally set out to cut NSC staff, "in a contest for power with Bannon, [he] soon seemed to realize that the traditional setup [of the NSC] could help him build influence in the White House."[52] As a result, Flynn's incentives became misaligned with the President's agenda; where the President wanted to streamline the NSC, it became in Flynn's interest to do the opposite. The White House had a principal-agent problem. Bannon's closeness to the President threatened Flynn's operation of his own White House component.

Two other notable moves from President Trump's initial organization of the NSC were the revival of the HSC and the exclusion of the Energy Secretary from meetings of the Principals Committee.[53] The reader will recall that President Obama had integrated the HSC back into the NSC, dissolving the domestic (HSC)/international (NSC) divide that President Bush had created when he established the HSC in the wake of 9/11.[54] To start his Administration, President Trump restored the pre-Obama division. And as for the President's removal of Secretary of Energy Rick Perry from Principals Committee meetings, Democratic congressmen Frank Pallone Jr. of New Jersey (then-Ranking Member of the House Energy and Commerce Committee) and Bobby Rush of Illinois (then-Ranking Member of the Committee's Energy Subcommittee) objected strongly to the move.[55] In February 2017, Congressmen Pallone and Rush penned a letter to President Trump "urging him to reconsider his decision."[56] The congressmen worried that without the Energy Secretary on the Principals Committee, energy security might not receive proper prioritization in the national security policymaking process.[57]

Flynn was forced to resign on February 13, 2017, less than a month into President Trump's White House tenure.[58] At the time, reporting indicated that Flynn's fatal mistake was misleading Vice President Mike Pence about the nature of his conversations with Russian Ambassador Sergey Kislyak.[59] President Trump later tweeted that Flynn's lies to the Federal Bureau of Investigation about conversations with Kislyak also contributed to his ouster.[60] With Flynn gone, the Trump Administration began to search for

48 Mullen, *supra* note 38.

49 *See id.*

50 *See* Julie Smith & Derek Chollet, *Bannon's 'Strategic Initiatives' Cabal Inside the NSC Is Dangerous Hypocrisy*, Foreign Pol'y, Feb. 1, 2017, https://foreignpolicy.com/2017/02/01/bannons-strategic-initiatives-cabal-inside-the-nsc-is-dangerous-hypocrisy/.

51 *See* Jonathan Easley, *WH: Internal Bannon Think Tank Never Actually Existed*, Hill, Apr. 4, 2017, https://thehill.com/homenews/administration/327296-wh-internal-bannon-think-tank-never-actually-existed; Presidential Memorandum on the White House Office of American Innovation, White House Archives: President Donald J. Trump (Mar. 27, 2017), https://trumpwhitehouse.archives.gov/presidential-actions/presidential-memorandum-white-house-office-american-innovation/.

52 *See* Schmidle, *supra* note 35.

53 *See* McInnis & Rollins, *supra* note 25. Although the Energy Secretary is included in the Council as a standing member, the President may remove the Secretary from the Principals Committee.

54 *See* Magsamen, *supra* note 14.

55 *See* Press Release, House Committee on Energy & Commerce, Pallone, Rush Urge Trump to Reappoint Secretary of Energy to the NSC Principals Committee (Feb. 21, 2017), *available at* https://energycommerce.house.gov/newsroom/press-releases/pallone-rush-urge-trump-to-reappoint-secretary-of-energy-to-the-nsc.

56 *Id.*

57 *See id.*

58 *See* Maggie Haberman et al., *Michael Flynn Resigns as National Security Adviser*, N.Y. Times, Feb. 13, 2017, https://www.nytimes.com/2017/02/13/us/politics/donald-trump-national-security-adviser-michael-flynn.html.

59 *See id.*

60 *See* Maggie Haberman et al., *Trump Says He Fired Michael Flynn 'Because He Lied' to F.B.I.*, N.Y. Times, Dec. 2, 2017, https://www.nytimes.com/2017/12/02/us/politics/trump-michael-flynn.html.

a replacement. In the meantime, retired lieutenant general Keith Kellogg briefly stepped in as Acting National Security Advisor.

II. H.R. McMaster Takes the Reins

One week later, the President selected decorated lieutenant general H.R. McMaster to replace Flynn as National Security Advisor.[61] From an ideological standpoint, McMaster seemed like an awkward choice. The *New York Times* reported that two of McMaster's chief boosters during the selection process were Chris Brose (the staff director of the Senate Armed Services Committee under Arizona Senator John McCain) and Arkansas Senator Tom Cotton.[62] Upon McMaster's hiring, Senator McCain (who represented once widely held Republican views on foreign policy[63]) jubilantly tweeted that McMaster was an "outstanding choice" for the position.[64] But on the campaign trail, candidate Trump had run *against* the Republican foreign policy consensus, rankling longtime national security leaders in the party apparatus.[65] Indeed, in March 2016, "dozens of Republican foreign policy experts" signed onto a letter denouncing then-candidate Trump.[66] Five months later, a group described as "[f]ifty of the nation's most senior Republican national security officials" signed another letter, criticizing him in harsher terms.[67]

President Trump's personal feud with the late Senator McCain was well-publicized, but they also had significant disagreements about foreign policy. On one side was a President who rode to a decisive victory in the 2016 South Carolina Republican primary, and ultimately the GOP nominating contest, after denouncing the Iraq war as a mistake.[68] On the other was a Senator who, just months after McMaster's appointment, would not-so-subtly criticize President Trump in a speech for "abandon[ing] the ideals we have advanced around the globe [and refusing] the obligations of international leadership for the sake of some half-baked, spurious nationalism cooked up by people who would rather find scapegoats than solve problems."[69] And although Senator Cotton had supported candidate Trump during the latter's campaign for President, *The Atlantic* published a piece in July 2016 that astutely pointed out significant areas of foreign policy disagreement between the two men (chief among them the role of the United States in the international community).[70] In Eisenhowerian fashion, President Trump was also a critic of the military industrial complex, even stating near the end of his presidency: "I'm not saying the military's in love with me. The soldiers are. The top people in the Pentagon probably aren't because they want to do nothing but fight wars so all of those wonderful companies that make the bombs and make the planes and make everything else stay happy."[71]

Nevertheless, McMaster was the pick. President Trump offered some insight into why he chose McMaster, noting, "He's a man of tremendous talent and tremendous experience. . . . He is highly respected by everyone in the military, and we're very honored to have him."[72] McMaster also had a reputation in the military as a "disruptor," endearing him to a President who had disrupted the traditional political system.[73] The decorated officer was reportedly not the President's first choice for the role; retired vice admiral and former Navy SEAL Robert S. Harward allegedly turned down the job when offered it first.[74]

McMaster quickly went to work at the NSC, making changes to the staffing arrangement. In his first two weeks, he "did away . . . with two deputy assistant spots" to remove an "extra layer" of staff on the Council.[75] One of those deputies, David Cattler, had been close to Flynn and served under him at the Defense Intelligence Agency during the Obama

61 *See* Peter Baker & Michael R. Gordon, *Trump Chooses H.R. McMaster as National Security Adviser*, N.Y. Times, Feb. 20, 2017, https://www.nytimes.com/2017/02/20/us/politics/mcmaster-national-security-adviser-trump.html.

62 *See id.*

63 *See* Michael Tracey, *Did John McCain Draw the Curtain on Neoconservatism?*, Spectator, Aug. 31, 2018, https://spectator.us/topic/john-mccain-draw-curtain-neoconservatism/.

64 John McCain (@SenJohnMcCain), Twitter (Feb. 20, 2017, 4:44 PM), https://twitter.com/SenJohnMcCain/status/833794401289793539.

65 *See, e.g.*, Dan Roberts, *Donald Trump Unveils 'America First' Foreign Policy Plan*, Guardian, Apr. 27, 2016, https://www.theguardian.com/us-news/2016/apr/27/donald-trump-foreign-policy-speech; Tim Hains, *Trump Mocks Bill Kristol: "This Poor Guy," "All He Wants to Do Is Go to War and Kill People"*, RealClearPolitics, May 25, 2016, https://www.realclearpolitics.com/video/2016/05/25/trump_mocks_bill_kristol_this_poor_guy_all_he_wants_to_do_is_go_to_war_and_kill_people.html.

66 *See* Michael Crowley, *GOP Hawks Declare War on Trump*, Politico, Mar. 3, 2016, https://www.politico.com/story/2016/03/trump-clinton-neoconservatives-220151.

67 *See* David E. Sanger & Maggie Haberman, *50 G.O.P. Officials Warn Donald Trump Would Put National Security 'at Risk'*, N.Y. Times, Aug. 8, 2016, https://www.nytimes.com/2016/08/09/us/politics/national-security-gop-donald-trump.html; *see also* Michael Crowley & Alex Isenstadt, *GOP Foreign Policy Elites Flock to Clinton*, Politico, July 6, 2016, https://www.politico.com/story/2016/07/national-security-clinton-trump-225137 ("Donald Trump is driving Republican foreign policy elites into the arms of Hillary Clinton, as several more Reagan and Bush administration veterans say they not only oppose Trump but will likely vote for Clinton this fall.").

68 *See* Zaid Jilani, *Neoconservatives Declare War on Donald Trump*, Intercept, Feb. 29, 2016, https://www.theintercept.com/2016/02/29/neoconservatives-declare-war-on-donald-trump/.

69 Scott Neuman, *In Speech, Sen. McCain Decries 'Half-Baked, Spurious Nationalism'*, NPR, Oct. 17, 2017, https://www.npr.org/sections/thetwo-way/2017/10/17/558247566/in-speech-sen-mccain-decries-half-baked-spurious-nationalism.

70 *See* Uri Friedman, *Why Would a Republican Hawk Support Donald Trump?*, Atlantic, July 3, 2016, https://www.theatlantic.com/international/archive/2016/07/tom-cotton-donald-trump/489890/.

71 Daily Caller (@DailyCaller), Twitter (Sept. 7, 2020, 2:16 PM), https://twitter.com/DailyCaller/status/1303034314997858308.

72 Baker & Gordon, *supra* note 61.

73 *See id.*

74 *See* Julie Hirschfeld Davis & Eric Schmitt, *Trump's Pick to Replace Flynn Turns Down the Job*, N.Y. Times, Feb. 16, 2017, https://www.nytimes.com/2017/02/16/us/politics/robert-harward-national-security-adviser.html.

75 Eliana Johnson et al., *McMaster Rolls Back Flynn's Changes at NSC*, Politico, Mar. 1, 2017, https://www.politico.com/story/2017/03/mcmaster-national-security-council-staff-changes-235579.

Administration.[76] At his first NSC meeting, McMaster eschewed use of the phrase "radical Islamic terrorism," opining that it was unhelpful.[77] Perhaps McMaster's most significant act related to the internal structure of the NSC was urging President Trump to issue a new directive that reorganized the Council. The new directive removed Steve Bannon from the organizing document; restored the Chairman of the Joint Chiefs of Staff, the Director of National Intelligence, and the Secretary of Energy[78] as regular attendees at the Principals Committee meetings; and elevated the United States Ambassador to the United Nations (at the time, the position was held by former South Carolina Governor Nikki Haley) to regular attendee status.[79] In addition, McMaster scored a victory in taking the HSC off of "equal footing" with his NSC, reintegrating the former Council into (and under) the latter as under President Obama.[80]

McMaster continued to remake the NSC as the months went on. He made former Bush Administration staffer and Goldman Sachs partner Dina Powell his Deputy National Security Advisor[81] and removed two Flynn loyalists—Derek Harvey and Rich Higgins.[82] Flynn deputy K.T. McFarland departed the NSC and was nominated to be U.S. Ambassador to Singapore (the nomination ultimately did not pan out).[83] McMaster was initially unsuccessful in attempting to get rid of Ezra Cohen-Watnick, a Trump loyalist on the NSC who was close with Bannon and Jared Kushner, pushing to the point that the President personally intervened against McMaster; eventually, however, McMaster managed to send Cohen-Watnick packing.[84] As Charlie Savage put it in the *New York Times*, McMaster was "moving to put a more traditionally professional stamp on the operations of the [NSC]."[85] Some context may be important to explain McMaster's consolidation of power. In the summer of 2017, as McMaster began to ramp up removals, President Trump replaced White House Chief of Staff Reince Priebus (former Chairman of the Republican National Committee) with John Kelly, a four-star general who had been serving as the Homeland Security Secretary.[86] Between Kelly, Secretary of Defense James Mattis (another four-star general[87]), and McMaster, military leaders were ascendant in the Trump Administration.

Some observers lauded Kelly, Mattis, and Secretary of State Rex Tillerson as the Administration's "Axis of Adults," including McMaster and CIA Director Mike Pompeo in the general sentiment.[88] These commentators "point[ed] to the men's influence in the Tomahawk strike in Syria—in contrast to President Trump's isolationist slogans on the campaign trail; the outreach to China, compared to the President's threats to launch a trade war; a possible escalation of the war in Afghanistan; and President Trump's hardening stance toward Russia."[89] Some opined that "[t]hrough near daily contact with" these foreign policy principals, the President's "world view appear[ed] to be morphing more closely to match hawkish conservatives of the Bush administration."[90] Media reports linked McMaster to President Trump's later decision to increase troops in Afghanistan, despite the President's initial instinct to withdraw U.S. forces

76 *See id.*

77 *See* Mark Landler & Eric Schmitt, *H.R. McMaster Breaks with Administration on Views of Islam*, N.Y. Times, Feb. 24, 2017, https://www.nytimes.com/2017/02/24/us/politics/hr-mcmaster-trump-islam.html.

78 The Secretary plays a critical role in the national security world, given the Department of Energy's responsibility "for the U.S. nuclear weapons arsenal as well as the security of the nation's energy grid infrastructure." Kyle Feldscher, *Energy Secretary Rick Perry Added to National Security Council*, Washington Examiner, Apr. 5, 2017, https://www.washingtonexaminer.com/energy-secretary-rick-perry-added-to-national-security-council. Indeed, the National Nuclear Security Administration is a bureau of the Department of Energy. *See National Nuclear Security Administration*, U.S. Dep't of Energy, https://www.energy.gov/nnsa/national-nuclear-security-administration (last visited Feb. 21, 2021).

79 *See* Bryan Bender, *Bannon's Departure Solidifies McMaster's Control over the NSC*, Politico, Apr. 5, 2017, https://www.politico.com/story/2017/04/bannon-mcmaster-national-security-council-236921; Mallory Shelbourne, *Perry, Haley Added to National Security Council Principals Committee*, Hill, Apr. 5, 2017, https://thehill.com/homenews/administration/327458-perry-haley-added-to-security-council-principals-committee.

80 *See* Robert Costa et al., *Bannon Removed from Security Council as McMaster Asserts Control*, Washington Post, Apr. 5, 2017, https://www.washingtonpost.com/politics/bannon-removed-from-security-council-as-mcmaster-asserts-control/2017/04/05/ffa8b5d2-1a3a-11e7-bcc2-7d1a0973e7b2_story.html.

81 *See* Tara Palmeri & Ben White, *Dina Powell to Be Named Trump's Deputy National Security Adviser*, Politico, Mar. 15, 2017, https://www.politico.com/story/2017/03/dina-powell-national-security-236110.

82 *See* Ken Dilanian, *McMaster Removes Flynn Pick Derek Harvey from National Security Council*, NBC News, July 27, 2017, https://www.nbcnews.com/politics/donald-trump/mcmaster-removes-flynn-pick-derek-harvey-national-security-council-n787146; Jana Winter & Elias Groll, *Here's the Memo That Blew up the NSC*, Foreign Pol'y, Aug. 10, 2017, https://foreignpolicy.com/2017/08/10/heres-the-memo-that-blew-up-the-nsc/.

83 *See* Adam Entous, *The Agonizingly Slow Downfall of K.T. McFarland*, New Yorker, Jan. 29, 2018, https://www.newyorker.com/news/news-desk/the-agonizingly-slow-downfall-of-k-t-mcfarland.

84 *See* Zack Beauchamp, *Trump's Allies in the National Security Council Are Being Taken Out*, Vox, Aug. 2, 2017, https://www.vox.com/world/2017/8/2/16087434/ezra-cohen-watnick-fired.

85 Charlie Savage, *K.T. McFarland, Deputy National Security Adviser, Is Expected to Leave Post*, N.Y. Times, Apr. 9, 2017, https://www.nytimes.com/2017/04/09/us/politics/mcfarland-deputy-national-security-adviser-expected-to-leave-post.html.

86 *See* Tara Palmeri et al., *Priebus out as Chief of Staff, Gen. John Kelly to Replace Him*, Politico, July 28, 2017, https://www.politico.com/story/2017/07/28/trump-names-gen-john-kelly-as-chief-of-staff-priebus-out-241105.

87 *See* Connor O'Brien, *Mattis Confirmed as Defense Secretary*, Politico, Jan. 20, 2017, https://www.politico.com/story/2017/01/mattis-confirmed-as-defense-secretary-233940.

88 *See* Kimberly Dozier, *New Power Center in Trumpland: The 'Axis of Adults'*, Daily Beast, May 5, 2017, https://www.thedailybeast.com/new-power-center-in-trumpland-the-axis-of-adults.

89 *Id.*

90 *Id.*

from the Middle Eastern nation.[91] Trump-skeptical Republican foreign policy operatives, who had not originally been willing to work for the President, began to "put[] names into the ring to work in one of the 'safe zones' with Mattis, Tillerson or Kelly[.]"[92]

Against the backdrop of these developments, McMaster began to draw the ire of Trump supporters. By August 2017, as a punchy *Washington Times* lede put it, President Trump was "defending . . . McMaster amid a steady drumbeat from conservatives . . . calling on the president to fire him for alleged disloyalty."[93] The story cited McMaster's "purge of Trump loyalists from the [NSC], a heated debate about sending more U.S. troops to Afghanistan[,] and a report that he allowed former Obama administration aide Susan E. Rice to keep her security clearance."[94] The Rice move particularly offended conservatives, given reports that she had "unmasked the identities of Trump transition aides in conversations with Russian officials."[95] *Breitbart*, a Trump-friendly media outlet (formerly run by Bannon) that had originally covered McMaster's hiring in a favorable manner, turned on McMaster after the Afghanistan decision, labeling him a "globalist" (a term of derision in the pro-Trump "America First" foreign policy space).[96] Conferring the moniker on McMaster "was part of a months-long war that Breitbart [had] been waging against Trump's top foreign policy adviser, publishing article after article attacking McMaster as soft on jihadism, hostile to Israel, and disloyal to the president."[97]

Daniel Horowitz of the website *Conservative Review* penned an op-ed on August 9, 2017 entitled "Trump's defense of HR McMaster is indefensible." Horowitz painted the Cohen-Watnick/Harvey/Higgins removals as proof that McMaster "fired all of the pro-Israel staff from the NSC"; criticized McMaster's hiring of Linda Weissgold, who had authored the "Benghazi talking points" that rebutted the popular Republican narrative on the issue; called out other personnel decisions that "brought in Obama's people" and "protected staffers who reported directly to [Obama foreign policy advisor] Ben Rhodes"; and highlighted policy disagreements between McMaster and the President's campaign rhetoric.[98] McMaster survived the criticism and continued in his role. Powell left the White House in late 2017.[99] For his part, McMaster would later go on to say that the "deep state" narrative about the NSC staff was "damaging."[100]

McMaster's most significant bureaucratic accomplishment as National Security Advisor was probably the production of the Trump Administration's "National Security Strategy" (NSS) document. The 68-page report, released in December 2017,[101] charted a roadmap for foreign policy in the Trump Administration.[102] The importance of having an NSS cannot be overstated. A centralized document from the White House detailing the President's national security policy provides key direction to the various executive branch agencies pursuing objectives in the national security space. As an example, Secretary Ryan Zinke of the U.S. Department of the Interior cited the NSS in framing the Department's report about the dangers of American reliance on countries like China for "critical minerals" used in manufacturing key American goods.[103]

Unfortunately for McMaster, his relationships with key officials like Kelly and Mattis deteriorated as 2017 turned to 2018.[104] As Mark Perry reported in *Foreign Policy*, the issue was "not McMaster's discipline or competence, but his temperament and relative lack of experience."[105] Perry's article explained that McMaster's management style lent itself more to a military operation than it did to the Beltway.[106] As one senior Defense Department official put it, "It may have helped if he'd had a D.C. tour in the Pentagon or NSC or somewhere."[107] One writer made the point that "in Washington, patience, nuance, a certain political deftness and a studied deference to senior civilian officials

91 *See* David Choi, *H.R. McMaster Showed Trump a Black-and-White, 1972 Image of Afghan Women Walking in Miniskirts to Convince Him of a Plan for Afghanistan*, Bus. Insider, Aug. 22, 2017, https://www.businessinsider.com/trump-afghanistan-plan-mcmaster-photo-1972-women-2017-8.

92 Dozier, *supra* note 87.

93 Dave Boyer, *Trump, McMaster Meet amid Purge of National Security Staffers, Susan Rice Revelation*, Washington Times, Aug. 3, 2017, https://www.washingtontimes.com/news/2017/aug/3/trump-mcmaster-meet-amid-purge-security-staffers/.

94 *Id.*

95 *Id.*

96 *See* Zack Beauchamp, *Breitbart's War on Trump's Top National Security Aide*, Vox, Aug. 23, 2017, https://www.vox.com/world/2017/8/23/16180032/breitbart-mcmaster-bannon-war.

97 *Id.*

98 Daniel Horowitz, *Trump's Defense of HR McMaster Is Indefensible*, Conservative Rev., Aug. 9, 2017, https://www.conservativereview.com/news/trumps-defense-of-hr-mcmaster-is-indefensible/.

99 *See* Jordan Fabian & Max Greenwood, *Dina Powell Leaving Trump White House*, Hill, Dec. 8, 2017, https://thehill.com/homenews/administration/363970-wapo-dina-powell-leaving-white-house.

100 Daniel Chaitin, *McMaster Says 'Deep State Narrative' 'Very Damaging' and Calls for 9/11-Style Commission to Examine Pandemic Response*, Washington Examiner, Apr. 24, 2020, https://www.washingtonexaminer.com/news/mcmaster-says-deep-state-narrative-very-damaging-and-calls-for-9-11-style-commission-to-examine-pandemic-response.

101 *See* Aaron Mehta, *Trump's National Security Strategy Unveiled, with Focus on Economics*, Defense News, Dec. 18, 2017, https://www.defensenews.com/breaking-news/2017/12/18/trumps-national-security-strategy-unveiled-with-focus-on-economics/.

102 White House, National Security Strategy of the United States of America (2017), *available at* https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf.

103 *See* Matthew Daly, *Zinke: US Reliance on Foreign Minerals a Security Risk*, Denver Post, Dec. 20, 2017, https://www.denverpost.com/2017/12/20/interior-dept-says-us-relies-china-for-critical-minerals/.

104 *See* Mark Perry, *McMaster's Problem Isn't Trump. It's Mattis and Kelly.*, Foreign Pol'y, Mar. 7, 2018, https://foreignpolicy.com/2018/03/07/mcmasters-problem-isnt-trump-its-mattis-and-kelly/.

105 *Id.*

106 *See id.*

107 *Id.*

is prized."[108] It appears McMaster lost the confidence of Kelly and Mattis when McMaster's relationship with the President went south.[109] Multiple outlets reported on the President's issues with McMaster, chief among them his briefing style and "rigid . . . thinking."[110] Of note, a *New York Times* article written in February 2017 about McMaster's hiring raised the point that "for all his war-making experience, [he] has little background in navigating Washington politics, which could be a challenge for him in his new role with a fractious national security team to corral."[111] The observation proved prescient.

The National Security Advisor is not just an advisor—she or he is also a bureaucratic leader in charge of a complex governmental entity. Consider that even with an experienced D.C. hand (Dina Powell, a former Bush official) as his deputy, McMaster struggled to negotiate the bureaucratic hurdles that came with the job. Further, four-star generals Kelly and Mattis reportedly saw McMaster (a three-star general) as beneath them and treated him as such.[112] Given the need for the National Security Advisor to manage an interagency policy process that includes the Defense Department, Defense Secretary Mattis' dim view of McMaster likely frustrated the latter's ability to carry out his duties. Ultimately, the President fired McMaster on March 22, 2018.[113]

III. Bolton Assumes Command

The day after President Trump announced the end of McMaster's tenure as National Security Advisor, the President chose John Bolton to occupy the role next.[114] Bolton was not a three-star general like Flynn or McMaster; rather, he was a Yale-educated attorney who had worked in a law firm, served in various Republican administrations, and spent time in the D.C. think tank world as an influential commentator on international affairs and national security issues.[115] Many government observers knew Bolton best from his failed nomination to be the United States Ambassador to the United Nations under President George W. Bush; President Bush gave Bolton an interim appointment, "which lasted until Democrats took control of Congress in the 2006 elections."[116] In a sense, Bolton was the anti-McMaster; he was "known among both admirers and critics for his masterful grasp of how to manipulate the bureaucracy and the policymaking process."[117] Some worried that Bolton would use this "masterful grasp" and weaponize the institution of the NSC to push his own views on the President, as opposed to emulating the "honest broker" ideal attributed to Brent Scowcroft.[118]

As with McMaster's initial consolidation of influence, the hiring of John Bolton did not occur in a vacuum. A week prior, President Trump had replaced Secretary of State Tillerson with CIA Director Pompeo.[119] Both Pompeo (a former congressman) and Bolton were politically savvier than were Tillerson (an oil executive with no substantive political experience prior to joining the Trump Administration[120]) and McMaster. At the time, the question of how Pompeo and Bolton would interact was one of great interest in the media.[121] From an institutional standpoint, the relationship mattered in the context of the NSC having "steadily increased its role in foreign policy decision-making at the expense of the State Department" over the years.[122]

The specter of a "bureaucratic turf war" between Bolton's NSC and Pompeo's State Department prompted one writer with the Brookings Institution to recommend a new conception of the two entities, concluding that calls to shrink the NSC and return it to its old mandate "reflect a desire to return the NSC to a halcyon past that probably never existed and certainly can't be recreated."[123] The author noted that State's "preeminence in diplomacy" had eroded over the years and suggested that the Department instead "concentrate its limited resources on the four functions where it has a competitive advantage to exercise greater influence in the interagency decision-making process and demonstrate value to the president": area expertise, authority to negotiate on behalf of the President, influencing of foreign audiences, and consular services.[124]

Bolton, whom the President had considered for the job as far back as the Flynn resignation,[125] immediately became

108 *Id.*

109 *See id.*

110 David Choi, *H.R. McMaster Is Reportedly Becoming Increasingly Frustrated, and It's Fueled Speculation He Could Be on His Way Out*, Bus. Insider, Mar. 1, 2018, https://www.businessinsider.com/hr-mcmaster-threatened-to-quit-white-house-trump-2018-3.

111 Baker & Gordon, *supra* note 61.

112 *See* Perry, *supra* note 104.

113 *See* Eliana Johnson, *McMaster Firing Upends Plan to Oust Other Top Trump Officials*, Politico, Mar. 23, 2018, https://www.politico.com/story/2018/03/22/mcmaster-firing-trump-officials-cabinet-482165.

114 *See* Mark Landler & Maggie Haberman, *Trump Chooses Bolton for 3rd Security Adviser as Shake-Up Continues*, N.Y. Times, Mar. 22, 2018, https://www.nytimes.com/2018/03/22/us/politics/hr-mcmaster-trump-bolton.html.

115 *See* Karen DeYoung, *John Bolton, Famously Abrasive, Is an Experienced Operator in the 'Swamp'*, Washington Post, Mar. 23, 2018, https://www.washingtonpost.com/world/national-security/john-bolton-famously-abrasive-is-an-experienced-operator-in-the-swamp/2018/03/23/b9b72000-2eab-11e8-8ad6-fbc50284fce8_story.html.

116 *Id.*

117 *Id.*

118 *See* Philip Elliott, *Donald Trump Just Hired John Bolton. Here's Why That Makes Some Nervous*, Time, Mar. 23, 2018, https://time.com/5212129/john-bolton-hr-mcmaster-donald-trump/.

119 *See* Landler & Haberman, *supra* note 114.

120 *See* Gardiner Harris, *Rex Tillerson Is Confirmed as Secretary of State amid Record Opposition*, N.Y Times, Feb. 1, 2017, https://www.nytimes.com/2017/02/01/us/politics/rex-tillerson-secretary-of-state-confirmed.html.

121 *See, e.g.*, Thomas M. Hill, *Can Pompeo and Bolton Coexist?*, Brookings (June 7, 2018), https://www.brookings.edu/blog/fixgov/2018/06/07/can-pompeo-and-bolton-coexist/.

122 *Id.*

123 *Id.*

124 *See id.*

125 *See* Spencer Ackerman, *Trump Appoints HR McMaster as National Security Adviser*, Guardian, Feb. 20, 2017, https://www.theguardian.

a power center in the West Wing. Even "[b]efore joining the administration, [Bolton] met regularly with the President in the Oval Office to discuss foreign policy."[126] When Bolton became the National Security Advisor, the President "made it clear that Bolton report[ed] directly to him, not chief of staff John Kelly."[127] Like McMaster, Bolton began to carry out ambitious personnel changes as soon as he took office. Further marginalizing the HSC, Bolton pushed out Homeland Security Advisor Tom Bossert. Nadia Schadlow, a senior NSC official who had written the National Security Strategy, left the White House, as did Ricky Waddell (who had replaced Powell as Deputy National Security Advisor) and top NSC communications official Michael Anton.[128] In their place, Bolton hired his own people, including Sarah Tinsley and Garrett Marquis (both of whom had worked with Bolton in the past).[129] He brought in Mira Ricardel to be Deputy National Security Advisor, "a shot across the bow at Mattis," with whom Ricardel had clashed on Pentagon appointments during the first months of the Trump Administration.[130] Ricardel would be let go just a few months later when First Lady Melania Trump "issued an extraordinary call for her ouster" (allegedly after a clash between Ricardel and the First Lady's staff regarding an official trip to Africa).[131] In addition, the *New York Times* reported in May 2018 that prior to formally joining the White House staff, a "shadow" NSC of candidates under consideration for Council jobs, including eventual Bolton Deputy National Security Advisor Charles Kupperman, was advising Bolton on NSC issues.[132]

In standing in the White House and in management style, Bolton differed substantially from McMaster. Bolton "pared back the number of people accustomed to playing a bigger role in important national security debates and . . . convened fewer [Principals Committee] meetings than [did] his predecessor[.]"[133] In addition to private huddles with his smaller group of more politically oriented advisors, he started to confer regularly alone with Secretaries Pompeo and Mattis over breakfast or lunch, and he participated in "frequent one-on-one" meetings with President Trump.[134] In this way, Bolton established the NSC as an entity on par with State and Defense, as opposed to simply a paper-pushing component. Bolton was not only more of an equal to Pompeo and Mattis than McMaster had been to Tillerson and Mattis, but he was also the leader of an NSC more interested in achieving specific policy outcomes. The focus on "shorter meetings and a smaller group of decision makers" was said to better suit President Trump,[135] and it also made sense in response to the Obama-era criticism of the NSC as a micromanager. Given the NSC's proximity to the President, the Council can be an effective driver of executive orders and other national security documents that require the President's stamp of approval.

The NSC has gotten itself into trouble with Cabinet heads when its officials have attempted to micromanage the departments. Chuck Hagel, who was Defense Secretary under President Obama, famously said that "[t]here were always too many meetings, too many people in the room, too many people talking. Especially young, smart 35-year-old PhDs who love to talk, because that's the way you let everybody know how smart you are, is how much you talk."[136] Upon leaving the NSC, Steve Bannon said, "Susan Rice operationalized the NSC during the last administration. I was put on to ensure that it was de-operationalized."[137] Did Bolton re-operationalize the Council? Yes, but that arguably misses the point.

At bottom, the issue of operationalization was an issue of lanes. Bolton's NSC was *operational* in a sense, but instead of micromanaging, it "animated" the President's America First approach, adding policy meat to the bones of the President's philosophical worldview.[138] In some instances, to be sure, Bolton appeared to pursue his own policy goals. One of those was U.S. departure from the International Criminal Court (ICC).[139] This

com/us-news/2017/feb/20/trump-appoints-hr-mcmaster-national-security-adviser.

126 Kaitlan Collins, *Bolton Adds Two Loyalists to the National Security Council*, CNN, May 29, 2018, https://www.cnn.com/2018/05/29/politics/john-bolton-hires-new-communication/index.html.

127 *Id.*

128 *See* Jonathan Swan, *Scoop: Ricky Waddell Is Leaving the White House*, Axios, Apr. 12, 2018, https://www.axios.com/deputy-national-security-adviser-ricky-waddell-white-house-898300a5-3ba2-4aef-a029-018dd0c89d43.html. Anton, some will recall, authored the *Flight 93 Election* essay during the 2016 presidential campaign under a pseudonym. *See* Daniel W. Drezner, *The Flight from the 'Flight 93 Election'*, Washington Post, Apr. 10, 2018, https://www.washingtonpost.com/news/posteverything/wp/2018/04/10/the-flight-from-the-flight-93-election/.

129 *See* Collins, *supra* note 126.

130 *See* Aaron Mehta, *After First Lady Slam, Mattis Foe Ricardel Appears on Thin Ice*, Defense News, Nov. 13, 2018, https://www.defensenews.com/news/pentagon-congress/2018/11/14/after-first-lady-slam-mattis-foe-ricardel-appears-on-thin-ice/.

131 *See* Andrew Restuccia & Caitlin Oprysko, *White House Dumps Senior Official After Clash with Melania Trump*, Politico, Nov. 14, 2018, https://www.politico.com/story/2018/11/14/mira-ricardel-still-employed-melania-990744.

132 *See* Kenneth P. Vogel, *Meet the Members of the 'Shadow N.S.C.' Advising John Bolton*, N.Y. Times, May 21, 2018, https://www.nytimes.com/2018/05/21/us/politics/advising-bolton-a-shadow-nsc-of-cronies.html.

133 Dion Nissenbaum, *John Bolton Energizes Trump's Agenda—and His Own*, Wall Street J., Nov. 18, 2018, https://www.wsj.com/articles/john-bolton-energizes-trumps-agendaand-his-own-1542546003.

134 *Id.* Contemporary reporting suggests that a reason for the shift to small, informal get-togethers may have been to clamp down on leaks. *See* Nahal Toosi et al., *Cabinet Chiefs Feel Shut out of Bolton's 'Efficient' Policy Process*, Politico, July 25, 2018, https://www.politico.com/story/2018/07/25/bolton-cabinet-meetings-mattis-pompeo-trump-740429.

135 *See* Nissenbaum, *supra* note 133.

136 Rudy Takala, *WATCH: 3 Former Defense Secretaries Slam White House 'Micromanagement'*, Washington Examiner, Apr. 7, 2016, https://www.washingtonexaminer.com/watch-3-former-defense-secretaries-slam-white-house-micromanagement.

137 Dave Boyer, *Steve Bannon Says Role Was to 'De-Operationalize' NSC After Rice's Tenure*, Washington Times, Apr. 5, 2017, https://www.washingtontimes.com/news/2017/apr/5/steve-bannon-says-role-was-de-operationalize-nsc-a/.

138 *See* Nissenbaum, *supra* note 133.

139 *See id.*

may seem to be a problem—after all, as a White House staffer, the National Security Advisor should be singularly focused on furthering the President's priorities. But in reality, to recruit top talent like Bolton, presidents likely need to promise potential high-quality hires a bit of room to pursue some pet policy projects of their own independent interest. Importantly, the ICC move did not *contradict* any aspect of Trump's goals in foreign affairs (in fact, they were generally consistent with his skepticism of international institutions), so they did not present a serious issue. On the other hand, some of Bolton's freelancing on signature policy issues (like opposing the President's promise to withdraw U.S. troops from Syria) reportedly led the President to feel that Bolton had "pursued an independent foreign policy[.]"[140] And in spite of Bolton's frequent huddles with Secretaries Mattis and Pompeo, some charged that his informal process did not adequately engage the agencies. Prior to his own resignation, Secretary Mattis (who "clashed frequently with Bolton") complained about the "paucity" of NSC meetings under Bolton's leadership.[141]

Perhaps most notably, Bolton was intimately involved in the President's diplomatic moonshot with North Korea. Bolton took the National Security Advisor job just weeks after President Trump accepted an invitation to meet with North Korean leader Kim Jong-Un, with the objective of denuclearizing North Korea.[142] The news of the accepted invitation came as a surprise after the President and Kim had traded threats and insults for months.[143] Secretary Pompeo took the lead on the North Korean negotiations; in contrast, Bolton had "publicly questioned" the diplomacy efforts prior to joining the Administration.[144] But Bolton continued to play a role. He mused that the United States was considering the "Libya model" for North Korean denuclearization, which seemed to make little sense as a note of encouragement for the North Koreans, given that just a few years after Libyan leader Muammar Gaddafi shelved his nuclear program in exchange for sanctions relief in the early 2000s, rebels backed by Washington overthrew and killed him.[145] Kim, unsurprisingly, was disinclined to the idea of suffering a similar fate. The President participated in a summit with Kim in Singapore on June 12, 2018, during which Kim pledged a "firm and unwavering commitment to complete denuclearization of the Korean Peninsula."[146] But North Korea made no actual progress on denuclearization, and Bolton gave multiple public statements in the following months denouncing North Korea's failure to live up to its word.[147] He did so as Secretary Pompeo took a more patient approach.[148] The President and Kim held a second summit in February 2019, which ended with no nuclear agreement.[149]

Relations between the U.S. and North Korea took a turn for the worse when, in May 2019, North Korea tested ballistic missiles after a freeze that had begun in late 2017 (the beginning of the President's diplomacy efforts).[150] The President "downplayed" the tests in a tweet, but Bolton lashed out, telling reporters that the tests violated U.N. resolutions.[151] North Korea attacked Bolton, calling him a "structurally flawed" man and a "defective human product" who was "an adviser for security destruction who destroys peace and security."[152] And then, a shift: during a June 2019 trip to Asia, President Trump tweeted an invitation to meet Kim in the Demilitarized Zone (DMZ) between North and South Korea, and Kim accepted.[153] The next day, the President traveled to the DMZ and shook hands with Kim.[154] In an unprecedented moment, the President asked if he could step over the border line into North Korea.[155] Kim consented, and President Trump walked

140 Karen DeYoung et al., *John Bolton Puts His Singular Stamp on Trump's National Security Council*, Washington Post, Mar. 4, 2019, https://www.washingtonpost.com/world/national-security/john-bolton-single-minded-advocate-puts-his-stamp-on-the-national-security-council/2019/03/04/5c59517e-3609-11e9-854a-7a14d7fec96a_story.html; Karen DeYoung & Karoun Demirjian, *Contradicting Trump, Bolton Says No Withdrawal from Syria Until ISIS Destroyed, Kurds' Safety Guaranteed*, Washington Post, Jan. 6, 2019, https://www.washingtonpost.com/world/national-security/bolton-promises-no-troop-withdrawal-from-syria-until-isis-contained-kurds-safety-guaranteed/2019/01/06/ee219bba-11c5-11e9-b6ad-9cfd62dbb0a8_story.html.

141 *See id.*

142 *See* Ali Vitali, *President Trump Agrees to Meet with North Korea's Kim Jong Un*, NBC News, Mar. 9, 2018, https://www.nbcnews.com/politics/white-house/south-koreans-deliver-letter-trump-kim-jong-un-n855051.

143 *See id.*

144 *See* Nissenbaum, *supra* note 133.

145 *See* Joshua Berlinger, *Bolton Says US Considering Libya Model for North Korean Denuclearization*, CNN, Apr. 30, 2018, https://www.cnn.com/2018/04/30/asia/north-korea-bolton-libya-intl/index.html.

146 Joint Statement of President Donald J. Trump of the United States of America and Chairman Kim Jong Un of the Democratic People's Republic of Korea at the Singapore Summit, White House Archives: President Donald J. Trump, June 12, 2018, https://trumpwhitehouse.archives.gov/briefings-statements/joint-statement-president-donald-j-trump-united-states-america-chairman-kim-jong-un-democratic-peoples-republic-korea-singapore-summit/.

147 *See* Eli Watkins, *Bolton: US Still 'Waiting' for North Korea to Start Denuclearizing*, CNN, Aug. 7, 2018, https://www.cnn.com/2018/08/07/politics/john-bolton-north-korea/index.html; Donna Borak & Zachary Cohen, *John Bolton Says North Korea Failure to Meet Commitments Requires Second Trump-Kim Summit*, CNN, Dec. 4, 2018, https://www.cnn.com/2018/12/04/politics/bolton-north-korea-summit-commitments/index.html.

148 *See* Watkins, *supra* note 147.

149 *See* Matthew S. Schwartz, *Trump and Kim's Second Nuclear Summit Ends with No Deal*, NPR, Feb. 28, 2019, https://www.npr.org/2019/02/28/698848039/second-nuclear-summit-ends-with-no-deal.

150 *See* Kim Tong-Hyung, *North Korea Calls John Bolton 'War Monger' and 'Defective Human Product' over Missile Comment*, USA Today, May 27, 2019, https://www.usatoday.com/story/news/world/2019/05/27/north-korea-calls-bolton-war-monger-over-missile-comment/1249183001/.

151 *See id.*

152 *Id.*

153 *See* Kevin Liptak & Allie Malloy, *Trump Tweets Kim Jong Un an Invitation to 'Shake His Hand' at DMZ*, CNN, June 29, 2019, https://www.cnn.com/2019/06/28/politics/donald-trump-kim-jong-un-dmz/index.html.

154 *See* Kevin Liptak, *Trump Takes 20 Steps into North Korea, Making History as First Sitting US Leader to Enter Hermit Nation*, CNN, June 30, 2019, https://www.cnn.com/2019/06/29/politics/kim-jong-un-donald-trump-dmz-north-korea/index.html.

155 *See id.*

into North Korea, becoming the first sitting U.S. President to set foot in the country.[156] Bolton, in Mongolia "consult[ing] with officials on regional security issues," was not with the President.[157]

One can look at Bolton's participation in the North Korea talks in either of two ways. The conventional view is that the pugilistic Bolton had a view of the diplomacy efforts that was contrary to that of the President, and that Bolton's engagement on North Korea purposely frustrated the process. Indeed, Bolton had written a February 2018 op-ed in the *Wall Street Journal* (just a month before his hiring) entitled "The Legal Case for Striking North Korea First."[158] And given Secretary Pompeo's approach to North Korea's denuclearization timeline, a *CNN* article reasonably questioned whether Bolton's public comments revealed "a possible split within the administration over how to handle Pyongyang."[159]

There is another way to understand Bolton's impact, however. The President knew well what Bolton's views on North Korea were when he hired Bolton to be the National Security Advisor, and given the President's clear belief in the importance of establishing a personal relationship with Kim, Bolton in effect ended up being the "bad cop" to the President and Secretary Pompeo's "good cop." With Bolton taking all of the heat from North Korea, the President himself was able to maintain a positive relationship with Kim, as evidenced by the meet-up at the DMZ. Further, Bolton's proximity to the President may have led the North Koreans to believe that if they pushed the envelope too far, the views of the man who believed in the merits of a pre-emptive strike against North Korea might have their day in the Oval Office. Perhaps, then, Bolton's public, anti-North Korea posturing was a chess piece in President Trump's larger diplomatic gambit. We cannot know for sure.

Ultimately, the former (and more obvious) interpretation is probably the right one; after leaving the Administration, Bolton criticized the President's efforts on North Korea.[160] But from the standpoint of learning lessons from the operations of the NSC and its leaders under President Trump, a key observation emerges. The NSC and the National Security Advisor are institutions, to be sure, but they are also actors in the political process. A President can use the NSC and its leader as diplomatic tools, keeping adversaries guessing about the White House's position on a certain matter when the State Department or other entities appear to have a different public stance.

One final note about Bolton's tenure at the NSC: After U.S. Ambassador to the United Nations Nikki Haley announced she would be departing the Trump Administration, Bolton joined with Kelly (the White House Chief of Staff) and Secretary Pompeo to push for the U.N. Ambassador position to be demoted to sub-Cabinet rank.[161] In recent history, the question of Cabinet rank for the U.N. Ambassador has taken on a partisan valence; Republican "Presidents Bush 41 and 43 both demoted their UN ambassadors from Cabinet-level status, while [Democratic] Presidents Clinton and Obama elevated the role upon taking office."[162] Bolton, Kelly, and Secretary Pompeo got their wish when the President selected U.S. Ambassador to Canada Kelly Craft for the U.N. position.[163] For Bolton and Pompeo, the move was framed as eliminating "a potential challenge to their foreign policy leadership in White House situation room meetings[.]"[164] And Bolton himself had noted his disapproval of the U.N. Ambassador having Cabinet rank during comments as far back as 2008: "One, it overstates the role and importance the U.N. should have in U.S. foreign policy. Second, you shouldn't have two secretaries in the same department."[165]

By September of 2019, Bolton had worn out his welcome in the White House.[166] At odds with the President on numerous issues, Bolton and the President's "differences came to a climax . . . as [Bolton reportedly] waged a last-minute campaign to stop the president from signing a peace agreement at Camp David with leaders of the radical Taliban group."[167] The President's account of the end of Bolton's tenure differed from Bolton's story; the President said he fired Bolton, while Bolton insisted he resigned.[168] The *New York Times* story on Bolton's departure noted that Secretary Pompeo had "feuded with [Bolton] for months" and that Vice President Pence was also upset with Bolton over reports linking the VP to opposition to the Taliban deal.[169] The same story also ticked off numerous areas of policy disagreement between the President and Bolton, from North Korea to Iran to Russia, and it alleged that the President felt "bogged down" by another project that was partially Bolton's brainchild: the "failed effort to push out President Nicolás Maduro of Venezuela[.]"[170]

156 *See id.*

157 *See* Eric Lutz, *John Bolton Left in Mongolia While Trump Schmoozed in North Korea*, Vanity Fair, July 1, 2019, https://www.vanityfair.com/news/2019/07/john-bolton-mongolia-trump-tucker-carlson-schmoozed-in-north-korea.

158 *See* John Bolton, *The Legal Case for Striking North Korea First*, Wall Street J., Feb. 28, 2018, https://www.wsj.com/articles/the-legal-case-for-striking-north-korea-first-1519862374.

159 Watkins, *supra* note 147.

160 *See* Vivian Salama & Nancy A. Youssef, *Bolton Criticizes Trump over Moves on North Korea*, Wall Street J., Dec. 23, 2019, https://www.wsj.com/articles/bolton-criticizes-trump-over-moves-on-north-korea-11577146673.

161 *See* Jonathan Swan, *Trump Officials Want to Demote the Next UN Ambassador*, Axios, Oct. 12, 2018, https://www.axios.com/trump-officials-demote-un-ambassador-cabinet-8d3ebfa2-2bd6-4c86-afaf-6d12500ea9d6.html.

162 *Id.*

163 *Trump Taps U.S. Ambassador to Canada as His New UN Envoy*, N.Y Daily News, Feb. 22, 2019, https://www.nydailynews.com/news/politics/ny-pol-trump-canada-un-envoy-20190222-story.html.

164 *Id.*

165 Peter Baker, *Choice for U.N. Backs Action Against Mass Killings*, N.Y. Times, Nov. 30, 2008, https://www.nytimes.com/2008/12/01/us/politics/01rice.html.

166 *See* Peter Baker, *Trump Ousts John Bolton as National Security Adviser*, N.Y. Times, Sept. 11, 2019, https://www.nytimes.com/2019/09/10/us/politics/john-bolton-national-security-adviser-trump.html.

167 *Id.*

168 *See id.*

169 *See id.*

170 *Id.*

Serving just under a year and a half, Bolton outlasted both Flynn and McMaster in the National Security Advisor role.

IV. O'Brien Steps into the Spotlight

President Trump selected State Department hostage negotiator Robert O'Brien to follow Bolton as National Security Advisor. O'Brien had been a Los Angeles lawyer before joining the State Department, and he had played a key part in helping the Trump Administration secure the freedom of numerous Americans imprisoned overseas.[171] In replacing the bureaucratically inexperienced McMaster with the deftly maneuvering Bolton, the President had made a fundamental change at the position. Now, the big change was the move from Bolton, who had strongly held policy views, to O'Brien, who was said to "bring 'no outside agenda' to the job."[172] Unlike Bolton, O'Brien had a "relative lack of experience . . . with the interagency process[.]"[173] An op-ed in the *Boston Herald* called O'Brien the "anti-Bolton," opining that O'Brien's "quiet and lawyerly" style contrasted with Bolton's "pugnacity."[174] Both Secretary Pompeo and Jared Kushner supported O'Brien in the selection process.[175]

The O'Brien pick solidified Secretary Pompeo's position "as the president's primary foreign-policy advisor."[176] At this point, the U.N. Ambassador was unquestionably a subordinate of the Secretary; the operationally masterful Bolton was gone, replaced by a more low-key staffer in O'Brien, whom Pompeo had boosted and who saw his role as more of a policy coordinator; new Defense Secretary Mark Esper was just two months removed from his own Senate confirmation;[177] General Kelly was long gone as Chief of Staff, replaced by former White House Office of Management and Budget Director and Congressman Mick Mulvaney, who assumed the role in an acting capacity and evinced more of an interest in domestic policy battles;[178] and Secretary Pompeo had demonstrated commitment to the President by spurning the opportunity to run for the U.S. Senate in his home state of Kansas so he could stay on as Secretary of State through the end of the President's term.[179] As a result, O'Brien's interagency process would necessarily have to account for the outsized influence that the State Department's policy preference on any given issue would have with the President, given Secretary Pompeo's rapport and history with President Trump. One major change from Bolton was that O'Brien "reinstituted more regular meetings of the . . . principals and deputies committee[s.]"[180]

Instead of the typical churn, O'Brien promoted his deputies from within. He elevated two staffers—Victoria Coates and Matt Pottinger—who had served since the beginning of the Trump Administration.[181] That Coates (who had been senior director for the Middle East and North Africa) and Pottinger ("the NSC's Asia expert") were now deputies appeared to signal the President's foreign policy "focus on China and the Middle East."[182] As to the broader conception of the NSC, however, O'Brien was intent on cutting down staff. In October 2019, just a month after taking office, he penned an op-ed in the *Washington Post* outlining what his key priorities as National Security Advisor would be.[183] Reasoning that the NSC staff at the White House "was intended to coordinate policy rather than run it" and that his job was "to distill and present to the president the views and options that come from the various departments and agencies[,]" O'Brien invoked the Scowcroft-ian "honest broker" model to justify streamlining the Council and restoring its historical mission.[184]

O'Brien stated that the "NSC staff should not, as it has in the past, duplicate the work of military officers, diplomats or intelligence officers."[185] And on the staffing issue, he identified a specific goal of reducing the 174 policy positions on the NSC "to

171 *See* Michael Crowley et al., *Robert O'Brien 'Looks the Part,' but Has Spent Little Time Playing It*, N.Y. Times, Sept. 18, 2019, https://www.nytimes.com/2019/09/18/us/politics/national-security-adviser-robert-obrien.html.

172 *Id.* However, even O'Brien had his own pet projects. *Foreign Policy* reported that O'Brien "made growing the Navy a key focus" as National Security Advisor. *See* Lara Seligman, *Robert O'Brien Is the Anti-Bolton*, Foreign Pol'y, Jan. 27, 2020, https://foreignpolicy.com/2020/01/27/obrien-bolton-trump-impeachment/. In the years prior to his hiring at the NSC, O'Brien had advocated for growing the fleet to 350+ ships; indeed, he and the President saw "eye to eye" on the issue. *See id.* But given the fact that a 2018 defense policy bill already mandated growing the Navy to 355 ships, former Pentagon official Loren DeJonge Schulman described the continued focus on the issue as "a bit odd[.]" *Id.*

173 Crowley, *supra* note 171 (quoting Richard Fontaine, the chief executive of the nonpartisan Center for a New American Security).

174 *See* Eli Lake, *Trump's NSA Pick O'Brien Is the Anti-Bolton*, Boston Globe, Sept. 24, 2019, https://www.bostonherald.com/2019/09/24/trumps-nsa-pick-obrien-is-the-anti-bolton/.

175 *See id.*

176 Ivo H. Daalder & I.M. Destler, *Can O'Brien Succeed as National Security Advisor?*, Foreign Pol'y, Sept. 20, 2019, https://foreignpolicy.com/2019/09/20/can-obrien-succeed-as-national-security-advisor/.

177 *See* Helene Cooper, *Mark Esper Confirmed as Trump's Defense Secretary*, N.Y. Times, July 23, 2019, https://www.nytimes.com/2019/07/23/us/politics/mark-esper-secretary-defense.html.

178 *See* Christine Wang, *Trump Names Mick Mulvaney Acting White House Chief of Staff, Replacing John Kelly*, CNBC, Dec. 15, 2018, https://www.cnbc.com/2018/12/14/trump-names-mick-mulvaney-acting-white-house-chief-of-staff.html.

179 *See* Josh Dawsey & John Hudson, *Pompeo Decides Against Run for U.S. Senate Seat in Kansas*, Washington Post, Jan. 6, 2020, 7:14 PM, https://www.washingtonpost.com/politics/pompeo-decides-against-run-for-us-senate-seat-in-kansas/2020/01/06/2e3b75d6-30dd-11ea-a053-dc6d944ba776_story.html.

180 Daniel Lippman & Meredith McGraw, *Inside the National Security Council, a Rising Sense of Dread*, Politico, Apr. 2, 2020, https://www.politico.com/news/2020/04/02/nsc-coronavirus-white-house-162530.

181 *See* Margaret Talev, *O'Brien Names New Deputy National Security Adviser*, Axios, Oct. 10, 2019, https://www.axios.com/obrien-coates-deputy-national-security-adviser-150ebefa-5027-4e84-b3e2-20d9d19dd6dc.html.

182 *See id.*

183 *See* Robert C. O'Brien, *Robert C. O'Brien: Here's How I Will Streamline Trump's National Security Council*, Washington Post, Oct. 16, 2019, https://www.washingtonpost.com/opinions/robert-c-obrien-heres-how-i-will-streamline-trumps-national-security-council/2019/10/16/2b306360-f028-11e9-89eb-ec56cd414732_story.html.

184 *See id.*

185 *Id.*

under 120 by early 2020."[186] To achieve this objective, O'Brien announced that the White House would "eliminate existing vacancies and consolidate duplicative positions[,]" allowing detailees from other departments and agencies to finish their assignments and return, unreplaced, to their home entities.[187] Finally, O'Brien wrote that he would "combine some functional directorates that duplicate other White House offices" (citing the National Economic Council's competency in handling international economic issues, as an example) and refocus the Council's emphasis on "directorates that cover geographic regions[.]"[188]

In an appearance at the Atlantic Council in February 2020, O'Brien discussed his views about his own role as the National Security Advisor. Striking a different tone than Bolton, he noted:

> It's not [my] position to be an advocate for one policy or another, not to seek a particular policy outcome; it's to ensure that the President is well-served by the Cabinet departments and agencies in obtaining counsel and formulating his policies. And then, those policies are decided by the *President*. And once the President's made his policy decisions, that they're faithfully executed.[189]

In that same set of remarks, O'Brien announced that the White House's streamlining efforts had already concluded—he had succeeded in bringing the NSC policy staff "down to around 115 to 120[.]"[190] He also mentioned that in five months, the NSC had held "over 60 Principal and Deputy Committee meetings" in an effort to improve NSC processes.[191]

A few months after O'Brien's hiring, the *Washington Times* ran a story about O'Brien's "rightsizing" efforts that provided some key insight into how the Council was originally set up. Rich Higgins, one of the NSC officials purged by McMaster, gave an interview to the news outlet and spoke candidly about his belief in the benefits of the O'Brien approach.[192] Higgins remarked that "the NSC was set up to implement the president's policies through 'command guidance' flowing from the Oval Office to the NSC and then to the various agencies and departments."[193] This characterization makes sense if one understands it in the context of communicating the President's policy goals to the "fragmented national security apparatus"[194] across the executive branch, without micromanaging the agencies and departments. Higgins charged that a "calcified bureaucracy" was attempting to "obstruct [President Trump's] and his voters' agenda," and he praised O'Brien for "eliminating those obstructing [the President's] foreign policy desires from the NSC staff and re-orienting the council's mission."[195]

A key foreign policy event in O'Brien's tenure occurred in late December 2019. Iranian-linked provocations in Iraq escalated tensions in the Middle East, from a militia group's attack on a military base in Iraq (which killed an American contractor) to riots at the U.S. embassy in Baghdad.[196] Just a few days later, President Trump authorized a drone strike at Baghdad International Airport that killed Iranian military commander Qassim Soleimani.[197] O'Brien had been intimately involved in the decision to take out Soleimani.[198] The National Security Advisor then proceeded to take a lead role in framing the strike to the national media, warning that Iranian retaliation would be a "very poor decision."[199] He cited the 2002 Authorization for Use of Military Force as statutory permission to carry out the strike and insisted that the action was defensive in nature, stating that Soleimani (who had been responsible for the deaths of hundreds of American soldiers) was actively planning further attacks on U.S. troops.[200]

Next, O'Brien and other Trump Administration national security leaders led a closed-door briefing with members of Congress about the strike.[201] Secretary Pompeo, Secretary Esper, and CIA Director Gina Haspel joined O'Brien.[202] Going into the briefing, one of the main criticisms of the strike was that the President's team had not "adequately detail[ed] the intelligence

186 *Id.*

187 *See id.*

188 *See id.*

189 *The View from the West Wing: A Conversation with Robert O'Brien, Assistant to the President for National Security Affairs*, Atlantic Council at 10:37 (Feb. 11, 2020), https://www.atlanticcouncil.org/event/the-view-from-the-west-wing-a-conversation-with-robert-obrien-assistant-to-the-president-for-national-security-affairs/.

190 *Id.* at 14:48.

191 *See id.* at 15:09.

192 *See* Bill Gertz, *FLASHBACK: NSC Chief Slashing Obama's 'Bloated' Staff to Create Tight-Lipped White House Operation*, Washington Times, Dec. 31, 2019, https://www.washingtontimes.com/news/2019/dec/31/robert-obrien-cuts-national-security-council-staff/.

193 *Id.*

194 *Armstrong*, 90 F.3d at 561.

195 Gertz, *supra* note 192.

196 *See* Elena Moore & Roberta Rampton, *Timeline: How the U.S. Came to Strike and Kill a Top Iranian General*, NPR, Jan. 4, 2020, https://www.npr.org/2020/01/04/793364307/timeline-how-the-u-s-came-to-strike-and-kill-a-top-iranian-general.

197 *See* Michael Crowley et al., *U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces*, N.Y. Times, Jan. 2, 2020, https://www.nytimes.com/2020/01/02/world/middleeast/qassem-soleimani-iraq-iran-attack.html (updated July 9, 2020).

198 *See* Jennifer Jacobs & Justin Sink, *As Mideast Tensions Flare, Trump Finds Solace in New Adviser*, Bloomberg, Jan. 6, 2020, https://www.bloomberg.com/news/articles/2020-01-06/as-middle-east-tensions-flare-trump-finds-solace-in-new-adviser.

199 *White House: Iran Retaliation for Soleimani Killing Would Be Poor Decision*, Reuters, Jan. 3, 2020, https://www.reuters.com/article/us-iraq-security-blast-o-brien/white-house-iran-retaliation-for-soleimani-killing-would-be-poor-decision-idUSKBN1Z228H.

200 *See* Rob Crilly, *White House Says Trump Used Iraq War Authorization to Kill Qassem Soleimani*, Washington Examiner, Jan. 3, 2020, https://www.washingtonexaminer.com/news/white-house-says-trump-used-iraq-war-authorization-to-kill-qassem-soleimani.

201 *See* Brakkton Booker, *National Security Adviser Defends Briefing on Iran Criticized by Lawmakers*, NPR, Jan. 9, 2020, https://www.npr.org/2020/01/09/795002806/nsa-chief-robert-obrien-defends-briefing-on-iran-criticized-by-lawmakers.

202 *See id.*

justifying" the Soleimani killing.[203] During the discussion, the Trump Administration officials in the room were reportedly unwilling to engage on questions about "the possibility of future military action against Iran[,]" leading Utah Republican Senator Mike Lee to decry the briefing as the "worst" he had seen "on a military issue in his entire nine years serving in the Senate."[204] O'Brien responded that he was "disappointed" by the Senator's characterization.[205]

Around the same time, Congress was taking steps to impeach President Trump. First, a bit of backstory: In July 2019, near the end of Bolton's tenure with the NSC, American and Ukrainian officials gathered in Bolton's office to discuss U.S.-Ukraine relations. As one set of writers in the *New York Times* put it, "[a]ll went well until the Ukrainians raised one of [newly elected Ukrainian President Volodymyr] Zelensky's most important issues: An invitation to the White House that [President] Trump had promised in a letter after [President] Zelensky was elected."[206] U.S. Ambassador to the European Union Gordon Sondland responded that Acting Chief of Staff Mulvaney "had guaranteed the invitation as long as Ukraine announced" certain investigations into Russian influence on the 2016 election and allegations of corruption against Democratic presidential contender Joe Biden and his son Hunter.[207] Bolton became concerned about this arrangement—a seeming cross between U.S. domestic politics and official foreign policy—and asked that aide Fiona Hill "report what had transpired to" John A. Eisenberg, the NSC's top lawyer.[208]

Shortly thereafter, President Trump called President Zelensky and made a similar request, framing it as a "favor."[209] Lieutenant Colonel Alexander Vindman, a career NSC official focused on Ukraine policy who was assigned to take notes on the call between President Trump and President Zelensky, went over to Eisenberg's office after the call "to question the propriety of the demand for investigations."[210] Eisenberg filed the information away and instructed Vindman not to discuss the call, but Vindman's concerns eventually made their way to a CIA official detailed to the White House.[211] That official filed a whistleblower complaint that ultimately became known to Congress, sparking an impeachment inquiry.[212] Vindman went on to testify before the House of Representatives about what he had heard from his post at the NSC.[213] The House, controlled by Democrats, went on to impeach President Trump, but the Republican-led Senate declined to convict.[214]

Vindman (along with his twin brother, NSC ethics lawyer Yevgeny Vindman) was dismissed from the NSC in February 2020 after the Senate rendered its verdict on impeachment.[215] O'Brien took care to note that Vindman, a detailee to the NSC whose assignment was not set to end until July 2020, was not fired.[216] Instead, he argued that "the president has to have confidence in his NSC staff to ensure that they're going to execute the agenda he was elected to deliver."[217] O'Brien stated that "[w]e're not a country where a bunch of lieutenant colonels can get together and decide what the policy is of the United States. . . . We are not a banana republic."[218] But when "[p]ressed on whether he was alleging that was what had happened in the case of the Vindmans, O'Brien denied that he was."[219] O'Brien's distinction between firing and reassignment sought to rebut the narrative that the Trump Administration had retaliated against the Vindmans.

As the White House dealt with the consequences of the decision to terminate Soleimani and the fallout from Congress's impeachment efforts, a major crisis loomed on the horizon: the COVID-19, or coronavirus, pandemic. In January, "as [the] mysterious pathogen was infecting its way across China . . . a lower-level policy team [at the NSC] was working frantically to understand the virus and figure out what needed to be done."[220] O'Brien put Pottinger, his deputy and the NSC's Asia expert, in charge of the task force. Pottinger viewed China with skepticism from his time working in the country as a journalist with the *Wall Street Journal*.[221] The virus quickly became the most important

203 *See id.*

204 *Id.*

205 *See id.*

206 Sharon LaFraniere et al., *Trump, Ukraine and Impeachment: The Inside Story of How We Got Here*, N.Y Times, Nov. 11, 2019, https://www.nytimes.com/2019/11/11/us/ukraine-trump.html.

207 *See id.*

208 *See id.*

209 *See* Michael D. Shear & Maggie Haberman, *'Do Us a Favor': Call Shows Trump's Interest in Using U.S. Power for His Gain*, N.Y. Times, Sept. 25, 2019, https://www.nytimes.com/2019/09/25/us/politics/ukraine-transcript-trump.html (updated Jan. 20, 2021).

210 LaFraniere et al., *supra* note 206.

211 *See id.*

212 *See id.*

213 *See* Mikhaila Fogel, *Summary of Lt. Col. Alexander Vindman's Deposition Testimony*, Lawfare, Nov. 11, 2019, https://www.lawfareblog.com/summary-lt-col-alexander-vindmans-deposition-testimony.

214 *See* Bart Jansen et al., *President Trump Acquitted on Both Impeachment Charges, Avoids Removal*, USA Today, Feb. 5, 2020, https://www.usatoday.com/story/news/politics/2020/02/05/trump-impeachment-trial-senate-poised-vote-acquittal/4655192002/.

215 *See* Natasha Bertrand, '*We Are Not a Banana Republic': National Security Adviser Defends Vindman Dismissals*, Politico, Feb. 11, 2020, https://www.politico.com/news/2020/02/11/banana-republic-obrien-vindman-dismissals-114212.

216 *See id.*

217 *Id.*

218 *Id.*

219 Nikki Carvajal & Paul LeBlanc, *National Security Adviser Says Vindman Brothers Weren't Fired -- Trump Says Military Should Decide Their Fate*, CNN, Feb. 12, 2020, https://www.cnn.com/2020/02/11/politics/alexander-vindman-robert-obrien/index.html.

220 Lippman & McGraw, *supra* note 180.

221 *See* David Nakamura et al., *Matthew Pottinger Faced Communist China's Intimidation as a Reporter. He's Now at the White House Shaping Trump's Hard Line Policy Toward Beijing.*, Washington Post, Apr. 29, 2020, https://www.washingtonpost.com/politics/matthew-pottinger-

issue in the nation. By April, "[t]he administration's models [projected] 100,000 to 240,000 deaths from the virus, and much of the country . . . enacted stringent social distancing policies that would have been unimaginable" in the months before.[222] Pottinger took a hard line against China from the beginning, proposing a plan "to shut down some flights from China in late January[]" and supporting the President's "decision . . . to freeze U.S. funding to the WHO over charges that it failed to hold China to account and muzzled Taiwan's earlier warnings in December about the virus that started in China."[223] He also "urged [President] Trump and other senior officials to brand the virus with a label so that there would be no mistaking its origins: the Wuhan virus."[224]

Pottinger was particularly concerned about "the disparity between official accounts of the novel coronavirus in China, which scarcely mentioned the disease, and Chinese social media, which was aflame with rumors and anecdotes," and on January 14 the NSC convened an interagency meeting about the virus.[225] Pottinger, a former Marine, operated with caution in articulating his policy suggestions while navigating various Trump Administration power centers with different views on the best approach to Sino-American relations, "maintain[ing] a military-style respect for the chain of command" while simultaneously pushing aggressive policies on China.[226] Still, *Politico* reported on a conflict between Pottinger and Acting Chief of Staff Mulvaney over how seriously to take the virus, with Pottinger advocating for more vigilance and Mulvaney taking a more skeptical tack.[227] Around this time, however, in a move that many had been expecting for months, President Trump replaced Mulvaney with conservative Republican Congressman Mark Meadows as Chief of Staff.[228]

While Pottinger's star rose, his fellow NSC deputy Victoria Coates' stock fell. For context, in September 2018, an anonymous Trump Administration official had penned an op-ed in the *New York Times* claiming to be part of a "resistance" against the President within the government.[229] Since its publication, the White House had been seeking to discover the identity of the author. In February 2020, Coates became "the target of a whisper campaign . . . making a circumstantial case that she was the identity behind [the] op-ed[.]"[230] Unfortunately for Coates, these rumblings "strained her working relationship with . . . O'Brien[.]"[231] Coates was quickly "reassigned as a senior adviser to Energy Secretary Dan Brouillette[.]"[232] A couple of months later, *Real Clear Investigations* published a long piece detailing the allegations against Coates,[233] which she vehemently denied.[234] Coates was ultimately vindicated when former Department of Homeland Security Chief of Staff Miles Taylor admitted that he was "Anonymous."[235]

As the coronavirus spread, the NSC's structure and preparedness became points of controversy. The virus response initially ran through the NSC's Counterproliferation and Biodefense directorate, "the so-called WMD unit[.]"[236] In May 2018, as part of his reorganization of the NSC, Bolton had merged the global health security/pandemic office into the WMD unit.[237] A March 2020 op-ed by Beth Cameron, who led the Global Health Security and Biodefense Directorate under President Obama, charged that the merger created a situation in which the Trump Administration had "no clear White House-led structure to oversee [the coronavirus] response[.]"[238] On Twitter, Bolton dismissed Cameron's claims.[239] While Cameron wrote that the White House "dissolved" the office, former Trump NSC official Tim Morrison responded with an op-ed of his own, asserting that

faced-communist-chinas-intimidation-as-a-reporter-hes-now-at-the-white-house-shaping-trumps-hard-line-policy-toward-beijing/2020/04/28/5fb3f6d4-856e-11ea-ae26-989cfce1c7c7_story.html.

222 Lippman & McGraw, *supra* note 180.

223 Nakamura et al., *supra* note 221.

224 *Id.*

225 *See* Lawrence Wright, *The Plague Year*, New Yorker, Dec. 28, 2020, https://www.newyorker.com/magazine/2021/01/04/the-plague-year.

226 *See* Nakamura et al., *supra* note 221.

227 *See* Lippman & McGraw, *supra* note 180.

228 *See* Peter Baker, *Trump Names Mark Meadows Chief of Staff, Ousting Mick Mulvaney*, N.Y. Times, Mar. 6, 2020, https://www.nytimes.com/2020/03/06/us/politics/trump-mark-meadows-mick-mulvaney.html (updated Apr. 16, 2020).

229 *See I Am Part of the Resistance Inside the Trump Administration*, N.Y. Times, Sept. 5, 2018, https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html.

230 Jonathan Swan, *Scoop: Top NSC Official Reassigned to Energy Department amid "Anonymous" Fallout*, Axios, Feb. 20, 2020, https://www.axios.com/scoop-top-nsc-official-reassigned-to-energy-department-amid-anonymous-fallout-83edb9b8-d47e-4211-baf7-e06b99004c85.html.

231 *Id.*

232 *Id.*

233 *See* Paul Sperry, *Here's 'Anonymous,' Trump Aides Say. And Here's How They Outed Her.*, RealClearInvestigations, Apr. 15, 2020, https://www.realclearinvestigations.com/articles/2020/04/15/heres_anonymous_trump_aides_say_and_heres_how_they_outed_her_122684.html.

234 *See* Alayna Treene, *First Look: Victoria Coates Denies Being "Anonymous"*, Axios, Apr. 19, 2020, https://www.axios.com/victoria-coates-denies-being-anonymous-dba3c643-55fe-4516-b0d5-fd34e181b007.html.

235 *See* Michael D. Shear, *Miles Taylor, a Former Homeland Security Official, Reveals He Was 'Anonymous'*, N.Y. Times, Oct. 28, 2020, https://www.nytimes.com/2020/10/28/us/politics/miles-taylor-anonymous-trump.html.

236 *See* Lippman & McGraw, *supra* note 180.

237 *See* Lena H. Sun, *Top White House Official in Charge of Pandemic Response Exits Abruptly*, Washington Post, May 10, 2018, https://www.washingtonpost.com/news/to-your-health/wp/2018/05/10/top-white-house-official-in-charge-of-pandemic-response-exits-abruptly/.

238 Beth Cameron, *I Ran the White House Pandemic Office. Trump Closed It.*, Washington Post, Mar. 13, 2020, https://www.washingtonpost.com/outlook/nsc-pandemic-office-trump-closed/2020/03/13/a70de09c-6491-11ea-acca-80c22bbee96f_story.html.

239 *See* John Bolton (@AmbJohnBolton), Twitter (Mar. 14, 2020, 11:05 AM),https://twitter.com/AmbJohnBolton/status/1238843788858208257 ("Claims that streamlining NSC structures impaired our nation's bio defense are false. Global health remained a top NSC priority, and its expert team was critical to effectively handling the 2018-19 Africa Ebola crisis. The angry Left just can't stop attacking, even in a crisis.").

what occurred was a reorganization, not a dissolution.[240] In a piece for *National Review*, Rebeccah Heinrichs wrote, "The facts back up Bolton and Morrison. . . . [T]his reorganization was designed in part to [foster] better cooperation between those monitoring and preparing for intentional biological threats on one hand and for naturally occurring biological threats on the other."[241] Still, President Trump's opponents seized on the issue, with Democratic presidential candidate Joe Biden going as far as expressing interest in elevating the global health security pandemic office to Cabinet level if he were elected President.[242]

In addition, *Politico* reported in March that although President Obama's NSC had developed a post-Ebola outbreak playbook for handling pandemics, the Trump Administration did not use the playbook in its coronavirus response.[243] An NSC official under President Trump commented that the playbook in question was "quite dated and [had] been superseded by strategic and operational biodefense policies published since[.]"[244] The official continued by saying that the Trump Administration was executing a "better fit, more detailed[]" plan that still applied "the relevant lessons learned from the playbook and the most recent Ebola epidemic in the [Democratic Republic of the Congo] to COVID-19."[245]

The White House decided to bring in Dr. Deborah Birx, the U.S. global AIDS coordinator, to be the White House's coronavirus response coordinator.[246] Dr. Birx entered the White House on a detail assignment to Vice President Pence's office, but her support staff came from the NSC.[247] President Trump tapped Vice President Pence to lead the White House Coronavirus Task Force.[248] The Vice President organized the task force "into a decision-making body modeled in part on the" NSC.[249] The task force met in the Situation Room; limited discussion to subjects on which decisions are needed; and kept the circle of attendees small, "cutting out deputies and staff if their bosses [were] represented."[250]

With Pottinger and Birx running point on the coronavirus from the NSC, O'Brien became a target of criticism for being too low-key. A *CNN* article described O'Brien as "out of sight," quoting "several current administration officials [as saying that O'Brien] is out of his depth in the job and that [O'Brien's] desire to keep a low profile inside a prickly White House has undermined his influence with the President -- to the point of irrelevance."[251] "[C]urrent and former NSC officials" told *CNN* that in O'Brien, President Trump lacked "a key asset that . . . served many of his predecessors well during times of crisis: a bold, proactive national security adviser who can flag early threats and ensure the government is focused on combating them[.]"[252] In response, O'Brien gave "a rare, in-depth interview" to *CNN*.[253] The *Wall Street Journal* offered a more charitable assessment, describing O'Brien as a National Security Advisor who "picks his spots."[254] Perhaps the most eye-opening line from the *CNN* story was one Administration official's critique that O'Brien's "shtick is 'I am a staffer. . . . My purpose is not to tell the President what his agenda is[.]'"[255] The official noted critically that O'Brien's default position is "deferring to the President's stated opinions."[256]

Ultimately, though some Republicans believed O'Brien's "background . . . suggested he'd likely support a more traditional Republican foreign policy," O'Brien showed "a willingness to implement the president's unconventional approach."[257] O'Brien worked to faithfully implement President Trump's policy goals, such as the President's "decision in October [2019] to abruptly withdraw U.S. troops from Kurdish-held territory in Syria[.]"[258] One telling line in a recent *Bloomberg* article alleged that "O'Brien told aides . . . that he want[ed] to stack up more 'wins,' and that his staff should look for ways to achieve decisive action for the U.S."[259] The *New York Times* reported that O'Brien "sometimes

240 *See* Tim Morrison, *No, the White House Didn't 'Dissolve' Its Pandemic Response Office. I Was There.*, Washington Post, Mar. 16, 2020, https://www.washingtonpost.com/opinions/2020/03/16/no-white-house-didnt-dissolve-its-pandemic-response-office/.

241 Rebeccah Heinrichs, *The Truth About the National Security Council's Pandemic Team*, Nat'l Rev., Apr. 1, 2020, https://www.nationalreview.com/2020/04/coronavirus-truth-national-security-council-pandemic-team/.

242 *See* Sean Sullivan, *Biden Says He's Already Choosing a Presidential Transition Team*, Washington Post, Apr. 17, 2020, https://www.washingtonpost.com/politics/biden-says-hes-already-choosing-a-presidential-transition-team/2020/04/17/63cbb5b4-805e-11ea-9040-68981f488eed_story.html.

243 *See* Dan Diamond & Nahal Toosi, *Trump Team Failed to Follow NSC's Pandemic Playbook*, Politico, Mar. 25, 2020, https://www.politico.com/news/2020/03/25/trump-coronavirus-national-security-council-149285.

244 *Id.*

245 *Id.*

246 *See* Steven Nelson, *White House Appoints Top AIDS Official as New Coronavirus Coordinator*, N.Y. Post, Feb. 27, 2020, https://nypost.com/2020/02/27/white-house-appoints-top-aids-official-as-new-coronavirus-coordinator/.

247 *See id.*

248 *See* Jill Colvin & Zeke Miller, *Pandemic Task Force Modeled on National Security Council*, Associated Press, Mar. 20, 2020, https://apnews.com/article/7cac3428636db830f8b503f93b65e9dc.

249 *See id.*

250 *Id.*

251 Vivian Salama & Kylie Atwood, *Trump's National Security Adviser out of Sight in Coronavirus Response*, CNN, May 2, 2020, https://www.cnn.com/2020/05/02/politics/robert-obrien-national-security-adviser-coronavirus-out-of-sight/index.html.

252 *Id.*

253 *Id.*

254 Michael C. Bender & Gordon Lubold, *On Coronavirus, National Security Threats, O'Brien Picks His Spots*, Wall Street J., Apr. 29, 2020, https://www.wsj.com/articles/on-coronavirus-national-security-threats-obrien-picks-his-spots-11588161602.

255 Salama & Atwood, *supra* note 251

256 *Id.*

257 Jacobs & Sink, *supra* note 198.

258 *Id.*

259 *Id.*

open[ed NSC meetings] by distributing printouts of Mr. Trump's latest tweets on the subject at hand," signaling that the meeting attendees' "job [was] to find ways of justifying, enacting or explaining [President] Trump's policy, not [advising] the president on what it should be."[260] The fact that O'Brien seemed to share the President's "worldview and approach" inspired the President's confidence in his National Security Advisor.[261]

The COVID-19 pandemic dominated the White House's attention during President Trump's final year in office. In fact, O'Brien himself contracted the virus in June 2020.[262] But other NSC-related developments stand out for their significance. In contrast to the McMaster-Mattis relationship, O'Brien reportedly sought to promote himself to the President as a supportive subordinate while highlighting remarks from Defense Secretary Esper that offered at-best lukewarm endorsements of the Commander in Chief.[263] One senior administration official speculated that O'Brien was angling to replace Secretary Esper atop the Pentagon if President Trump won reelection in 2020, but NSC spokesman John Ullyot denied these rumors.[264]

O'Brien took on other senior military officials, including Chairman of the Joint Chiefs of Staff General Mark Milley. The two carried on an "unusually public back-and-forth" regarding President Trump's promise to draw down troops in Afghanistan.[265] In October 2020, during a speech in Nevada, O'Brien articulated an ambitious goal: Reduce the troop level to 2,500 by early 2021.[266] President Trump tweeted hours later that troops "should" be home by Christmas 2020, an even more accelerated timeline than O'Brien had described. But shortly thereafter, during an interview with NPR, Milley declined to "speculate" about the timeline for troop withdrawal, noting O'Brien (by name) as someone who might be more willing to engage in such speculation.[267] Milley advocated for a more restrained approach, opining that the administration did not yet have enough information to seriously consider "reductions beyond the near-term 4,500 number."[268]

O'Brien, a few days later, commented that he was "'not going to get into a public debate with General Milley,' [whom] he called 'a friend' and 'a great American.'"[269] It was, however, clear which of the two national security officials was taking the public position closer to that of the President. At an Aspen Institute event in the following days, O'Brien stated that "he could 'guarantee' that the planned drawdown to 2,500 troops is 'the order of the commander in chief.'"[270] O'Brien continued, "When I speak about troop levels and that sort of thing, I'm a staffer, I staff the president of the United States, so it's not my practice to speculate."[271] Perhaps most notably, he said, "Other people can interpret what I say as speculation or not but I wasn't speculating then and I wasn't speculating today. . . . When I'm speaking, I'm speaking for the president."[272]

Contemporary reporting indicates that O'Brien went to significant lengths to remain in the President's good graces. In terms of issues on which O'Brien focused, "[l]ongtime current and former officials" commented that O'Brien "repeatedly delegated issues that might put him in the president's crosshairs, such as Russia and the coronavirus pandemic, to his deputy, the State Department or the Defense Department."[273] Meanwhile, "O'Brien . . . championed a hard-line China policy, an Iran pressure campaign and an expansion of the Navy fleet—all top issues for Trump."[274] In the run-up to the 2020 election, the National Security Advisor also took trips to politically important states like Minnesota and Wisconsin, promoting the President's record on military issues at various events.[275] O'Brien published an op-ed in June 2020 arguing that "President Trump's efforts have made the American people safer and our nation stronger."[276] And he also emerged as a key attack dog against the World Health Organization as the COVID-19 pandemic raged on, "echoing claims made by" President Trump about the organization's flaws.[277]

260 Michael Crowley & David E. Sanger, *Under O'Brien, N.S.C. Carries Out Trump's Policy, but Doesn't Develop It*, N.Y. Times, Feb. 21, 2020, https://www.nytimes.com/2020/02/21/us/politics/national-security-council-trump-policy.html (updated Feb. 23, 2020).

261 *See id.*

262 *See* Kaitlan Collins et al., *Trump's National Security Adviser Tests Positive for Covid-19*, CNN, July 27, 2020, https://www.cnn.com/2020/07/27/politics/robert-obrien-tests-positive-covid/index.html.

263 *See* Carol E. Lee & Courtney Kube, *National Security Adviser O'Brien Jockeys for Future Spot in a Second Trump Administration*, NBC News, Oct. 30, 2020, https://www.nbcnews.com/politics/national-security/national-security-adviser-o-brien-jockeys-future-spot-second-trump-n1245330.

264 *See id.*

265 *See* Jacqueline Feldscher & Connor O'Brien, *O'Brien Takes Indirect Shot at Milley over Afghanistan Drawdown*, Politico, Oct. 16, 2020, https://www.politico.com/news/2020/10/16/robert-obrien-mark-milley-afghanistan-drawdown-429831.

266 *See id.*

267 *See id.*

268 Lara Seligman, *White House Leans on Pentagon to Fulfill Trump's Afghanistan Pledge*, Politico, Oct. 21, 2020, https://www.politico.com/news/2020/10/21/trump-afghanistan-pledge-pentagon-430747.

269 *Id.*

270 Carol E. Lee & Courtney Kube, *O'Brien Confirms Trump Ordered Pentagon to Cut U.S. Troops in Afghanistan to 2,500 by Early 2021*, NBC News, Oct. 16, 2020, https://www.nbcnews.com/news/military/o-brien-confirms-trump-ordered-pentagon-cut-u-s-troops-n1243740.

271 *Id.*

272 *Id.*

273 *National Security Adviser O'Brien Jockeys for Future Spot in a Second Trump Administration*, *supra* note 263.

274 *Id.*

275 *See id.*

276 Robert C. O'Brien, *Robert O'Brien: National Security Reforms – President Trump Has Made People Safer, Nation Stronger*, Fox News, June 30, 2020), https://www.foxnews.com/opinion/national-security-council-reforms-trump-leadership-robert-obrien.

277 *See* Evan Semones, *Trump's National Security Adviser Attacks World Health Organization*, Politico, May 31, 2020, https://www.politico.

O'Brien positioned himself as an in-the-building political ally of the President, a rarity in the foreign policy/national security space even within the President's own Administration. Without a doubt, the President came to trust O'Brien and empowered him to play a significant role in effectuating American foreign policy. O'Brien focused on the idea of a "free and open Indo-Pacific" as key to the U.S.'s strategy of countering China, and in January 2021 he declassified the United States Strategic Framework for the Indo-Pacific (which had served for three years "as the Trump Administration's overarching strategic guidance for implementing the President's 2017" NSS document).[278] O'Brien also "waged a public and private crusade to get the Pentagon . . . on board" with a rapid build-up of the Navy as a counter-China measure.[279] The President credited the NSC, along with State Department officials, for "getting the deal done" with respect to a cease fire between Armenia and Azerbaijan over the disputed area of Nagorno-Karabakh.[280] O'Brien got to join Senior Advisor Kushner on the first commercial flight from Tel Aviv to Abu Dhabi in connection with Kushner's historic breakthrough in Middle East policy.[281] And despite the reporting that O'Brien was making a conscious effort to avoid Russia policy, he took a public-facing role in the Trump Administration's negotiations with Russian President Vladimir Putin regarding an important nuclear arms treaty between the two countries.[282] The historical record should show that O'Brien was deeply involved in various important aspects of foreign policy during President Trump's final year in office.

In November 2020, former Vice President Joe Biden defeated President Trump in the presidential election.[283] President Trump, however, did not concede the election, citing what he "claimed were widespread voter irregularities."[284] Almost immediately after the election, President Trump fired Secretary Esper, who had resisted some of the President's directives during his time as Secretary of Defense.[285] What happened next was what a *Washington Post* story described as a "Pentagon takeover by . . . National Security Council staff."[286] O'Brien consolidated influence as President Trump installed top NSC officials at the Defense Department, including Christopher Miller as Acting Secretary of Defense.[287] For his part, O'Brien commented that he "never wanted Mark Esper's job" and "just wanted to see Mark Esper succeed and do a great job as secretary of defense."[288] Still, it stands to reason that O'Brien would have had as good a shot as anyone to take over as Defense Secretary had President Trump won a second term.

President Trump's refusal to concede the election lasted into the new year. On January 6, 2021—just two weeks before President-Elect Biden was set to be inaugurated—supporters of President Trump stormed the U.S. Capitol building in an effort to influence Congress's certification of the election results in the President-Elect's favor.[289] Things turned violent and multiple people involved in the events, including Capitol Police Officer Brian Sicknick, died.[290] In the immediate aftermath, Pottinger and senior NSC official Ryan Tully resigned.[291] O'Brien reportedly considered walking away as well,[292] but he ultimately decided to stay through January 20 "for the continuity of government in the national security realm."[293]

com/news/2020/05/31/trump-obrien-world-health-organization-corrupt-292059.

278 *See A Free and Open Indo-Pacific*, White House Archives: President Donald J. Trump, https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/OBrien-Expanded-Statement.pdf (last visited Feb. 22, 2021).

279 *See* Lara Seligman, *How Robert O'Brien Helped Steer the Pentagon Toward a Bigger Navy*, Politico, Sept. 22, 2020, https://www.politico.com/news/2020/09/22/obrien-pentagon-bigger-navy-defense-419775.

280 *See* Nailia Bagirova & Humeyra Pamuk, *U.S. Announces New Nagorno-Karabakh Ceasefire as Fighting Persists*, Reuters, Oct. 25, 2020, https://www.reuters.com/article/us-armenia-azerbaijan-usa/u-s-announces-new-nagorno-karabakh-ceasefire-as-fighting-persists-idUSKBN27A0WQ.

281 *See* Karen DeYoung, *Kushner, O'Brien to Be on First Commercial Flight from Tel Aviv to Abu Dhabi*, Washington Post, Aug. 25, 2020, https://www.washingtonpost.com/national-security/kushner-obrien-to-be-on-first-commercial-flight-from-tel-aviv-to-abu-dhabi/2020/08/25/d450786a-e701-11ea-97e0-94d2e46e759b_story.html.

282 *See* Bryan Bender, *O'Brien Calls Putin's New Nuclear Treaty Offer a 'Non-Starter'*, Politico (Oct. 16, 2020, 1:50 PM), https://www.politico.com/news/2020/10/16/putin-nuclear-pact-extension-429798.

283 *See* Jonathan Martin & Alexander Burns, *Biden Wins Presidency, Ending Four Tumultuous Years Under Trump*, N.Y. Times, Nov. 7, 2020, https://www.nytimes.com/2020/11/07/us/politics/biden-election.html (updated Nov. 18, 2020).

284 *Highlights from the Transition: Trump, Refusing to Concede, Cheers on Supporters*, N.Y. Times, Jan. 6, 2021, https://www.nytimes.com/live/2020/11/14/us/joe-biden-trump.

285 *See* Helene Cooper et al., *Trump Fires Mark Esper, Defense Secretary Who Opposed Use of Troops on U.S. Streets*, N.Y. Times, Nov. 9, 2020, https://www.nytimes.com/2020/11/09/us/politics/esper-defense-secretary.html (updated Nov. 11, 2020).

286 Dan Lamothe et al., *Trump Administration Upends Senior Pentagon Ranks, Installing Loyalists*, Washington Post, Nov. 10, 2020, https://www.washingtonpost.com/national-security/defense-department-election-transition/2020/11/10/5a173e60-2371-11eb-8599-406466ad1b8e_story.html.

287 *See* Paul Sonne, *Trump's National Security Adviser Says It Looks as Though Biden Won*, Washington Post, Nov. 16, 2020, https://www.washingtonpost.com/national-security/trumps-national-security-adviser-says-it-looks-like-biden-won/2020/11/16/f4a75fe4-2850-11eb-b847-66c66ace1afb_story.html.

288 *Id.*

289 *See Woman Dies After Shooting in U.S. Capitol; D.C. National Guard Activated After Mob Breaches Building*, Washington Post, Jan. 7, 2021, https://www.washingtonpost.com/dc-md-va/2021/01/06/dc-protests-trump-rally-live-updates/.

290 *See* Matthew Daly & Michael Balsamo, *Deadly Siege Focuses Attention on Capitol Police*, AP News, Jan. 8, 2021, https://apnews.com/article/capitol-police-death-brian-sicknick-46933a828d7b12de7e3d5620a8a04583.

291 *See* Daniel Lippman et al., *Deputy National Security Adviser Resigns After Wednesday's Chaos*, Politico, Jan. 7, 2021, https://www.politico.com/news/2021/01/06/security-adviser-deputy-possible-resignation-455713.

292 *See id.*

293 Kevin Liptak et al., *Some Trump Administration Officials Resign While Others Stay to Prevent Chaos*, CBS 58 WDJT – Milwaukee, Jan. 7, 2021, https://www.cbs58.com/news/mulvaney-joins-others-in-resigning-as-special-envoy-to-northern-ireland.

President Biden moved quickly to build out his NSC. He chose as his National Security Advisor Jake Sullivan, who had been then-Vice President Biden's national security advisor and a senior State Department official under then-Secretary of State Hillary Clinton.[294] President Biden decided to elevate the homeland security advisor position while installing the first deputy national security advisor for cyber and emerging technology.[295] The President also decided to elevate the position of Director of the U.S. Agency for International Development to membership on the NSC.[296] This was little surprise, given who the President's nominee for the role was: former U.N. Ambassador Samantha Power.[297] Moreover, the Biden NSC's early moves have evinced a strong focus on China; *Axios* reported that "[v]irtually every team in" President Biden's NSC would "incorporate China into their work," and that the Indo-Pacific team would be the largest regional NSC directorate.[298] But perhaps the most consequential shift will be the Biden NSC's inclusion of a focus on the domestic impact of the NSC's work as the White House seeks to "break down barriers between national security and domestic policy."[299]

V. Conclusion

Over the course of his presidency, President Trump made his mark on the history of the National Security Council. So did the National Security Advisors he chose to lead the entity. Michael Flynn, H.R. McMaster, John Bolton, and Robert O'Brien each enjoyed successes and faced challenges as National Security Advisors under President Trump. Their experiences are instructive when considering how best to manage the NSC going forward. In the years to come, the NSC will continue to provide presidents with critical coordination and advice on national security policy. It remains to be seen the direction in which President Biden and his team will take the NSC, but early signs indicate that some key changes are in store for the influential White House component. The Scowcroft "honest broker" model remains a high ideal for national security advisors, and time will tell whether lessons learned from the experience of the NSC under President Trump can permanently solidify a Scowcroft-ian approach to the Council.

294 *See* Margaret Brennan, *Biden to Appoint Jake Sullivan as National Security Adviser*, CBS News, Nov. 23, 2020, https://www.cbsnews.com/news/biden-jake-sullivan-national-security-adviser/.

295 *See* David E. Sanger, *Biden to Restore Homeland Security and Cybersecurity Aides to Senior White House Posts*, N.Y. Times, Jan. 13, 2021, https://www.nytimes.com/2021/01/13/us/politics/biden-homeland-security-cybersecurity.html.

296 *See* Andrea Mitchell, *Biden to Nominate Samantha Power to Lead Foreign Aid Agency*, NBC News, Jan. 13, 2021, https://www.nbcnews.com/politics/2020-election/biden-nominate-samantha-power-lead-foreign-aid-agency-n1254023.

297 *See id.*

298 *See* Bethany Allen-Ebrahimian, *Biden's Whole-of-National Security Council Strategy*, Axios, Feb. 2, 2021, https://www.axios.com/bidens-whole-of-national-security-council-strategy-431454bb-43dc-45ef-9ccc-8a3f229ba598.html.

299 Karen DeYoung, *Biden's NSC to Focus on Global Health, Climate, Cyber and Human Rights, as Well as China and Russia*, Washington Post, Jan. 8, 2021, https://www.washingtonpost.com/national-security/biden-nsc-covid-climate-cyber-china/2021/01/08/85a31cba-5158-11eb-83e3-322644d82356_story.html.

Should the Supreme Court Take Note of "Th' Iliction Returns" Next Time It Addresses Race-Preferential Admissions Policies?

By Gail Heriot & Alexander Heideman

Civil Rights Practice Group

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Other Views:

• Amaka Okechukwu, *Prop 16's Defeat and the Future of Affirmative Action*, Inside Higher Ed, Nov. 30, 2020, https://www.insidehighered.com/admissions/views/2020/11/30/despite-defeat-prop-16-affirmative-action-remains-important-tool-society.

• Editorial, *Californians, Vote Yes on Prop 16*, N.Y. Times, Oct. 27, 2020, https://www.nytimes.com/2020/10/27/opinion/california-prop-16-affirmative-action.html.

• Eric Hoover, *Failure of California's Prop. 16 Underscores Complexity of Affirmative-Action Debate*, Chronicle, Nov. 4, 2020, https://www.chronicle.com/article/failure-of-californias-prop-16-underscores-complexity-of-affirmative-action-debate.

• Abbygail de Castro, *Students and faculty voice concerns after Prop. 16 was rejected*, The Collegian, Dec. 1, 2020, https://collegian.csufresno.edu/2020/12/students-and-faculty-voice-concerns-after-prop-16-was-rejected/#.YE-dLZ1KjD4.

"[N]o matter whether th' constitution follows th' flag or not, th' Supreme Court follows th' iliction returns."

– Mr. Dooley[1]

Mr. Dooley—the fictional creation of early 20th-century journalist Finley Peter Dunne—was at times too cynical. It was unfair for him to suggest that the Supreme Court simply follows the election returns—though, alas, over its long history, there have certainly been occasions when the Court unjustifiably bowed to public opinion.[2] On the whole, however, had members of the Court taken a bit of umbrage at Mr. Dooley's cynicism, it would have been understandable.

On the other hand, no less a Supreme Court authority than Justice Sandra Day O'Connor, in her 2003 book *The Majesty of the Law,* has taken the position that sometimes popular sentiments really should make a difference to courts:

> [R]eal change, when it comes, stems principally from attitudinal shifts in the population at large. Rare indeed is the legal victory—in court or legislature—that is not the careful byproduct of an emerging social consensus."[3]

Justice O'Connor did not fully elaborate on her point, and we won't try to put words in her mouth. Obviously, the Constitution and popular sentiments are two different things. Sometimes they conflict. When they do, it's the Court's job to stand firmly with the Constitution. That's why we have a Constitution. Still, that doesn't rule out the possibility that there may be occasions on which the Supreme Court should take public sentiment into account.

Legal philosophers could probably write treatises on this topic: Under what circumstances should courts consider public opinion? When should they not? This short essay is not such a treatise. Instead, it will focus on how Justice O'Connor's statement was interpreted at the time her book was published and why that may have relevance to future cases coming before the Court, perhaps even as soon as the spring of 2021.

The Majesty of the Law was arriving at bookstores just about the time of oral argument in *Grutter v. Bollinger* (2003).[4] Two months later, when the Court announced its decision upholding the University of Michigan Law School's race-preferential

1 Elmer Ellis, Mr. Dooley's America: A Life of Finley Peter Dunne 162 (1941).

2 *See, e.g.*, Giles v. Harris, 189 U.S. 475 (1903); Plessy v. Ferguson, 163 U.S. 537 (1896).

3 Sandra Day O'Connor, The Majesty of the Law: Reflections of a Supreme Court Justice 166 (2003).

4 539 U.S. 306 (2003). Oral argument in *Grutter* was held on April 1, 2003. *Grutter v. Bollinger*, Oyez, https://www.oyez.org/cases/2002/02-241. *See* Publisher's Weekly, Book Notice: The Majesty of the Law: Reflections of a Supreme Court Justice, https://www.publishersweekly.com/9780375509254 (giving publication date as April 1, 2003).

admissions policy, O'Connor turned out to be the opinion's author, and commentators naturally looked to her book to help explain that result.

The best example is the *New York Times*. Two days after the *Grutter* decision, reporter Linda Greenhouse cited O'Connor's words in *The Majesty of the Law* and drew the following inference:

> For Justice O'Connor, the *broad societal consensus in favor of affirmative action in higher education* as reflected in an outpouring of briefs on Michigan's behalf from many of the country's most prominent institutions was clearly critical to her conclusion . . . .[5]

We will raise four points in response to Greenhouse's inference:

I. There was no such "broad societal consensus" in favor of race-preferential admissions policies in 2003. Indeed, public opinion was—and remains—opposed to such policies. Thus, if Greenhouse was correct about O'Connor's reasoning, O'Connor was mistaken.

II. Even if there had been such a "broad societal consensus," it should not have excused the Court from its obligation to strictly scrutinize the University of Michigan's racially discriminatory admissions policy. Unfortunately, by purporting to "defer" to the university's judgment on whether the need for racial diversity in education is "compelling," Justice O'Connor essentially admitted that the Court was not scrutinizing the policy with the level of care that had become customary in racial discrimination cases up to that point.[6]

III. With the overwhelming rejection of California's Proposition 16 in the November 2020 elections, it has become all the more clear that a broad societal consensus really does exist on race-preferential admissions policies, but it's against such policies, not in favor. Certainly, therefore, if Justice O'Connor based her opinion in *Grutter* in part on the belief that Americans were favorably disposed toward race-preferential admissions (at least for the short term), that reasoning can be safely dismissed now. With *Students for Fair Admissions v. President and Fellows of Harvard College* likely to come before the Court in the near future, the lesson of Proposition 16's defeat should be (and likely will be) drawn to the Court's attention.[7]

IV. Unlike a broad agreement *in favor* of a racial preferential admissions policies, a broad agreement *against* them is something courts arguably *should* take into account. How can a governmental interest be compelling (as it is required to be under the applicable legal standard of strict scrutiny) if most Americans don't find it even persuasive?

I. Race-Preferential Admissions Policies Have Never Been Popular

Greenhouse noted that the amicus curiae briefs filed in *Grutter v. Bollinger* were strongly on the side of the University of Michigan.[8] True enough. By our count, there were 69 such briefs submitted in support of Michigan, while only 19 (four of which were filed at the petition stage) supported plaintiff Barbara Grutter. That understates the number of "persons" submitting briefs. One brief supporting the university was submitted on behalf of 13,922 law students;[9] another was submitted on behalf of 28 private colleges and universities.[10] None of the briefs in support of the plaintiff was submitted on behalf of that many individuals or institutions.[11]

But that's a silly way to gauge "societal consensus." It should go without saying that those motivated to file amicus curiae briefs in the Supreme Court are not a cross-section of American opinion on the topic being litigated. Many of the amici supporting the university were either themselves colleges or universities or administrators at a college or university. Many others were government entities or government officials. Many of both sets of amici were practitioners of race preferences themselves. It hardly makes sense to view them as representative of the public at large. Many of the rest were students, alumni, or associations of students or alumni. A large number of those likely perceived themselves to be beneficiaries of the admissions policies at issue. Again, it makes no sense to view them as a cross-section of the general public.

A better—though admittedly imperfect—way to gauge public opinion is through public opinion polls. Here the evidence is consistent: In the decades before and after *Grutter*, polls showed, over and over again, that Americans oppose race-preferential admissions. For example, a Gallup poll asked the following question in 2003, the same year that *Grutter* was decided:

5 Linda Greenhouse, *The Supreme Court: The Justices: Context and the Court*, N.Y. Times, June 25, 2003, at A1 (italics supplied). The passage referring to Justice O'Connor's book read:

> In her new book "The Majesty of the Law," a collection of essays published the week after the Michigan cases were argued in April, Justice O'Connor wrote that "courts, in particular, are mainly reactive institutions." Noting that "change comes principally from attitudinal shifts in the population at large," she said that "rare indeed is the legal victory—in court or legislature—that is not a careful byproduct of an emerging social consensus."

6 *Compare* Ozan O. Varol, *Strict in Theory, but Accommodating in Fact?*, 75 Mo. L. Rev. 1243 (2010) *with* Gerald Gunther, *Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972) (calling the strict scrutiny standard "'strict' in theory and fatal in fact").

7 *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, No. 19-2005, 2020 WL 6604313, at *1 (1st Cir. Nov. 12, 2020); e-mail from Edward Blum, President, Students for Fair Admissions (Nov. 12, 2020, 06:37 PST) (on file with authors).

8 Greenhouse, *supra* note 5.

9 Brief of 13,922 Current Law Students at Accredited American Law Schools as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241).

10 Brief of Carnegie Mellon University and 37 Fellow Private Colleges and Universities as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241).

11 On the other hand, one of the briefs supporting Ms. Grutter was submitted by the Solicitor General on behalf of the United States, which could be viewed as constructively speaking for 290 million Americans.

> Which comes closer to your view about evaluating students for admission into a college or university—applicants should be admitted solely on the basis of merit, even if that results in few minority students being admitted (or) an applicant's racial or ethnic background should be considered to help promote diversity on college campuses, even if that means admitting some minority students who otherwise would not be admitted?[12]

In responding to that question, 69% of Americans choose "solely on the basis of merit"; only 27% thought race and ethnicity should be considered. That result was no fluke. Gallup asked precisely the same question in 2007, 2013, and 2016.[13] Each time, the result was the same: Americans rejected the consideration of race or ethnicity by a margin of at least 2 to 1. Earlier polls are consistent with that result.[14] An even more recent poll by the Pew Research Center is also consistent. According to that poll, 73% of Americans said colleges and universities should not consider race or ethnicity when making decisions about student admissions.[15]

This is why supporters prefer to talk about the issue in terms of euphemisms—like "affirmative action"—which mean different things to different people.[16] As one jurist put it:

> The term "affirmative action" has entered our common parlance . . . . Although the frequent topic of discussion, the term is rarely defined in advance so as to form a common base for intelligent discourse. This lack of definition (sometimes perhaps deliberate . . .) is responsible for much of the confusion, misunderstanding, and disagreement regarding the subject.[17]

Under the circumstances, it is unsurprising that "affirmative action" polls better for supporters of race-preferential admissions than does any more clarifying description of race-preferential admissions policies.[18]

Voter behavior does not always track opinion polls, but in this case it does. In 1996, seven years before *Grutter*, Californians demonstrated their opposition to race-preferential admissions by passing Proposition 209. In doing so, they amended their state constitution to include the following prohibition:

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12 Frank Newport, *Most in U.S. Oppose Colleges Considering Race in Admissions*, Gallup, July 8, 2016, https://news.gallup.com/poll/193508/oppose-colleges-considering-race-admissions.aspx.

13 *Id.*

14 *See* Wash. Post et al., Race and Ethnicity in 2001: Attitudes, Perspectives, And Experiences 22 (2001), https://www.kff.org/other/poll-finding/race-and-ethnicity-in-2001-attitudes-perceptions/ ("In order to give minorities more opportunity, do you believe race or ethnicity should be a factor when deciding who is hired, promoted, or admitted to college, or that hiring, promotions, and college admissions should be based strictly on merit and qualifications other than race or ethnicity?" Of the 1,709 adults polled, 5 percent responded that "race or ethnicity should be a factor," 3 percent said "don't know," and 92 percent said "should be based strictly on merit and qualifications other than race/ethnicity."); Larry D. Hatfield, *Prop 209 Leads by 14% in Poll*, S.F. Examiner, Nov. 4, 1996, https://www.sfgate.com/news/article/Prop-209-leads-by-14-in-poll-3116305.php; Paul Sniderman & Thomas Piazza, The Scar of Race (1993) (citing a number of polls indicating that race-preferential admissions have little support among members of the public).

15 *Most Americans Say Colleges Should Not Consider Race Or Ethnicity In Admissions*, Pew Res. Ctr. (Feb. 25, 2019), https://www.pewresearch.org/fact-tank/2019/02/25/most-americans-say-colleges-should-not-consider-race-or-ethnicity-in-admissions/; *see also* Race and Ethnicity in 2001, *supra* note 14 at 22 (finding that 94 percent of whites and 86 percent of African Americans said hiring, promotions, and college admissions should be based "strictly on merit and qualifications other than race/ethnicity").

16 The term "affirmative action" in this context is traceable back to President John F. Kennedy's Executive Order 10,925. That order states in relevant part:

> The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take *affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.*

Exec. Order No. 10,925, 26 Fed. Reg. 1,977 (Mar. 8, 1961) (emphasis added). In context, this refers to training supervisors, posting signs guaranteeing nondiscrimination, supervising hiring officials to ensure that they are not discriminating. The point was to *prevent* preferential treatment, not to promote it. This remains an important meaning of affirmative action. In 1965, President Lyndon Johnson repeated the term "affirmative action" in Executive Order 11,246. 30 Fed. Reg. 12,319 (Sept. 28, 1965). By this time, various kinds of "outreach" were also being talked about as an "affirmative action" that employers could take to ensure opportunity. Outreach, however, is qualitatively different from the kind of preferential treatment practiced by colleges and universities like the University of Michigan.

In *Lungren v. Superior Court*, a California court pointed out that the term "affirmative action" encompasses much that that is neither discrimination nor preferential treatment (as prohibited by Proposition 209). 48 Cal. App. 4th 435, 55 Cal. Rptr. 2d 690 (Cal. Ct. App. 1996) The opinion concludes that "any statement to the effect that Proposition 209 repeals affirmative action programs would be overinclusive and hence 'false and misleading.'" As proof, it provides the following string citation of definitions:

> (See, e.g., Random House Dict. of the English Language (2d ed. 1987) p. 34, c. 1 ["the encouragement of increased representation of women and minority-group members, especially in employment."]; American Heritage Dict., New College Ed. (1976) p. 22, cl. 1 ["Action taken to provide equal opportunity, as in hiring or admissions, for members of previously disadvantaged groups, such as women or minorities, often involving specific goals and timetables."]; Black's Law Dict. (5th ed. 1983) p. 29, col. 2 ["Employment programs required by federal statutes and regulations designed to remedy discriminatory practices in hiring minority group members; i.e. designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination…."]; Garner, Bryan A., Dict. of Modern Legal Usage (2d ed. 1995) p. 36, c. 1 ["The phrase is sometimes used generically to denote 'a positive step taken,' as well as more specifically to denote 'an attempt to reverse or mitigate past racial discrimination ….'"]; see also 59 Ops. Cal. Atty. Gen. 87, 90-91.).

Lungren, 48 Cal. App. 4th at 442.

17 Dawn v. State Personnel Board, 91 Cal. App. 3d 588, 593, 154 Cal Rptr. 186 (Cal. Ct. App. 1979) (Paras, J. concurring).

18 Jim Norman, Americans' Support for "Affirmative Action" Programs Rises, Gallup, Feb. 27, 2019, https://news.gallup.com/poll/247046/americans-support-affirmative-action-programs-rises.aspx.

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.[19]

Significantly, California was not alone in rejecting racial preferences. Voters in Washington State and Michigan passed similar initiatives in 1998 and 2006, respectively.[20] Voters followed suit in Nebraska in 2008,[21] Arizona in 2010,[22] and Oklahoma in 2012.[23] Only in Colorado in 2008 did such a statewide initiative fail.[24]

No wonder public opinion experts Paul Sniderman and Thomas Piazza were able to write even as early as 1993 that the race-preferential policy agenda "is controversial precisely because most Americans do *not* disagree about it."[25] As these scholars demonstrated, opposition has always been strong.[26]

Far from being a consensus policy, race-preferential admissions have been imposed from the top down. Where voters have had access to an initiative process, it has been possible to overturn it. But in those states in which a popular initiative along the lines of Proposition 209 is not an option, elected officials have often left the policies alone. This, of course, could mean that they favor government institutions having the discretion to discriminate. Alternatively, it could mean that they subscribe to the traditional attitude that legislators should maintain a hands-off position toward institutions of higher learning. But it could also be—and we believe it is—in part the result of the more modern reticence of elected officials to speak out on issues of race, sex, or ethnicity, and instead to leave such matters to the courts. Elected officials are fearful of providing fodder to those eager to tar them as racists.[27] That fear sometimes prevents them from acting in the best interests of the country.

The one group that is reliably in strong support of race-preferential admissions policies is college and university administrators. But why wouldn't they approve of policies that give them nearly unfettered discretion? Interestingly, at least as of 2003, when the *Grutter* decision came down, the evidence called into question whether even university faculty members supported racial preferences.[28]

II. *Grutter v. Bollinger*'s "Strict Scrutiny Lite"

Even if there had been a "broad societal consensus in favor of affirmative action in higher education," that would not have been cause for the Court to dispense with the application of strict scrutiny to the University of Michigan's discriminatory policies. Among the Court's most important roles is its duty to pull the nation back from the brink when it is tempted by the path of race discrimination. That obligation is what the strict scrutiny standard is all about. But did the Court fulfill that role in *Grutter*? We believe it did not. Indeed, Justice O'Connor's opinion makes that plain.

Grutter and its companion case, *Gratz v. Bollinger*,[29] were arguably the most important cases before the Court in the

19 Cal. Const. art. I § 31.

20 *See generally* Carl Cohen, *The Michigan Civil Rights Initiative and the Civil Rights Act of 1964*, 105 Mich. L. Rev. First Impressions 117 (2006). *See also* Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN), 572 U.S. 291 (2014).

21 *Official Results of Nebraska General Election – November 4, 2008*, Neb. Sec'y of State (2008), https://sos.nebraska.gov/sites/sos.nebraska.gov/files/doc/elections/2008/2008%20General%20Canvass%20Book.pdf; Melissa Lee, *Affirmative Action Ban Passes*, Lincoln J. Star, Nov. 5, 2008, at 7A.

22 *State of Arizona Official Canvass: 2010 General Election – November 2, 2010*, Ariz. Sec'y of State (2010), https://apps.azsos.gov/election/2010/General/Canvass2010GE.pdf; *Affirmative-Action Ban is a Winner at Ballot Box*, Ariz. Daily Star, Nov. 3, 2020, at A10.

23 *Federal, State, Legislative and Judicial Races General Election — November 6, 2012*, Okla. State Election Bd., https://www.ok.gov/elections/support/12gen_seb.html (last visited Feb. 9, 2021); Silas Allen, *State Colleges Prepare for Affirmative Action Ban*, Oklahoman, Nov. 8, 2012, at 7A.

24 Tim Hoover, *Amendment 46 Fizzling Out*, Denver Post, Nov. 6, 2008, https://www.denverpost.com/2008/11/06/amendment-46-fizzling-out/.

25 Sniderman & Piazza, *supra* note 14. Later, Dr. Sniderman partnered with Edward G. Carmines to study the correlation between opposition to racial preferences and racial intolerance. Lo and behold, it turns out the accusations that preference opponents are motivated by racism are untrue. Among the group found to be in the top one percent in racial tolerance, opposition to preferential treatment was very high. Approximately 80 percent opposed preferential treatment in hiring, and more than 60 percent opposed quotas in college admissions. Sniderman and Carmines wrote that "the fundamental fact is that race prejudice, far from dominating and orchestrating the opposition to affirmative action, makes only a slight contribution to it." Paul M. Sniderman & Edward G. Carmines, Reaching Beyond Race 20-22 (1997).

26 At the same time, Sniderman and Piazza found this opposition tended to be firmer and less malleable than the positions taken by poll respondents on other issues. For example, they asked white poll respondents who opposed racial quotas in higher education if their views would change "if it mean[t] that hardly any blacks would be able to go to the best colleges and universities." They found opinions changed less on this issue than on what they called "more traditional forms of governmental assistance for the disadvantaged." Sniderman & Piazza, *supra* note 14, at 142.

27 *See, e.g.*, Brent Budowsky, *Newt Gingrich's Racist Campaign is Dying*, The Hill, Mar. 22, 2012, https://thehill.com/blogs/pundits-blog/presidential-campaign/217563-newt-gingrichs-racist-campaign-is-dying; Mehdi Hasan, *The Ignored Legacy of George H.W. Bush: War Crimes, Racism, and Obstruction of Justice*, The Intercept, Dec. 1, 2018, https://theintercept.com/2018/12/01/the-ignored-legacy-of-george-h-w-bush-war-crimes-racism-and-obstruction-of-justice/; Joan McCarter, *Mitch McConnell is Really Letting His Racism Show These Days*, Daily Kos, May 15, 2020, https://www.dailykos.com/stories/2020/5/15/1945362/-McConnell-s-really-letting-his-racism-show-these-days; Robert Moore, *Frist for the Mill? Senate Majority Leader Aspirant Has Race-Related Controversy in His Past*, Ctr. for Pub. Integrity, Dec. 20, 2002, https://publicintegrity.org/accountability/frist-for-the-mill-senate-majority-leader-aspirant-has-race-related-controversy-in-his-past/.

28 *See, e.g.*, Thomas Wood, *Who Speaks for Higher Education on Group Preferences?*, 14 Academic Questions 31 (Spring 2001); Robert A. Frahm, *Debate Erupts Over UConn Survey Poll: Professors Oppose Racial "Preferences,"* Hartford Courant, April 19, 2000; Carl A. Auerbach, *The Silent Opposition of Professors and Graduate Students to Preferential Affirmative Action Programs: 1969 and 1975*, 72 Minn. L. Rev. 1233 (1988). We are unaware of any polling data that contradicts the data in these sources, but to our knowledge there have been no additional polls of academics on the subject.

29 539 U.S. 244 (2003).

2002-03 term. They received considerable media attention.[30] *Grutter* focused on the admissions policy at University of Michigan's law school, whereas *Gratz* focused on the admissions policy at University of Michigan's College of Literature, Science, and the Arts.

In neither case was the university able to deny that it was giving preferential treatment in admissions based on race. It obviously was, and it was just as obvious that that racial preference was not merely a tiny thumb on the scale. The level of preferential treatment was very high in both cases. For example, in *Gratz*, African American applicants with a B average (3.0) were treated the same as Asian American or white applicants with an A average (4.0) all other things being equal.[31]

Instead of denying that it was discriminating, the university argued that having racially diverse classes was, for pedagogical reasons, a compelling purpose and that its admissions policies were narrowly tailored to achieve that end. Hence, it argued, even if the strict scrutiny standard is applicable, its admittedly discriminatory policies should survive that scrutiny.[32]

Unsurprisingly, the Court held that the strict scrutiny standard did apply (just as it would to any other racially discriminatory state action). But ultimately, the Court held that the law school's admissions policy satisfied the high bar set by that standard. (The *Gratz* case was ultimately decided on a tangential issue and hence was a far less important decision than *Grutter*.)[33]

Rather than closely scrutinizing the university's argument that the pedagogical need for diversity among its students is compelling, the Court announced that it would "defer" to the university's academic judgment on that matter.[34] That allowed the Court to avoid the uncomfortable job of closely analyzing the university's claim. Deference, however, is the opposite of strict scrutiny. The whole point of strict scrutiny is to ensure that race discrimination is only engaged in when the need for it is compelling (and even then only when it is narrowly tailored to serve that compelling need). It is the Court's job to conduct "a most searching examination."[35]

Imagine if the Court had deferred to the academic judgment of the Topeka Board of Education in *Brown v. Board of Education* (1954). We might still be in the throes of Jim Crow. At the time, there was no shortage of educational experts willing to testify that racially segregated education was pedagogically sound.[36]

If the erroneous belief that there was a broad societal consensus that race-preferential admissions policies are desirable had anything to do with the result in *Grutter*, it was a serious error. But even if it didn't, the result was still a serious error. One can imagine the Court declining to grant a petition for certiorari in a case that it views as too hot to handle. But watering down the strict scrutiny standard by deferring to the discriminating party on the question of whether the argument for such discrimination is compelling is inexcusable.

III. The Defeat of Proposition 16

Here's some news: On November 3, 2020, California voters shocked the state's political establishment by rejecting Proposition 16. It wasn't close: 57.2% voted against; only 42.8% in favor.[37]

Proposition 16 would have stripped the state constitution of the words put there by Proposition 209 in 1996. It would thus have *permitted* the government and public institutions to discriminate against or grant preferential treatment to persons on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, and public contracting.[38]

The final tally suggests that racial preferences are less popular than they were in 1996.[39] Proposition 209 itself had passed with 54.55% of the vote, though its clones in other states tended to

30 *See, e.g.*, Karen Branch-Brioso, *Top Court Backs Affirmative Action*, St. Louis Post-Dispatch, June 24, 2003, at A1; James M. O'Neill, *Court Upholds Use of Race in Admissions*, Phila. Inquirer, June 24, 2003, at A1; David G. Savage, *Court Affirms Use of Race in University Admissions*, L.A. Times, June 24, 2003, at A1.

31 *Gratz*, 539 U.S. 244; Plaintiff's Memorandum of Law in Support of Motion for Partial Summary Judgment on Liability, Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (No. 97-CV-75231-DT), *available at* https://www.yumpu.com/en/document/read/7622869/barbara-grutter-plaintiff-vs-lee-bollinger-jeffrey-. *See also* Gail Heriot & Carissa Mulder, *The Sausage Factory*, *in* A Dubious Expediency: How Race Preferences Damage Higher Education (Gail Heriot & Maimon Schwarzschild eds., 2021).

32 No legal doctrine is more familiar to students of constitutional law than the strict scrutiny test. Its requirements of a "compelling purpose" and "narrow tailoring" are the stuff of which multiple choice questions on the bar examination can be made. *See* John E. Nowak & Ronald D. Rotunda, Constitutional Law 639 (6th ed. 2000). *See also* 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).

33 Jennifer Gratz won her case, but only because the admissions policy in that case was considered by the Court to be overly formulaic. The *Gratz* decision has had little to no effect on race-preferential admissions policies, since that aspect of any policy could be easily eliminated without reducing the level of racial discrimination in the least.

34 *Grutter*, 539 U.S. at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.").

35 Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 223 (1995) (quoting Wygant v. Jackson Bd. of Educ., 476, U.S. 267, 273 (1984) (plurality opinion)).

36 In *Fisher v. Univ. of Texas*, 570 U.S. 297 (2013), Justice Thomas stated,

> Indeed, the argument that educational benefits justify racial discrimination was advanced in support of racial segregation in the 1950s, but emphatically rejected by this Court. And just as the alleged educational benefits of segregation were insufficient to justify racial discrimination then, *see Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), the alleged educational benefits of diversity cannot justify racial discrimination today.

570 U.S. at 320 (Thomas, J. concurring).

37 *Official Declaration of the Vote Results on November 3, 2020, State Ballot Measures*, Cal. Sec'y of State, https://elections.cdn.sos.ca.gov/sov/2020-general/sov/official-dec-vote-results-bm.pdf (last visited Feb. 9, 2021).

38 *Prop 16*, Cal. Sec'y of State, https://voterguide.sos.ca.gov/propositions/16/ (last visited Feb. 9, 2021).

39 *See* Conor Friedersdorf, *Why Californians Rejected Racial Preferences, Again*, The Atlantic (Nov. 10, 2020), https://www.theatlantic.com/ideas/archive/2020/11/why-california-rejected-affirmative-action-again/617049/.

do better. For example, Washington State's passed with 58.22% of the vote, Michigan's with 57.92%, Nebraska's with 57.56%, Arizona's with 59.5%, and Oklahoma's with 59.2%.[40]

It wasn't always obvious—even to its most dedicated opponents—that Proposition 16 was doomed to failure. For a while, Proposition 16 had looked like a train coming downgrade. It flew out of the state's legislature, garnering more than two thirds of the vote in each house. A plethora of influential government officials, businesses, newspapers, and advocacy organizations endorsed it, including now-Vice President Kamala Harris, U.S. Senators Dianne Feinstein and Bernie Sanders, Governor Gavin Newsom, and the mayors of Los Angeles and San Francisco.[41]

Supporters of Proposition 16, buoyed by the protests of racial injustice following the death of George Floyd earlier in the year, urged Californians to "cast their ballots for a simple measure advancing that cause: undoing two decades of educational and economic setbacks for Black and Latino Californians."[42] They "dwarfed their opponents in fundraising by nearly a 14-1 margin."[43] Big businesses and big labor unions showered money on the "Yes on 16" campaign. Among those donating were Pacific Gas & Electric ($250,000), Kaiser Foundation Health Plan, Inc. ($1,500,000), United Domestic Workers of America Issues PAC ($100,000), Saleforce.com, Inc. ($375,000), SEIU Local 2015 Issues PAC ($50,000), and Genentech USA ($100,000).[44]

By contrast, the opposition to Proposition 16 had to operate on a shoestring. Unlike the Yes on 16 campaign, however, the opposition had an astonishing number of reliable volunteers. They organized car rallies during the pandemic; they distributed yard signs. They were active on Facebook, Twitter, Instagram, WeChat, YouTube, and TikTok. A large number of these volunteers were Asian American, more often than not Chinese immigrants or the children of Chinese immigrants. Proposition 16 and *Students for Fair Admissions v. Harvard University* were a political awakening for many of these volunteers. They correctly understood the impact that Proposition 16 could have on their children. They got the word out.

Consequently, despite the overwhelming advantage in cash and endorsements by political officials that Proposition 16's proponents had, they still failed to convince California voters of their cause; it showed at the ballot box. Voters in this haven of progressive politics soundly rejected the state's effort to repeal the words added to the state constitution by Proposition 209.

Since the vote, apologists have attributed the loss to a distracting election cycle, voters' inability to keep track of issues, and "abundant misinformation concerning affirmative action."[45] But the data show that racial preferences are disliked by Californians of almost every stripe. About one-third of voters who supported Joe Biden for president also rejected Proposition 16.[46]

A post-election poll conducted by Strategies 360 showed that the notion that voters just didn't understand is a fantasy. In that poll, respondents were first asked whether they thought Proposition 16, which was described as "the proposal to permit government decision making policies to consider race, sex, color, ethnicity, or national origin in order to address diversity by repealing constitutional provision prohibiting such policies," was a good or a bad idea. Only 33% thought it was a good idea, with 44% responding that it was a bad idea and 22% not sure. Respondents were next told the following:

> Sometimes the language on the ballot can be confusing, so here is a little more information about Proposition 16.
>
> California law currently bans the use of policies and practices within government that seek to include particular groups based on their race, gender, ethnicity, and national

40 California Proposition 209, Affirmative Action Initiative (1996), https://ballotpedia.org/California_Proposition_209,_Affirmative_Action_Initiative (1996); Washington Initiative 200, Affirmative Action Initiative (1998), https://ballotpedia.org/Washington_Initiative_200,_Affirmative_Action_Initiative (1998); Michigan Proposal 2, Affirmative Action Initiative (2006), https://ballotpedia.org/Michigan_Proposal_2,_Affirmative_Action_Initiative (2006); Nebraska Measure 424, Affirmative Action Initiative (2008), https://ballotpedia.org/Nebraska_Measure_424,_Affirmative_Action_Initiative (2008); Arizona Proposition 107, Affirmative Action Amendment (2010), https://ballotpedia.org/Arizona_Proposition_107,_Affirmative_Action_Amendment (2010); Oklahoma State Question 759, Affirmative Action Amendment (2012), https://ballotpedia.org/Oklahoma_State_Question_759,_Affirmative_Action_Amendment (2012).

41 *Endorsements*, VoteYesOnProp16, https://voteyesonprop16.org/endorsements/ (last visited Feb. 9, 2021) (listing many other prominent endorsers, including U.S. Rep. Karen Bass, California Secretary of State Alex Padilla, Pete Buttigieg, Tom Steyer, several local governments, the *New York Times*, the *Los Angeles Times*, the *San Francisco Chronicle*, two co-founders of Black Lives Matter, the AFL-CIO, the Anti-Defamation League, the California Democratic Party, the California Teachers Association, Natural Resources Defense Council, Sierra Club California, the ACLU of California, several chambers of commerce, the San Francisco 49ers, the San Francisco Giants, Twitter, Uber, Facebook, United Airlines, Wells Fargo, Yelp, and Instacart).

42 Editorial, *Californians, Vote Yes on Prop 16*, N.Y. Times, Oct. 27, 2020, https://www.nytimes.com/2020/10/27/opinion/california-prop-16-affirmative-action.html; *see also* Friedersdorf, *supra* note 39, ("In 2020, in the heat of the George Floyd protests, the California legislature finally succeeded in putting a new affirmative-action proposition on the ballot.").

43 *Yes on Prop. 16 Has Big Fundraising Lead in Effort to Restore Affirmative Action in California*, EdSource, https://edsource.org/2020/yes-on-prop-16-has-big-fundraising-lead-in-effort-to-restore-affirmative-action-in-california/642647 (last visited Feb. 9, 2021).

44 Cal-Access, http://cal-access.sos.ca.gov/ (search Cal-Access search field for "YES ON 16, OPPORTUNITY FOR ALL COALITION, SPONSORED BY CIVIL RIGHTS ORGANIZATIONS," then select "Historical," then select "2019 through 2020," then select "Late and $5000+ Contributions Received").

45 Jeremy Bauer-Wolf, *California Vote Signals Affirmative Action Remains Divisive*, Education Dive, Nov. 4, 2020, https://www.educationdive.com/news/california-vote-signals-affirmative-action-remains-divisive/588433/.

46 Althea Nagai, *Race, Ethnicity, and California Prop 16*, Center for Equal Opportunity, at 13 (2020), https://www.ceousa.org/attachments/article/1380/California%20Proposition%2016.pdf. Opposition wasn't just bipartisan; while certainty would require a thorough quantitative analysis, there is evidence to suggest that Proposition 16 was rejected by majorities of California's Latino/Hispanic voters. For example, in California's Imperial County, which, according to the U.S. Census, is 84.2% Hispanic, 57.9% of voters opposed Proposition 16. State Ballot Measures By County, Cal. Sec'y State, https://elections.cdn.sos.ca.gov/sov/2020-general/sov/58-ballot-measures.pdf; *Imperial County, California*, United States Census Bureau, https://data.census.gov/cedsci/profile?g=0500000US06025 (last visited Feb. 9, 2021).

> origin in areas in which they were underrepresented in the past such as education and employment. In order to address issues of diversity and representation, Prop 16 would have removed this ban and allowed state and local governments to optionally consider factors like race, gender, ethnicity, and national origin in college admissions, public employment, and public contracting. These programs would still be subject to federal laws, meaning that any quota systems would have remained illegal.
>
> Now that you have a little more information, do you think Proposition 16 was a good idea or a bad idea?[47]

The gap between those who viewed it as a good idea and those who viewed it as a bad idea barely changed: 37% viewed it as good idea to 47% who considered it a bad idea. Interestingly, support for the idea dropped slightly among African Americans, while opposition increased markedly. Support edged up slightly for Asian/Pacific Islander Americans, but opposition increased much more.[48]

Why is it so hard to understand why Californians would vote to retain Proposition 209? The answer to that question is that it isn't hard at all for anyone who doesn't insist on interpreting the world through the lens of identity politics. Most California voters—including many who consider themselves left of center—have long known and understood how racial preferences work, and they find them distasteful. They agree with the *Argument Against Proposition 16*, which all voters received in the mail as part of the Official Voter Information Guide. The ballot argument described the kind of discrimination that Proposition 16 would have legalized as "poisonous." "The only way to stop discrimination," it stated, "is to stop discriminating."[49]

California voters know there is a better way. The ballot argument pointed out that "[n]ot every Asian American or white is advantaged," just as "[n]ot every Latino or black is disadvantaged."[50] Pretending otherwise only "perpetuate[s] the stereotype that minorities and women can't make it unless they get special preferences."[51] On the other hand, the ballot argument went on the state:

> [O]ur state also has men and women—of all races and ethnicities—who could use a little extra break. Current law allows for "affirmative action" of this kind so long as it doesn't discriminate or give preferential treatment based on race, sex, color, ethnicity or national origin. For example, state universities can give a leg-up for students from low-income families or students who would be the first in their family to attend college. The state can help small businesses started by low-income individuals or favor low-income individuals for job opportunities.[52]

In view of all this, no one should be surprised at the outcome of the Proposition 16 vote.

Just as California voters were not alone in adopting Proposition 209 more than two decades ago, they are not alone today in rejecting an effort by their legislature to repeal. In 2019, voters in Washington State rejected an effort by the state legislature to effectively repeal that state's version of Proposition 209 (known there as Initiative 200).[53] This has not stopped some state legislators from threatening to start the process all over in 2021.[54]

In contrast to the overwhelming rejection of racial preferences by American voters, the Supreme Court has equivocated on the issue. The Court allowed for racial preferences in higher education in 1978,[55] 2003,[56] and most recently in 2016.[57]

IV. Can the Argument for Racial Preferences Ever Be Considered Compelling If Most Americans Reject It?

It would be one thing for the Court to ignore public opinion when that opinion *favors* discrimination. That's what the courts are supposed to do: Exercise their independent judgment to ensure that the need for a discriminatory law or policy is truly compelling.

But we are in the opposite position: Americans aren't just *unconvinced* that the argument for race-preferential admissions is compelling; they find it unpersuasive altogether. That puts the Court in the extremely awkward position of being more willing

47 *California Statewide Adults, Ages 18+, Conducted November 4–15, 2020*, Strategies 360 (2020), https://www.strategies360.com/wp-content/uploads/2020/11/20-665-Nov-CA-Community-Post-Elect-Survey-Toplines.pdf.

48 *Id.*

49 Ward Connerly, Gail Heriot, & Betty Tom Chu, *Argument Against Proposition 16*, *Official Voter Information Guide: California General Election: Tuesday, November 3, 2020* 29 (2020), https://vig.cdn.sos.ca.gov/2020/general/pdf/complete-vig.pdf. *See also* Parents Involved in Community Schools v. Seattle School District No. 1, 426 F.3d 1162, 1222 (9th Cir. 2005)(en banc)(Bea, J. dissenting), rev'd and remanded, 551 U.S. 701 (2007).

50 *Id.*

51 *Id.*

52 *Id.*

53 *Referendum Measure No. 88*, Wash. Sec'y of State (Nov. 26, 2019), https://results.vote.wa.gov/results/20191105/state-measures-referendum-measure-no-88.html; Joseph O'Sullivan, *With Nearly All Ballots Counted, Voters Reject Washington's Affirmative-Action Measure*, Seattle Times, Nov. 12, 2019, https://www.seattletimes.com/seattle-news/politics/with-nearly-all-ballots-counted-voters-reject-washingtons-affirmative-action-measure/.

Private citizens who advocate repeal had tried to gather the signatures necessary to *force* the legislature to repeal Initiative 200 or to put the matter on the ballot again in 2021. As of the December 30, 2020 deadline, however, that effort appears to have failed since its supporters did not turn over to the Washington Secretary of State the number of signatures needed. Jackie Mitchell, *Washington Initiative Signature Passes with No Campaigns Submitting Signatures*, Ballotpedia News, Jan. 5, 2021, https://news.ballotpedia.org/2021/01/05/washington-initiative-signature-deadline-passes-with-no-campaigns-submitting-signatures-2/.

54 E-mail from WA Asians for Equality to Gail Heriot (Jan. 20, 2021) (on file with authors). If the legislature does put the repeal process in motion again and passes a repeal, opponents of repeal will have to gather signatures again to place the issue on the ballot. The number of signatures required will be based on the number of voters who voted in the most recent election (November 2020).

55 Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978).

56 *Grutter*, 539 U.S. at 306.

57 *Fisher*, 136 S. Ct. 2198.

to tolerate state-sponsored race discrimination than the American people. For almost a century, its proper role in enforcing the Fifth and Fourteenth Amendments has been to pull us back from race discrimination, knowing that such discrimination, no matter how popular it seems at the time, is something we always come to regret. In *Grutter*, however, the Court did the opposite—it delivered the nation, kicking and screaming, into the hands of state university officials bent on discriminating.

If the purpose of the strict scrutiny doctrine is to create a strong presumption against race discrimination and in favor of race neutrality, then for the Supreme Court to find an interest to be compelling that the public consistently rejects is wrongheaded.[58] The fact that the public opposes race-preferential admissions policies is reason enough, by itself, to find the argument for them insufficient to meet strict scrutiny.

V. Conclusion

In 2003, Justice Sandra Day O'Connor, in her majority opinion in *Grutter v. Bollinger*, wrote that "[t]he Court expects that 25 years from now, the use of racial preferences will no longer be necessary."[59] But the year 2028 is fast approaching, and preferences do not show signs of abating. To the contrary, the little evidence that exists suggests that preferences increased after *Grutter*.[60]

As *Students for Fair Admissions v. Harvard University* comes before the Court on a petition for certiorari,[61] perhaps the Court will remember a different assertion by Justice O'Connor in *The Majesty of the Law*: "Justice moves slowly (especially in a federal system where multiple courts may be entitled to review the issue before we do), so the Court usually arrives on the scene some years late."[62] American voters have consistently rejected the use of racial preferences for decades, and have now—after decades of experience without those preferences—done so in California by increased margins. It may be time for the Court to do likewise.

58 *See* Heriot, *Strict Scrutiny, Public Opinion, and Affirmative Action on Campus*, *supra* note 32.

59 *Grutter*, 539 U.S. at 310.

60 Althea K. Nagai, *Racial and Ethnic Preferences in Undergraduate Admissions at the University of Michigan*, Center for Equal Opportunity (Oct. 17, 2006) (showing that preferences grew at the University of Michigan after the *Gratz* decision), http://www.ceousa.org/attachments/article/548/UM_UGRAD_final. pdf.

61 Petition for Writ of Certiorari, Students for Fair Admissions v. President and Fellows of Harvard College, No. ____ (Feb. 25, 2021), *available at* https://www.supremecourt.gov/DocketPDF/20/20-1199/169941/20210225095525027_Harvard%20Cert%20Petn%20Feb%2025.pdf.

62 The Majesty of the Law, *supra* note 3, at 15.

Last Hurrah for the Minimalist Court?

By Donald A. Daugherty, Jr.

Litigation Practice Group

A Review of:

SCOTUS 2020: Major Decisions and Developments of the U.S. Supreme Court, edited by Morgan Marietta (Palgrave Macmillan), https://www.palgrave.com/gp/book/9783030538507

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Other Views:

• Adam Feldman, *Final Stat Pack for October Term 2019 (updated)*, SCOTUSblog, July 10, 2020, https://www.scotusblog.com/2020/07/final-stat-pack-for-october-term-2019/.

• Leah Litman, *Progressives' Supreme Court Victories Will Be Fleeting*, The Atlantic (July 14, 2020), https://www.theatlantic.com/ideas/archive/2020/07/court-gave-progressives-hollow-victories/614101/.

• Adam Liptak, *In a Term Full of Major Cases, the Supreme Court Tacked to the Center*, N.Y. Times, July 10, 2020, https://www.nytimes.com/2020/07/10/us/supreme-court-term.html.

• Ilya Shapiro, *Foreword: The Roberts Court*, Cato Supreme Ct. Rev., ix (2020), https://www.cato.org/sites/cato.org/files/2020-09/2020-supreme-court-review_foreword.pdf.

SCOTUS 2020: Major Decisions and Developments of the U.S. Supreme Court offers an evenhanded, thoughtful overview of the Supreme Court's October 2019 Term. The book recaps the Term's most important decisions, with each chapter addressing a different case and written by a different author. *SCOTUS 2020* is accessible to nonlawyers and useful either as a pedagogical tool for learning about the Court, or for readers wanting a recap of the Term without wading through the opinions in all 16 cases it considers.

In welcome contrast to some other Supreme Court term reviews, the *SCOTUS 2020* writers focus on the decisions themselves (and related legal issues), and their analyses resist ranging into speculation about the motives of individual Justices, or other chambers intrigue. While most of the authors are conventional academics, there appears to have been a real effort to offer a diversity of viewpoints, resulting in an overall balanced discussion. And notwithstanding different authors covering each case, common themes about the Term emerge over the course of the book.

In his Introduction, editor Morgan Marietta observes that the Term "was the most eventful in decades," with significant decisions in areas like employment discrimination, immigration, administrative law, religious liberty, and separation of powers. For the first time since Justice Antonin Scalia passed in early 2016, there was no distraction by questions about filling an open seat, and the composition of the Court remained stable.

Although the Term unfolded against the backdrop of the 2020 presidential election, the campaign plays only a small role in the book, with a brief discussion in the conclusion of stay requests in five election-related cases on the shadow docket. Similarly, the case reviews aren't distorted by an obsession with former President Donald Trump, which would quickly have left them dated.

Court operations were, of course, affected by the pandemic, with no in-person oral arguments after early March. Still, the Term had more blockbuster cases than the three previous ones, even though, as a result of COVID, the Court only rendered 61 decisions on the merits, which is low even under Chief Justice John Roberts. Also because of the pandemic, 10 cases were rescheduled to be heard in the October 2020 Term, and several opinions were not issued until July, which is the latest a term had gone in decades.

On the whole, the Term's decisions generally balanced out to be fairly centrist, offering something for both political conservatives and political liberals. This is true notwithstanding the fact that there was a clear majority of Justices who are considered conservative. Furthermore, as noted in *SCOTUS 2020*, Republican presidents have appointed 11 of the 15 (now, 12 of 16) Justices to take the bench since 1973; given that there has been no sharp right turn over the last 47 years, this data point undermines any contention that these Justices are beholden to the politics of whoever nominated them. Despite claims over the

years that a conservative revolution from the Court is nigh, we're still waiting for it, which gives the lie to any current forecasts of an imminent hard shift to the right.

Although with the addition of Amy Coney Barrett in Fall 2020, it may no longer be accurate to characterize this as the "Roberts Court," there is no question that the Chief Justice was a decisive, but moderating, presence in the Term. He was in the majority in 97% of the cases decided, including significant 5-4 decisions as discussed below. Also as discussed below, the Roberts Court can be defined by its minimalistic, incremental approach, as reflected by, for example, the fact that it strikes down federal laws as unconstitutional and overturns precedent at a much lower rate than the Warren, Burger, and Rehnquist Courts did.

Marietta observes that some of the Term's most significant decisions turned on issues of statutory interpretation. He usefully describes the differences between interpretive methods that focus on the purpose of the statute (even if that involves looking to extratextual sources) and those holding that judges must determine the law based on the statute's text. The latter is affiliated with the textualist/originalist approach, and there is little doubt that it is now preferred by most of the Justices, especially those described as conservative.

Over the decades that it has gained support as an interpretive method, textualism/originalism has been subjected to thorough, constructive criticism, and this has made it a more robust theory today. For example, after early references to the original "intent" behind provisions of the Constitution were sometimes derided as efforts to delve into the crania of the Founding Fathers, originalists shifted their focus to the original public meaning of these provisions. Similarly, concern about the accuracy of common textualist tools (e.g., contemporaneous dictionaries) is being addressed through the use of new tools (e.g., corpus linguistics). In the meanwhile, coherent, viable alternatives are few, and they often seem like mere covers for outcome-driven Posnerism.

At the same time, the textualist/originalist approach has never promised that it always leads inexorably to a single possible legal conclusion, nor that that conclusion will necessarily be "conservative" as a policy matter. Relatedly, as in previous terms, the conservative Justices were much less predictable this Term than the liberal ones. This is shown by the first case discussed in *SCOTUS 2020*, *Bostock v. Clayton County*.

Julie Novkov writes that *Bostock* was a landmark win for LGBT rights, and a "surprise victory" for many who believed the Court was heading in a more conservative direction after the addition in Fall 2018 of "Federalist Society stalwart" Brett Kavanaugh. The opinion was authored by another such stalwart, Neil Gorsuch, who was joined in a 6-3 majority by the Chief Justice and the four liberal Justices.

The issue in the case was whether the provision in Title VII making it unlawful to "discriminate against" an employee "because of . . . sex" prohibits termination based on sexual orientation or transgender status. Finding that it does, Gorsuch seemed to divorce textualism from originalism, as *Bostock*'s understanding of the relevant statutory language does not comport with the phrase's ordinary meaning. *Bostock* notwithstanding, "sex discrimination" is universally understood to be something different from "discrimination based on sexual orientation" or "gender identity."

As a general matter, originalism primarily deals with interpreting the text of the Constitution, while textualism applies more to statutory interpretation. At the same time, textualism necessarily includes originalist considerations. The meaning of text as originally understood is the interpretive goal of both, but that is less of challenge with more recent statutes. To the extent that the meanings of words change over time, originalist tools for investigating the original public meaning of those words become more important to interpreting statutes containing them.

Recognizing this, Novkov acknowledges that "Title VII's framers would not have anticipated" the Court's statutory construction, but she points out that Gorsuch insisted that "'the limits of the drafter's imagination supply no reason to ignore the law's demands.'" However, it wasn't only Title VII's drafters who would not have imagined the Court's interpretation; no one in Congress, or in larger society, would have imagined it in 1964. (Even in common parlance today, the word "sex" is rarely used in the sense the majority used it in *Bostock*.) Although the decision may arguably be textualist, it cannot be considered originalist and, given the overlap between the two, this undermines the majority's entire analysis.

Novkov explains, "Rather than reading the statute as rigidly frozen in time, [Gorsuch] advocated for the language's meaning as something that could develop." If so, this is the antithesis of a textualist/originalist approach, under which the meaning is fixed when words become law and does not later morph independent of democratically-elected representatives in Congress and the White House. For this reason, Justice Samuel Alito's dissent accused Gorsuch of sailing "like a pirate ship" under a false "textualist flag."

Novkov traces the legislative history of Title VII through its enactment as part of the Civil Rights Act, as well as the case law that has interpreted it since, and that precedent may better account for the outcome than textualism. Before *Bostock*, the Supreme Court had interpreted the statute broadly to prohibit, for example, refusing to hire women with young children, requiring that women make larger pension contributions, and same-sex sexual harassment in the workplace, and Gorsuch's opinion relied on such precedent. There is surely little interest on the Court in revisiting those decisions, but their less-than-textualist foundations raise the issue of how much weight a strict textualist should give them.

Besides *Bostock*, the Court also released in mid-June *Department of Homeland Security v. University of California Regents*, a 5-4 decision that blocked Trump's repeal of President Obama's executive order creating the Deferred Action for Childhood Arrivals (DACA) program. The 2012 order had halted the deportation of aliens brought to the United States illegally as children. For the majority, Roberts stated that even if the previous executive order was unlawful, the Administrative Procedure Act (APA) still required the Trump Administration to "compl[y] with the procedural requirement that it provide a reasoned explanation for" rescinding the order, notwithstanding the fact that all parties agreed that DHS had the authority to rescind it.

In short, as John Eastman writes, the DACA opinion rested not on the legality of the DACA program, but on the process by which the decision to rescind it was made. Eastman posits that going forward, the DACA decision will require "a presidential

administration to put forth arguments the Court considers to be complete, candid, and considering all the relevant factors before shifting course from a prior administration's policies or risk the actions of executive agencies being struck down," which he characterizes as an "honesty review."

Eastman argues that along with *Department of Commerce v. New York* from the previous term (holding that the DOC hadn't adequately disclosed the basis for its (entirely lawful) decision to include a citizenship question on the 2020 census), the DACA decision shows the Court failing during the Trump Administration to give administrative agencies the judicial deference ordinarily accorded an agency's interpretation of the law.

Eastman concludes that the DACA decision created "a more stringent standard of review" under the APA, but whether the same standard will apply to the rash of executive orders issued at the outset of the Biden Administration remains to be seen. At least initially, it appears that the same standard is being applied by lower courts, as a Texas district court imposed in February 2021 a nationwide injunction against the new president's 100-day pause on deporting migrants, in part on grounds that DHS had not adequately justified its abrupt reversal of the Trump-era policy. The institutional credibility of the Court will suffer greatly if some Justices now become more deferential to exercises of discretion by the current administration than they were to those by its immediate predecessor.

Further, it is not clear that the 2012 executive order itself would have survived "honesty review" in the courts. The Obama Administration justified the DACA program as "an exercise of prosecutorial discretion." This rationale seems contrived, however, as the exercise of such discretion is ordinarily understood to be refraining from criminal prosecution of an individual defendant in a specific case based on considerations such as finite government resources. By contrast, DACA effected a wholesale suspension of enforcement of the deportation statute against an entire category of potential defendants.

In the Term's only abortion decision (and the last case to be argued in person before the COVID shutdown in early March), *June Medical Services v. Russo*, the Court followed recent precedent in striking down a Louisiana law that required physicians performing abortions to have admitting privileges at a hospital within 30 miles of where they perform the procedure.

Gerald Rosenberg writes that in 2016, the Court had struck down a nearly identical Texas statute in *Whole Woman's Health v. Hellerstedt*. In the earlier case, the Chief Justice had been one of three dissenting Justices who would have upheld the Texas law, but in *June Medical*, he voted with the four liberal Justices while concurring separately. In his concurrence, Roberts stated that he was compelled by "the legal doctrine of *stare decisis* . . ., absent special circumstances, to treat like cases alike." At the same time, he "continue[d] to believe that [*Whole Woman's Health*] was wrongly decided."

Some commentators have opined that Roberts' concurrence contains a landmine for future abortion cases. Specifically, as Rosenberg observes, Roberts reiterated the assertion in his *Whole Woman's Health* dissent that when assessing the constitutionality of abortion restrictions, courts should not seek to balance the benefits and burdens associated with the restriction but, rather, must defer to the balance struck by the legislature. Citing the standard announced in *Planned Parenthood v Casey*, Roberts argued that a court's sole focus should be on whether the law "'has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'" If adopted in the future by a clear majority of the Court, this test could make it easier to find that abortion restrictions comply with *Casey*. In light of a post-*June Medical* circuit split developing on the issue, it will likely be back before the Court soon.

Rosenberg recognizes that neither *Roe* nor *Casey* resolved the issue of abortion with finality, as they had purported to do, and believes that "[p]olitics, rather than legal argument, will determine the future of the constitutional right to abortion." Thus, he predicts that "the opinions of most of the Justices [in the next abortion case] will coincide with the party of the president who appointed them." Although this is certainly true for Democratic appointees, it fails to take into account Warren Burger, Harry Blackmun, Lewis Powell, John Paul Stevens, Sandra Day O'Connor, Anthony Kennedy, David Souter, and, at least in *June Medical*, Roberts. The constitutional right to abortion endures almost 50 years after *Roe*.

As mentioned by Marietta in his Introduction, on the day *June Medical* was argued, Senator Charles Schumer stood in front of the Court, addressing pro-choice supporters and jabbing his finger at the building, and yelled, "I want to tell you Gorsuch. I want to tell you, Kavanaugh. You have released the whirlwind, and you will pay the price. You will not know what hit you if you go forward with these awful decisions." The Chief Justice quickly rebuked him, stating that such "threatening statements . . . are dangerous." In the event, the two Justices named by Schumer did not heed his demand but, presumably because they were in the minority, Schumer did not act on his threat.

After *Bostock*, the DACA case, and *June Medical* had left conservatives demoralized in a "blue June," three of the Term's last decisions (two issued in July) offered consolation in the area of religious liberty. Kevin Pybas writes that together, the three cases "indicate a majority of the Justices supporting the equal treatment of religious institutions in public benefit programs, and an even stronger majority willing to exempt religious institutions from some of the legislative burdens imposed by the contemporary regulatory state."

The most consequential of the three was *Espinoza v. Montana Department of Revenue*, which held that the First Amendment's Free Exercise Clause mandated that government benefit programs must treat religious providers of services in the same way that they treat their secular counterparts. At issue was a Montana program allowing scholarships funded by a state tax-credit program to be used in private schools. The Montana Supreme Court held that because it allowed scholarship money to be distributed to private religious schools, the entire program was unlawful under the state constitution's prohibition on aid to such schools.

Writing for the 5-4 majority, Roberts found that the constitutional no-aid provision did not pass strict scrutiny because it did not prohibit tax dollars from being directed to nonreligious private schools, which meant that the state's purported interest

in protecting the funding of public education clearly was not compelling.

Espinoza extended the Court's 2017 decision in *Trinity Lutheran v. Comer*, which held 7-2 that excluding churches from a public benefit (there, funds to resurface daycare playgrounds) solely because of their status as churches violated the Free Exercise Clause. *Trinity Lutheran* made clear in a footnote that the opinion did "not address religious uses of funding or other forms of discrimination" beyond the immediate issue of playground resurfacing; this limitation presumably persuaded Justices Stephen Breyer and Elena Kagan to join the *Trinity Lutheran* majority because they dissented in *Espinoza* on the grounds that the Montana program funded "the inculcation of religious truths."

The potential effect of *Espinoza* on state funding for vouchers, tax credits, educational savings accounts, and the like for religious schools is considerable. Thirty six other states have no-aid provisions similar to Montana's in their constitutions; such provisions are referred to as "Blaine Amendments," and most were enacted in the 19th and early 20th centuries explicitly to prevent any government funding of Catholic schools. Shortly after *Espinoza* was issued, the Second Circuit cited it in enjoining the prohibition under Vermont's Blaine Amendment on students from religious high schools enrolling in college courses through a state-funded program. Pybas doubts, however, that a majority of the Court is willing to go so far as to extend *Espinoza* to mandate that states fund religious schooling on a basis identical to public schools.

The other two cases were decided by larger margins of 7-2. In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court held that the First Amendment's Religion Clauses together prohibit courts from adjudicating employment claims brought against religious schools by teachers whose responsibilities include instilling the school's faith because such teachers fit within the "ministerial exception" to federal antidiscrimination law. In the latest decision in a long-running fight brought by federal and state governments against a small denomination of nuns, *Little Sisters of the Poor v. Pennsylvania* held that an administrative rule exempting religious employers who object to including contraception benefits in their insurance plans was promulgated lawfully under the Affordable Care Act.

Unlike the three Religion Clauses cases, *New York State Rifle and Pistol Association v. City of New York* had little precedential significance; nonetheless, Austin Sarat offers an interesting review of how the decision reflects the Roberts Court's minimalism.

NYSRPA involved a Second Amendment challenge to a New York City ordinance that criminalized transporting firearms to any place other than seven designated shooting ranges in the City, thereby restricting licensed gun owners from carrying their weapons outside their homes. After the Court agreed to review decisions upholding the ordinance from a federal district court and the Second Circuit, the City amended the ordinance to narrow the restriction. In an unsigned per curiam opinion, the Court dismissed the case as moot because the amendment provided "the precise relief that petitioners requested in the prayer for relief in their complaint." The Chief Justice and the four liberal Justices said nothing beyond the short opinion; writing separately, Kavanaugh concurred and Alito, Thomas, and Gorsuch together dissented.

Sarat compares Roberts' approach to the "passive virtue" of judicial restraint advocated by the late Professor Alexander Bickel. Bickel famously contended that because the Justices are appointed rather than elected, "they should interfere as little as possible in the democratic political process, jealously guarding the Court's legitimacy in the face of" the notion that judicial review of lawmaking by elected representatives is anti-democratic. Invoking the doctrine of mootness was one way of exhibiting this passive virtue.

The *NYSRPA* dissenters contended that the City had tried to manufacture mootness in order to evade an unfavorable ruling, and that live, justiciable issues still remained under the amended ordinance. The dissent also hypothesized that the outcome would be different if the City had sought to restrain publication of a newspaper editorial, and it argued that rights under the Second Amendment are no less precious than those under the First Amendment.

Sarat contrasts Roberts' restraint with what he sees as Alito's Second Amendment "activism." Of course, given that since 2010 it has issued no guidance in this continuingly relevant area of jurisprudence, the Court as a whole seems restrained to a fault. Further, both the concurrence and the dissent expressed "concern" that, in Kavanaugh's words, "some federal and state courts may not be properly applying *Heller* and *McDonald*"; inaction in the face of lower courts ignoring binding precedent is not virtuous.

The dissenters also called out another unseemly attempt by Democratic senators to bully the Court. As Sarat writes, Sheldon Whitehouse and four others filed an amicus brief that "offered a broad and unprecedented indictment of the Court's conservative majority," "accus[ing] them of pursuing a 'political project' and being in league with the National Rifle Association and other pro-gun groups seeking to radically expand gun owners' protections provided by the Second Amendment," and warning that Congress might seek to "restructure" the Court with additional Justices if the case was not dismissed. Bickel probably didn't anticipate such attempts by members of Congress to whip up pressure on the Court.

Sarat muses that Roberts and Kavanaugh may be "waiting for a [Second Amendment] case that is not open to the kind of criticism launched by the senators' brief." If so, this would seem incredibly naïve because, short of the Court overturning *Heller* and *McDonald*, there seems to be no scenario in which these senators will withhold criticism. Regardless, the Court won't be able to continue dodging Second Amendment issues, especially in light of, among other things, skyrocketing gun sales since the beginning of the COVID-19 pandemic, and its minimalism in *NYSRPA* can be seen as a failure to give much-needed direction in an unsettled area of the law.

Also because of the Roberts Court's minimalism, conservatives were heartened only mildly by *Seila Law v. Consumer Finance Protection Bureau*. *Seila Law* held that the creation by Congress in the Dodd-Frank Act of an administrative agency with a single head who could only be removed by the President for cause, not at will, violated the constitutional separation of powers.

Howard Schweber discusses the omission from the Appointments Clause in Article II, Section 2 of a process for removing federal officers, along with early congressional debates over filling this constitutional lacuna. Schweber traces the debate through the "unitary executive" theory articulated by President Andrew Jackson when he terminated the Treasury Secretary, who had refused to carry out his directive during a dispute with Congress over creation of a national bank: "the President controlled the appointment and removal of executive officers [because] all their actions were his actions and subject to his control."

Schweber follows the development of the unitary executive theory through the expansion of the federal government beginning in the 1870s, and as driven later by "the Progressives' belief in the efficacy of regulatory executive agencies." Although the theory waned significantly as the Court's decisions accommodated a growing administrative state, Roberts relied on a slimmed-down version of it in his opinion for the 5-4 majority. In his typically cautious style, Roberts didn't question prior caselaw, but distinguished it by making the CFPB's single director structure the key: unlike with commissions that have multiple members serving staggered terms, a President might never appoint a CFPB director during his or her four-year term, leaving the director too independent to pass constitutional muster.

On the corollary issue of the effect of the invalidity of the director-termination provision on the constitutionality of the CFPB itself, a different majority of seven Justices did not go so far as to declare the entire agency unconstitutional; rather, it concluded that the termination provision could be severed, and the balance of the statute left in place. These Justices' reticence contrasts with the boldness of Thomas and Gorsuch, who concurred that the for-cause removal requirement was unconstitutional, but dissented as to severability, asserting, "Free-floating agencies simply do not comport with [the] constitutional structure," and calling for all independent and inter-branch agencies to be abolished.

Kagan voted conversely to Thomas and Gorsuch and, along with Justices Ginsburg, Breyer, and Sotomayor, called for restraint: "compared to Congress and the President, the Judiciary possesses an inferior understanding of the realities of administration" and the way "political power operates." Although this may be true, these realpolitik considerations shouldn't be allowed to operate outside the constitutional framework, which was the heart of the legal issue before the Court and about which the Court should have a superior understanding.

In the book's concluding chapter, "Ideology and the Court's Work," Lawrence Baum offers meaningful insights through a statistical analysis of the Justices' voting patterns over the Term. For example, he finds that there were more ideological crossovers than had been expected, especially by Roberts, Gorsuch, and Kagan. Thus, Baum is careful not to fall into the trap of casually ascribing political labels to the Court's decisions, which he believes "oversimplifies the Justices." Records of "votes on case outcomes—who wins or loses—provide only a partial picture of their ideological positions, because it is ultimately the legal rules they support in opinions that have the greatest impact."

By "ideology," Baum appears to mean *political* ideology, which he states "alone could not have predicted many of the surprising outcomes" of the Term. At the same time, certainly individual Justices have their own *legal* ideologies as to the proper methods and tools for deciding cases, and it is fair to expect these to be more accurate predictors. Again, textualism/originalism seems to have the widest acceptance on the Court. In fact, the less that the vote in a case by an individual Justice can be explained by his or her preferred legal "ideology" (that is, interpretive method), the more reasonable it is to suspect that the vote resulted from some personal, non-legal ideology. Of course, wedding oneself to an interpretive method may in specific applications lead a jurist to results that he or she doesn't like personally, so some resist it; the desire to retain the use of multiple interpretive methods may be akin to a preference for multi-factor tests where, as the factors multiply, a judge's individual discretion broadens.

Baum's statistical analysis shows that "it was common for conservative Justices to join with the liberal Justices to produce a liberal decision or for liberals to join with their conservative colleagues to increase the size of the majority for a conservative decision." In other words, although conservative Justices may sometimes provide the margin that results in a liberal outcome, the liberal Justices will only increase a margin of victory that already exists for a conservative outcome. Kagan and other liberal Justices may help conservatives run up the score, but they will never provide the margin of victory. In the most important cases, the liberal bloc is steadfast.

Labeling based on a Justice's presumed political ideology may distort an understanding of the Court even more than Baum recognizes. Like most observers, Baum believes that "in general, votes for litigants who claimed that their civil liberties have been violated" are properly "characterized as liberal." To the extent this characterization had any validity in the past, however, it has become inaccurate in recent years as the dominant culture in the United States is increasingly hostile to civil rights that are considered conservative, like First Amendment rights of free speech, free association, and free exercise of religion, the Second Amendment right to bear arms, and property rights protected by the Fifth Amendment. Because the Bill of Rights is largely intended as a bulwark against majoritarian excesses, it makes sense that it would be invoked against the current orthodoxy, whether conservative or liberal. In any event, that conservatives may be the new civil libertarians is another reason to be wary of using conventional political labels when trying to understand the Court.

Undoubtedly, many political conservatives want the Court to more actively enforce the Constitution and view Roberts' minimalism as timidity. For them, Baum states, "Roberts has become the most recent example of a frequent pattern in which Justices appointed by Republican Presidents establish moderate or even liberal records on the Court." As Baum acknowledges, "the deviations from conservative positions taken by Roberts alone came in two of the most important decisions of the term," *June Medical* and the DACA case. Baum continues:

> Roberts has expressed concern over perceptions of the Court as a partisan body, perceptions that reflect on his leadership as Chief Justice. Roberts may also be seeking to strengthen his reputation in another way by showing that he does not

> follow a consistent ideological line. And it is possible that he has reacted to changes in the political world over the past few years.

Baum's observation is probably on point, but such concern with extralegal factors when deciding legal disputes does not reflect favorably on the Roberts Court.

Deciding cases with an eye towards avoiding backlash from certain quarters does not bolster the Court's credibility, and it may actually be giving the wrong incentives to politicians hoping to influence its decisions. Although Baum doesn't mention the "enemy of the court" brief filed in *NYSRPA* or Schumer calling out Kavanaugh and Gorsuch on the Court's steps while *June Medical* was being argued, the senators may believe that their efforts are having some beneficial effect beyond merely whipping up their base. For example, in March 2021, Whitehouse held Senate hearings entitled, "What's Wrong with the Supreme Court: The Big-Money Assault on Our Judiciary," and he is pressuring the Court to change its rules to add disclosure requirements that would chill participation by amici. Then, later in the month, Whitehouse requested that the Attorney General reinvestigate allegations made without corroboration during Kavanaugh's confirmation about events purportedly occurring four decades ago. Observers will be watching closely to see whether in the face of such pressure, the Court adheres to passive virtues or tries to assert itself as a co-equal branch.

As Baum notes in closing, "the appointment of Amy Coney Barrett as the sixth conservative will make a considerable difference," and any "deviations" by the Chief Justice may now have less impact. For example, instead of concurring with the liberal Justices to form a majority in *June Medical*, would Roberts have dissented separately by himself if Justice Barrett had been on the Court? Whether minimalism will continue to be a defining characteristic of the Roberts Court remains to be seen.

Negative Legislation

By Roberto Borgert

Article I Initiative

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Note from the Editor:

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

Mr. Borgert's article won First Place in the Fourth Annual Article I Initiative Writing Contest, conducted by the Federalist Society's Article I Initiative on the topic *Judicial Interpretation and the Erosion of Legislative Power*. Prof. Lillian BeVier, Hon. C. Boyden Gray, and Hon. Chris DeMuth were the esteemed judges for the Writing Contest. They completed a blind review of the submitted essays addressing the contest topic, and they selected this paper as the winner. Please visit articleiinitiative.org to learn more about the Initiative.

Other Views:

• Ganesh Sitaraman, *How to Rein In an All-Too-Powerful Supreme Court*, The Atlantic, Nov. 16, 2019, https://www.theatlantic.com/ideas/archive/2019/11/congressional-review-act-court/601924/.

• Deborah A. Widiss, *Communication Breakdown: How Courts Do — and Don't — Respond to Statutory Overrides*, Judicature (Spring 2020), https://judicature.duke.edu/articles/how-courts-do-and-dont-respond-to-statutory-overrides/.

• James Durling, *May Congress Abrogate Stare Decisis by Statute?*, 127 Yale L.J. Forum 27 (May 1, 2017), https://www.yalelawjournal.org/pdf/Durling_uhck33r9.pdf.

Modern commentators have spilled much ink on the undemocratic nature of congressional delegations to executive branch agencies. Less discussed is the unchecked role of courts in declaring law through statutory interpretation. Whether federal courts have intentionally appropriated Congress's lawmaking function or reluctantly speak when Congress abdicates its legislative duties is, for purposes of this essay, largely irrelevant. Congressional response to judicial statutory interpretation is inhibited by structural features established by the Constitution and by political self-interest. In an era of polarization and weakening separation of powers, Congress is losing its voice in expounding the meaning of statutes.

To protect its lawmaking function from judicial encroachment, Congress should embrace negative lawmaking: the exercise of its power to say what the law is *not*. Underpinning this proposal is the view that Congress's difficulty in restricting judicial activism in the realm of statutory interpretation is primarily a problem of political economics. Negative lawmaking is a public-choice-informed innovation that can reduce the cost of producing legislation.

This essay proceeds in three parts. Part One describes how each of the three branches of government produces legal goods. It then illustrates how the relative costs of lawmaking and judicial interpretation of statutes give the judiciary an institutional advantage in having the last word on the meaning of a law. Part One concludes by explaining the pressures on Congress to cede to the judiciary that last word. The second part of this essay defines negative lawmaking and explores how it can empower Congress to respond to judicial interpretations. Part Two also speculates about why Congress has not chosen to enact negative legislation in the past and why it nevertheless may choose to do so in the future. The final part of the essay affirms the constitutionality of negative lawmaking and its strengthening effect on the separation of powers between the branches.

I. Costs of Legislation, Regulation, and Judicial Interpretation

Public choice theory contends that our political system functions according to economic incentives.[1] In the Article I realm, constituents demand legislative goods, and legislators, seeking reelection, produce legislation to meet that demand.[2] Interest groups with specific goals likewise prod legislators to take positions, offering political support as a reward. Legislators and

1 Robert D. Tollison, *Public Choice and Legislation*, 74 Va. L. Rev. 339, 341–42 (1988). *See also* Matthew Wansley, *Virtuous Capture*, 67 Admin. L. Rev. 419, 425–32 (2015) (describing legislative public choice theory and critiques of it).

2 Tollison, *supra* note 1, at 344–51. *See also* Elizabeth Garrett & Adrian Vermeule, 50 Duke L.J. 1277, 1287–88 (2001) (observing that legislators are motivated by reelection, desire for respect, promoting vision of public interest, and other ends).

interest groups then wield procedural and political tools to push desired legislation through each house of Congress and across the President's desk for the signature that transforms an enrolled bill into federal law. This Part discusses the political economics of legal goods, that is, laws, regulations, and court decisions. It lays the groundwork for the negative legislation proposal by describing the costs of obtaining different legal goods and explains why Congress is ill-equipped, and even reluctant, to protect the laws it passes from judicial interpretations it views as incorrect.

A. Sources of Legal Goods

The public may seek legal goods from Congress, but there are strong reasons to seek them elsewhere. Under the Presentment Clause[3] and the internal rules of Congress,[4] a legislative proposal must make its way through the committees and floors of each house of Congress and then to the President for approval. Legislative scholars have observed that the path to presidential signature is littered with "vetogates," or points in the legislative process at which political actors can "veto" a bill.[5] Vetogates take the form of a committee chairman's power to place or not place an item on the committee's agenda; a party leader's decision to call or not call for a vote on the floor of either chamber; the Senate filibuster; reconciliation negotiations; or the President's ultimate prerogative to refuse to sign a bill.[6] These constitutional and extra-constitutional hurdles increase the cost of producing legislation.

Aware of the high cost of passing a federal law, interest groups and the public also turn to administrative agencies to obtain legal goods.[7] Rulemaking, while not entirely free from vetogates, is a lower-cost venture, typically requiring sign-off only by the White House and agency officials.[8] Once the relevant officials—who themselves may be connected to interest groups—green-light a proposed regulation, the regulation undergoes the Administrative Procedure Act's[9] relatively undemanding notice-and-comment procedures before publication in the Federal Register.

But the administrative state gives, and it can also take away. Lawmaking by regulation is less durable than lawmaking by statutes. While amending or repealing statutes requires a second journey through Article I's legislative minefield, a regulation issued in one administration can be undone via the same, less onerous process by the next.

The courts are a third source of legal goods.[10] Courts can broaden or narrow the scope of constitutional rights, resolve the meaning of contracts or the nature of a property right, or, most relevant to this essay, interpret statutory language. As long as an interpretive dispute can be packaged as an Article III "case or controversy,"[11] a court is likely to issue a decision on a matter of statutory interpretation.[12] If an interest group, or a cooperating plaintiff, goes to court to advance its view of the meaning of a federal statute, and the initial ruling is contrary to the group's position, the group can seek review by a federal appellate court. And if the appellate court issues another unfavorable decision, the group will encounter its first formal vetogate: the Supreme Court's discretion to grant or deny certiorari.[13] If the Court denies certiorari, the group will have to find a different plaintiff and start all over again to limit or overturn the adverse opinions spawned on the earlier case's journey to the Supreme Court.

But if the group prevails at either the Court of Appeals or the Supreme Court, the interest group will have obtained, in most cases, a durable legal good. This is because courts take the view that stare decisis has "special force" in statutory interpretation cases.[14] This view presupposes that Congress can always amend a statute if it does not approve of a judicial interpretation.[15] Absent congressional indication to the contrary, courts will assume the prior interpretation is correct.[16]

B. The (Not So) Active Dialogue Theory

The judiciary's approach to statutory interpretation is grounded in a misapprehension: that if Congress disagrees with a judicial interpretation, it can easily respond by enacting responsive legislation. For reasons described below, the structure of Congress's market for legal goods limits the institution's ability to counter judicial statutory interpretations. Facing a handicapped Congress, the judiciary should have little reason to expect pushback on most matters of statutory interpretation.

The Supreme Court's view of its own interpretive decisions is that they "effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special

3 U.S. Const., art. I, § 7 (requiring bicameralism and presentment to the President).

4 U.S. Const., art. I, § 5 ("Each House may determine the Rules of its Proceedings . . . .").

5 William N. Eskridge, Jr., *Vetogates,* Chevron*, Preemption*, 83 Notre Dame L. Rev. 1441, 1444 (2008).

6 *Id.* at 1444–45.

7 Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 Geo. L. J. 1337, 1342–44 (2013) (describing agency capture by interest groups).

8 Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 Va. L. Rev. 471, 513–17 (1988) (delegation of law making power to agencies "lowers the cost to interest groups of influencing the political process; it conflicts in the most fundamental way imaginable with the core constitutional function of raising the transaction costs to interest groups of obtaining passage of favored legislation").

9 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

10 Frank B. Cross, *The Judiciary and Public Choice*, 50 Hastings L.J. 355, 360 (1999) ("Courts are simply another venue in which influence may be brought to bear upon government policy.").

11 *See* U.S. Const. art III, § 2 ("The judicial Power shall extend to all Cases . . . [and] Controversies . . . .").

12 Cross, *supra* note 10, at 367–68 (describing how interest groups "[p]urchas[e] judicial precedent"). *But see* Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 Cal. L. Rev. 1401, 1436 (2016) (explaining that courts may use justiciability doctrines to limit certain plaintiffs' access to litigation as a means to effect policy changes through the judiciary).

13 28 U.S.C. § 1254(1).

14 Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989).

15 *Id.* at 173.

16 Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317, 322–27 (2005) (discussing rationales for the doctrine).

justification, [the decisions] are balls tossed into Congress's court, for acceptance or not as that branch elects."[17] Scholars describe this communicative model of statutory interpretation as a "courts-Congress interpretive dialogue."[18] Congress first "speaks" by enacting legislation. The judiciary responds by interpreting the legislation and, to paraphrase Justice Elena Kagan, sends the ball back into Congress's court. If Congress does nothing, the courts read that silence as confirmation that their interpretation was correct. The judicial interpretation gains the protection of the super stare decisis rule, and the courts-Congress dialogue moves to a different statutory subject.[19]

This view of statutory interpretation is convenient for the judiciary, but it ignores Article I truths. While it is technically correct that "Congress remains free to alter what [the Court] ha[s] done," political factors within Congress cast doubt on the Court's approach to statutory interpretation.[20]

Justice Antonin Scalia recognized as much in his first term as a Supreme Court Justice. In *Johnson v. Transportation Agency, Santa Clara County, California*,[21] the majority relied on the fact that Congress did not amend Title VII of the Civil Rights Act of 1964[22] in response to the Court's decision in *United Steelworkers of America v. Weber*,[23] and it construed that congressional inaction as affirmation that its interpretation in *Weber* was correct.[24] Justice Scalia noted the majority's reasoning ignored that the provision at issue was "part of a total legislative package containing many *quids pro quo*."[25] The brunt of his argument was that, by focusing on Congress's reaction to the Court's prior interpretation of a single provision, the Court was mistakenly disentangling different components of the overall agreement. Members of Congress, who originally voted for the legislation as a compromise, could not be expected to vote for disfavored components once there was a "judicial opinion, safely on the books," protecting the parts of the law of which they approved.[26] To infer anything from Congress's inaction would require "ignor[ing] rudimentary principles of political science"[27] since congressional inaction could represent either "(1) approval of the status quo, [ ] (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice."[28]

There are other reasons Congress's ability and willingness to respond to judicial interpretations are limited. First, the individuals constituting the Article I and Article III branches have different time horizons in their institutional roles—differences that operate to Congress's disadvantage. Article III judges have lifetime tenure.[29] Representatives, in contrast, must run for reelection every two years, and senators every six years.[30] Because of the pace of litigation in federal court, this means that, by the time the Supreme Court or an inferior appellate court interprets a statute, the country will have held elections.[31] The Congress replying to a judicial statutory interpretation will rarely be the same Congress that enacted the statute.

Whether a future Congress's view of a statute illuminates the original meaning of a statute has theoretical implications for statutory interpretation,[32] but, more importantly here, congressional turnover also affects Congress's institutional capacity to respond to a judicial decision. Political agendas, membership, and the balance of power within Congress will likely shift between a statute's enactment and courts' interpretation of that statute. If a court misconstrues a statute's original meaning, the enacting coalition may no longer exist to recognize the court's error and correct it. Remaining members of the enacting coalition may not wish to spend political capital responding to a judicial interpretation that they recognize as wrong, but that is costly to correct. Other members of Congress may prefer the incorrect interpretation and block attempts to amend the law.[33]

Courts also enjoy resource advantages in any interpretive dialogue with Congress. For one, the cost to courts of producing a statutory interpretation is relatively low.[34] Outside of justiciability issues and the granting of certiorari, courts do not face the vetogates that raise the cost of producing legal goods. Second, deciding legal disputes, including interpreting and applying statutes, is what courts do all day, every day. Congress, on the

17 Kimble v. Marvel Entertainment, LLC, 576 U.S. 446, 456 (2015).

18 Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 Stan. L. Rev. 725, 731, 776 (2014); *see also* James J. Brudney & Ethan J. Leib, *Statutory Interpretation as "Interbranch Dialogue"?*, 66 UCLA L. Rev. 346, 348 (2019).

19 Eskridge, Jr., *supra* note 5, at 1458–59 (describing how this dialogue works in practice).

20 Kisor v. Wilkie, 139 S. Ct. 2400, 2422 (2019) (quoting *Patterson*, 491 U.S. at 172–73).

21 480 U.S. 616 (1987).

22 42 U.S.C. § 2000 *et seq*.

23 443 U.S. 193 (1979).

24 *Johnson*, 480 U.S. at 629 n.7.

25 *Id.* at 671 (Scalia, J., dissenting).

26 *Id.*

27 *Id*. at 672.

28 *Id.*

29 U.S. Const. art. III, § 1.

30 U.S. Const. art. I, §§ 2, 3.

31 *See* United States Courts, *Judicial Business*, Table B-4A, U.S. Courts of Appeals—Median Time Intervals in Months for Civil and Criminal Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2019 (2019) (median time in civil and criminal cases from filing in lower court to last opinion or final order in appeals court across the D.C. and regional circuits was 29.6 months).

32 *See, e.g.*, Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 Tex. L. Rev. 1125, 1138–39 (2019) ("[I]t is not obvious that the Court should rely on what *today's* legislators think about the meaning of a law enacted by a *previous* Congress.").

33 *Johnson*, 480 U.S. at 671 (Scalia, J., dissenting). *See also* Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 881 (D.C. Cir. 1992) (en banc) (Randolph, J., concurring) (observing that "a later Congress might [ ] actually prefer a court's misinterpretation [of a statute]").

34 The cost of resolving interpretation cases falls mostly on the public who pay to maintain the judicial system. *See* Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 Harv. J. Legis. 123, 127 (1992).

other hand, has an agenda consisting of far more than determining the correct meaning of any given statute.[35] And even if Congress were inclined to keep tabs on statutory interpretation decisions, courts produce so many decisions that Congress would have to devote a substantial part of its sessions to analyzing, debating, and responding to judicial decisions. Because courts have comparatively more resources and time to devote to statutory interpretation,[36] it should come as no surprise that courts often have the last word in the interbranch conversation

For all these reasons, courts' interpretive canons often misread congressional cues.[37] The canons of congressional acquiescence and reenactment make little sense once congressional dynamics are understood.[38] The canon of congressional acquiescence instructs that a court may take congressional inaction as evidence that Congress approves of a prior judicial interpretation.[39] But as Justice Scalia noted, legislative inaction can occur for many reasons other than acquiescence:[40] A hostile committee chair can block an otherwise popular proposal, a backchannel threat of presidential veto can torpedo a bill before it is drafted, or a bill can fail because not enough members were in the Capitol during a vote.[41]

The canon of congressional reenactment suffers from similar flaws. The reenactment rule presumes that Congress is "aware of an administrative or judicial interpretation of a statute and [ ] adopts that interpretation when it re-enacts a statute without change."[42] As in the context of acquiescence, the fact that Congress reenacts a statute without addressing a judicial interpretation says little about whether Congress approves of the interpretation. It equally could be the case that Congress did not respond to a decision because it was not aware of the decision,[43] or that a legislative bargain had been struck and tinkering with a proposed bill would undo the deal.

Professors Abbe Gluck and Lisa Schultz Bressman have demonstrated that congressional staff are unaware of certain interpretive canons[44] and do not draft legislation with known canons in mind.[45] This reality increases the likelihood that courts will understand Congress to say X when Congress really means Y.

Justice Scalia's observations in *Johnson*, while astute, have not changed the Court's approach to statutory stare decisis. The Court has indeed been humbler in deploying the canon of congressional acquiescence that supported the majority's holding in *Johnson*.[46] But it continues to rely on the super stare decisis rule,[47] and it arguably even expanded it to non-statutory cases where Congress "exercises primary authority" and could override the Court's decision.[48] In continuing to apply statutory stare decisis and other interpretive canons, the Court maintains the formalist view that Congress and the courts dialogue through effortless channels of clear communication.

C. Statutory Interpretation as Blame-Shifting

Congress may be content with this state of affairs. In the realm of administrative law, a commonplace theory proposes that politics incentivizes Congress to delegate authority to agencies rather than enact legislation.[49] In doing so, Congress delegates to agencies the authority to address issues that are controversial or that require taking unpopular or politically costly action. Once an agency has lawmaking power, members of Congress can claim credit for creating a new pro-social program but blame the agency when conflicts inevitably arise between implementation of that program and the interests of regulated groups.[50] In other words, Congress can pass the buck to the executive branch.

35 Victoria Nourse, *Underwrites, Overrides and Recovered Precedents*, 104 Va. L. Rev. Online 89, 94 (2018) (Congressional "members focus on how to solve national crises, not on how to draft a legal decision, particularly a legal decision no voter has ever heard of.")

36 *See* Garrett & Vermeule, *supra* note 2, at 1301 (noting that a member of Congress who analyzes constitutional questions "loses time for fundraising, casework, media appearances, and obtaining particularized spending projects in her district"). The same goes for legislators analyzing statutory interpretation questions.

37 *See generally* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901 (2013) (describing results of a survey of congressional staffers about their knowledge or use of interpretive canons in drafting legislation).

38 William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 Mich. L. Rev. 67, 95–108 (1988) (arguing there is little informative value from legislative inaction).

39 *Id.* at 71–72.

40 *Id.*; *see also Johnson*, 480 U.S. at 672 (Scalia, J., dissenting).

41 Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. Cal. L. Rev 205, 212–13 (2013).

42 Lorillard v. Pons, 434 U.S. 575, 580 (1978).

43 Barrett, *supra* note 16, at 331–33 (collecting evidence that "Congress is generally unaware of circuit-level statutory interpretations").

44 *See* Gluck & Bressman, *supra* note 37, at 949 (drafters are unaware of rule of lenity and clear statement rules).

45 *Id.* at 930 ("[T]he canons most commonly employed by courts, including the rule against superfluities, the whole act rule, and the use of dictionaries, appear to be used the least often by our drafters.").

46 *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 749–50 (2006) (reciting "oft-expressed skepticism toward reading the tea leaves of congressional inaction").

47 *See Kimble*, 576 U.S. at 456–57, 462, 464–65 (citing lack of congressional response to Supreme Court decision as justification to maintain precedent).

48 *See* Michigan v. Bay Mills Indian Community, 572 U.S. 782, 799 (2014) (applying doctrine to tribal sovereign immunity precedent); *see also id.* at 828 n.6 (Thomas, J., dissenting) (rejecting expansion of doctrine to "preserve a common-law decision of this Court").

49 David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 Cardozo L. Rev. 731, 740–41 (1999).

50 *Id.*; *but see* Nicholas Almendares, *Blame-Shifting, Judicial Review, and Public Welfare*, 27 J.L. & Pol. 239, 240–51 (2012) (proposing alternative account of delegation and blame-shifting).

Congress also passes the buck to the courts.[51] Congress does so by enacting vague legislation[52] or by not updating older laws.[53] By letting courts take up hard questions of statutory interpretation, Congress avoids difficult votes and can avoid fault for delivering unsatisfactory legislative outcomes.[54] For example, a coalition may pass a law that is vague enough to sweep in policies preferred by different members of the coalition and then leave it to the courts to determine which policies the legislation actually enacts.[55] These maneuvers result in courts deciding major questions because Congress failed to definitively answer them legislatively.[56]

II. Negative Legislation

To increase Congress's ability and willingness to counter judicial interpretations, legislators should begin proposing "negative legislation." Negative legislation negates the effect of a court's statutory interpretation. Unlike typical congressional "override" legislation, which renders a judicial decision obsolete by enacting new statutory language, negative legislation rejects a statutory interpretation but does not propose a correct meaning.

That difference should increase the likelihood Congress will respond to a judicial statutory interpretation it opposes. As anyone who has worked with a team knows, it is easier to assemble a coalition against an idea than a coalition affirmatively endorsing an idea. By allowing Congress to negate a judicial interpretation without proposing new language for detractors to veto, the costs of legislation should go down. Enacting negative legislation will, at the margins, make it easier for Congress to negate an errant interpretation when the requisite majorities of Congress dislike the interpretation but cannot agree on how to correct the judiciary.

A. The Basics

Negative legislation functions by nullifying the precedential value of a particular judicial statutory interpretation and precluding future courts from adopting the same interpretation. Where typical legislation amending a statute may discuss a court case to give context to the law and explain the effect of new statutory language, negative legislation bluntly disapproves a judicial interpretation. A negative law could, for example, state only: "The United States Court of Appeals for the Third Circuit's interpretation of 1 U.S.C. § 1 as interpreted in *Bus v. Gus*, 123 F.4th 567 (3d Cir. 2053) is incorrect." Rejecting an interpretation is the goal of negative legislation. Once the legislation accomplishes that goal, its work is done.

Negative legislation assumes that there exists a range of reasonable interpretations for many statutes, if not all statutes. As Dean John Manning notes, modern statutory interpretation theory acknowledges that "one can believe both that there is a right or best answer to a legal question and that reasonable people may disagree about what that answer is."[57] The *Chevron*[58] doctrine is a tool courts developed to accommodate that principle in the realm of administrative law, allowing courts to defer to an agency interpretation of an ambiguous statute that falls within "the bounds of reasonable interpretation."[59]

Other contexts also reflect this truth. For example, the meaning of a statute's text took center stage in *Bostock v. Clayton County*.[60] The majority and two dissenting opinions, all proclaiming a textualist approach to interpretation, interpreted Title VII of the Civil Rights Act of 1964 and reached different conclusions about the statute's meaning.[61] Given that most statutes can bear a range of potential interpretations, negative legislation simply instructs courts that they misinterpreted a statute and sends the judiciary back to the drawing board to consider other possible interpretations.

That may seem simplistic, but it is a commonplace method of communication in legal and other contexts. A variation on Francis Lieber's classic "soupmeat" allegory illustrates the ordinariness of communicating by simply saying "no."[62] Lieber envisions that "a housekeeper says to a domestic: 'fetch some soupmeat,' accompanying the act with giving some money to the latter."[63] In this instance, suppose the housekeeper adds "from the butcher on Drury Lane." There are three butchers on Drury Lane. The domestic goes to one butcher, purchases the meat and returns

51 Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 Vand. L. Rev. 363, 370–72, 376–77 (2010) (describing how and why Congress delegates lawmaking authority to courts).

52 *Id.* at 370–72.

53 Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 Stud. in Am. Pol. Dev. 35, 37 (1993) (politicians divert difficult issues to the judiciary). *See also* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. Cal. L. Rev. 405, 434 (2008) (providing examples of "policy-driven [ ] statutory interpretation").

54 Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 Int'l Rev. L. & Econ. 349, 364–65 (1993) (theorizing that delegating legislative power to courts accomplishes "the largest risk shift, that is, the largest responsibility shift").

55 Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. Rev. 575, 595–97 (2002) (congressional staffers use ambiguity to resolve political disputes and "hope that the courts will give [their side] the victory); *see also* Hasen, *supra* note 41, at 221 (Congress deliberately passed ambiguous legislation in response to *Georgia v. Ashcroft* to "avoid a deep partisan divide about the workings of the Act."); *cf.* Bressman & Gluck, *supra* note 18, at 774 (significant number of congressional staffer survey respondents expressed preference that "courts not interpret their statutes at all").

56 Graber, *supra* note 53, at 44.

57 John F. Manning, *Clear Statement Rules and The Constitution*, 110 Colum. L. Rev. 399, 424 (2010).

58 Chevron, U.S.A., Inc. v. N.R.D.C., 467 U.S. 837 (1984).

59 City of Arlington, Tex. v. F.C.C., 569 U.S. 290, 296 (2013).

60 140 S. Ct. 1731 (2020).

61 *See id.* at 1737 (majority opinion) (Gorsuch, J.); *id.* at 1754–84 (Alito, J., dissenting); *id.* at 1822–37 (Kavanaugh, J., dissenting).

62 Francis Lieber, Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics 18 (William G. Hammond ed., 3d ed. 1880), republished in 16 Cardozo L. Rev. 1883, 1904 (1995).

63 *Id.*

to the housekeeper. The housekeeper rejects the meat, saying, "No, not *that* butcher. Go and get different soupmeat." Now left with two choices, the domestic picks one, purchases meat, and returns to the housekeeper. This time the housekeeper is satisfied.

This surely is not the most efficient method of communication in many circumstances. And in the hypothetical, it is perfectly plausible that the domestic may have had to go shopping a third time to satisfy the housekeeper. To ease the domestic's burden, the housekeeper could have specified "the butcher in the green store" or revealed other information to guide the domestic. But perhaps the housekeeper did not have time to write out further instructions or did not remember which butcher sold the best soupmeat. In that case, assuming there was no urgency in receiving the soupmeat and the household could absorb the cost of buying or repurposing the first soupmeat, trial and error was not an irrational choice.

Here, Congress is the housekeeper; the judiciary, the domestic. Congress can give affirmative direction to the judiciary in interpreting statutes, or it can say, "Try again." Where a majority disapproves of an interpretation, and the costs of error and delay in reaching the correct interpretation by this indirect route are less than the cost and delay of assembling a coalition to enact new statutory language, negative legislation can play a role in checking the judiciary.

B. Negative Legislation Is a Fourth Species of Override Legislation

Congress occasionally responds to judicial decisions, but it has either never or very rarely passed negative legislation.[64] There are, however, many examples of other kinds of override legislation.[65] Override legislation is what it sounds like: a law that overrides a judicial decision interpreting a statute. Negative legislation acts similarly to traditional override legislation, but it differs in two ways.

First, where override legislation gives courts new statutory language to interpret, negative legislation disclaims a past interpretation as incorrect and prevents courts from applying the same interpretation in future cases analyzing the statute. Second, negative legislation explicitly identifies the judicial interpretation it negates. Override legislation typically mentions a court case, if at all, only in legislative history or in a findings or purpose section, but not in the operative language amending the statute at issue.

There are different flavors of override legislation. One group of scholars delineates three categories of overrides: updates, clarifications, and restorations. First, overrides can "update" the law because a statute and its judicial interpretations may no longer be good fits for modern problems and amendments are necessary.[66] Overrides can also "clarify" the law by setting a clear rule where the Supreme Court has not. This may occur when the Supreme Court summarily affirms a lower court interpretation without announcing a national rule, or where the Supreme Court fails to agree on a statute's meaning—for example, where there is no controlling majority opinion.[67] Finally, overrides can "restore" the law in reaction to what Congress and the President consider to be a "bad interpretation by the Supreme Court."[68] Negative legislation is most similar to restorative overrides and can be thought of as a subset of the restorative override category or as a fourth species of override legislation.

Whether Congress is updating, clarifying, or restoring a law following a judicial interpretation, Congress rarely mentions the relevant judicial decision in the language of the legislation, instead opting to amend statutes directly.[69] When Congress chooses to identify the court case it seeks to override, it usually names the decision in a legislative finding or purpose section that the Office of the Law Revision Counsel often does not place in the U.S. Code.[70] Congress's discussion of an overridden case can range from criticizing the effect of a court decision[71] to opining that a decision interpreted a provision too narrowly or broadly.[72] Unlike traditional override legislation, negative legislation requires naming the negated decision in the text of the substantive language.

64 Matthew Christiansen and Professor William Eskridge, Jr., identified 286 overrides of 275 Supreme Court statutory interpretation decisions. *See* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 Tex. L. Rev. 1317, 1329, 1515 (2014). In researching for this essay, I examined all of the overriding legislation they identified and did not find a single example of negative legislation. Nevertheless, other scholars have found that Congress sometimes "underwrites" or specifically approves of interpretive decisions, which is functionally the inverse of negative legislation. *See* Ethan J. Leib & James J. Brudney, *Legislative Underwrites*, 103 Va. L. Rev. 1487, 1495 (describing different forms of underwriting, including "within the substantive law itself").

65 Christiansen & Eskridge, Jr., *supra* note 64, at 1515.

66 *Id*. at 1370.

67 *Id.* at 1373–74.

68 *Id.* at 1374–75.

69 Deborah A. Widiss, *Identifying Congressional Overrides Should Not Be This Hard*, 92 Tex. L. Rev. See Also 145, 164–65 (2014).

70 *Id.* at 164 n.102 (providing examples of override legislation identifying court cases they sought to reject in precatory findings and purposes sections). Professor Kevin Stack observes that purpose sections are often placed in the notes to the Code, rather than the Code itself. *See* Kevin M. Stack, *The Enacted Purposes Canon*, 105 Iowa L. Rev. 283, 329–30 (2019). Placement in the U.S. Code is not legally significant, but Professor Stack argues that American legal culture "frequently treats the Code as a shorthand for the corpus of all federal legislation" and thus ignores legislative purpose statutes. *Id.* One benefit of negative legislation is that it avoids the problems associated with not naming cases in the substantive language of an override statute. *See* Widiss, *supra* note 69, at 165 (noting practical benefits of statements "in statutory language that [a law] is intending to override a prior judicial decision); Stack, *supra*, at 331 (arguing that Code-based legal analysis overlooks properly enacted legislative purpose sections).

71 *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2(1), 123 Stat. 5 (2009) ("The Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co*., 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The *Ledbetter* decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.").

72 ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3553 (2008) ("[T]he Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress.").

C. Negative Legislation in Practice

The discussion thus far has been theoretical. A couple of examples now follow to show how Congress can use negative legislation to respond to real cases.

In *Trump v. Hawaii*,[73] the Supreme Court construed Section 212(f)[74] of the Immigration and Nationality Act[75] (INA) to give the President authority to bar certain classes of foreign nationals from entering the United States. The Court held that the statute granted "the President broad discretion to suspend the entry of aliens into the United States" and upheld the challenged action.[76] The appellees offered alternative statutory constructions limiting the power of the President under Section 212(f).[77] They lost.

To understand how Congress can use negative legislation to respond to the decision, assume that the Court's interpretation of the INA is near the upper bound of potential interpretations regarding how much discretion the statute gives to the President. Further, suppose that a majority of Congress believes the Court should have interpreted Section 212(f) as granting less discretion to the President. If the majority wishes to pass override legislation but is split on how much discretion the President should have, the majority will not be able to respond to the judicial decision. On the other hand, if the majority is willing to merely negate *Trump v. Hawaii*, its chances of passing legislation increase.[78]

This example demonstrates how negative legislation can facilitate congressional response where the scope or range of a statute is in dispute. Those cases tend to operate on a continuum of potential meanings, asking "how much?" or "to what extent?" Negative legislation can also facilitate congressional action where statutes present categorical questions. Rather than ask how much of a thing a statute addresses, categorical cases ask with which things a statute concerns itself.

For example, circuits are split as to which factors sentencing courts can consider when determining whether to reduce a sentence under the First Step Act.[79] Some circuits think courts must or may consider post-sentencing developments such as intervening changes in law or a defendant's rehabilitation.[80] Others disagree.[81] These questions do not have a continuum of potential answers; either a court can consider a factor, or it cannot. Negative legislation is perhaps more useful to legislators in responding to categorical cases than continuum cases because the range of interpretations is likely to be slimmer, and the potential meanings after reinterpretation may be known in advance.[82]

To draw on the First Step Act example, suppose a statute could allow a court to consider one of the following in deciding whether to reduce a sentence: (1) rehabilitation but not intervening changes in law, (2) intervening changes in law but not rehabilitation, (3) both rehabilitation and intervening changes in law, or (4) neither. An interpreting court finds that the statute authorizes consideration of (1) rehabilitation but not intervening changes in law.

The court's interpretation has the support of forty percent of Congress. The rest of Congress disagrees with the court's interpretation but is divided as to whether a court can consider both factors or neither. No member thinks a court can consider intervening changes in law but not rehabilitation. With a majority to negate the opinion, Congress enacts negative legislation and the President signs it. The legislation precludes the next court encountering the statute from interpreting it to authorize consideration of rehabilitation but not intervening changes in law. The court's remaining options are to consider (2) intervening changes in law but not rehabilitation, (3) both, or (4) neither.[83]

D. Negative Legislation Fills a Legislative Gap

Negative legislation allows Congress to legislate if a majority does not like a court's interpretation but cannot agree how to fix it. It is not a complicated idea, and since there is some use for the mechanism, there should be some history of Congress employing the device. But there is scant evidence Congress has ever used it. This section considers why that might be and predicts that the same political conditions that have caused a decline in override legislation also make negative legislation more attractive.

Negative legislation has many advantages for members of Congress, though perhaps not for the public. First, by disapproving a judicially imposed meaning rather than proposing new statutory language, Congress necessarily adds a layer of complexity that will inhibit the public's ability to monitor congressional action. Monitoring negative legislation will therefore likely be difficult for the general public and will raise the cost of countering proposed negative legislation.[84] Understanding the effect of negative legislation requires understanding the role of courts in our system of governance, the implications of a statutory interpretation, and the range of interpretations the relevant statute can bear. That complexity will favor resourced interest groups best able

73 138 S. Ct. 2392 (2018).

74 8 U.S.C. § 1182(f).

75 8 U.S.C. § 1101 *et seq*.

76 *Trump*, 138 S. Ct. at 2408.

77 *Id.* at 2410–15.

78 Legislators who believe the Court should have interpreted the statute to give the President even more discretion may even join the negating coalition.

79 Pub. L. No. 115-391, 132 Stat. 5194 (2018).

80 *See, e.g.*, United States v. Easter, 975 F.3d 318, 327 (3d Cir. 2020); United States v. Chambers, 956 F.3d 667, 675 (4th Cir. 2020).

81 *See, e.g.*, United States v. Kelley, 962 F.3d 470, 476 (9th Cir. 2020).

82 On the other hand, ex-ante knowledge of potential outcomes could make a vote for negative legislation more politically costly. There may be only one alternative interpretation a court could reach after negation. If the effects of the alternative interpretation are clear, the political consequences of the vote may be the same as a vote for override legislation.

83 This scenario leaves open the possibility of interpreting the statute to allow consideration of intervening changes in law but not rehabilitation, an interpretation no member of Congress thinks is correct. *See infra* note 92 and accompanying text.

84 John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 William & Mary L. Rev. 365, 379 (1999) (explaining how the general public remains "rationally ignorant" of legislative activity because of the cost of monitoring the activity and remote chance of affecting its outcome).

to monitor the importance of any proposed negative legislation and to identify instances in which negative legislation can achieve their goals.[85] It will also favor legislators who wish to avoid public scrutiny for undoing a statutory interpretation.

Second, and relatedly, Congress can use negative legislation to negate district and appellate court interpretations. Negating decisions from those courts should be the bread and butter of interest group and congressional coalitions engaging in negative lawmaking because doing so will negate the future impact of an adverse decision and remove the need for further litigation.[86] These decisions attract less media attention, which is likely a consequence of the cost of monitoring all judicial proceedings across the federal judiciary. Perhaps reflecting these visibility issues, Congress has been much less likely to respond to appellate court decisions than to Supreme Court decisions.[87]

Because of their low visibility among the public and Congress, inferior court decisions are ripe for negation.[88] Their lower visibility means it is less likely the voting coalition will be blamed if the negation leads to an unpopular outcome. And if the negation results in a popular outcome, the voting coalition can be sure to let its constituents know of its success. Negating lower court decisions will probably raise their visibility in the long run, but it is doubtful that they will ever achieve the same political saliency as Supreme Court decisions.

Finally, negative legislation is a good bargaining chip for pulling together a legislative coalition. Because the effect of negative legislation on the meaning of a statute is not determined until a court reinterprets the statute, members of a voting coalition should not fear commensurate political repercussions for including negative legislation as part of a deal.[89] It is hard to be blamed for something when the effect of undoing an interpretation is not concrete and will not be determined until a court reinterprets a statute, which could take months or even years. Further, if a court later interprets a statute and a member's constituents do not approve of that interpretation, the member can always shift blame to the courts.[90]

Because negative legislation allows Congress to pass the buck and is the type of legislation interest groups are well positioned to pursue, it should already be a mainstay in the congressional toolbox. But it is not. It could be that members of Congress are not interested in negating interpretations, though that seems unlikely. If interest groups are willing to litigate court cases to the Supreme Court to avoid bad precedent or create new favorable precedent, they should also have an interest in pushing Congress to undercut unfavorable precedent.[91]

One possible explanation for the dearth of negative legislation is that, where a coalition exists that can enact negative legislation, the coalition is also sufficiently numerous to pass affirmative statutory language effectuating its goals. Members of Congress take a risk by negating one interpretation since the judge or panel who next reinterprets the statute may produce a "worse" outcome.[92] That risk may deter coalitions from pursuing negative legislation altogether. If a legislator has scarce political capital, it is rational to spend that capital on securing legislative benefits rather than simply negating an interpretation and sending it back to a judiciary that may not adopt the legislator's preferred alternative. It is better to get the sure thing. Another potential answer is that internal institutional rules or norms may discourage negative legislation. Members and their staff may think negative legislation is not "real" legislation worth congressional consideration.[93] In any event, the lack of negative legislation deserves additional study.

Even if negative legislation is not commonplace today, it may start falling into congressional favor. Congress's production of restorative congressional overrides has decreased since the 1990s.[94] Some scholars propose that the decline is related to increased polarization, Congress's shift in subject-matter focus away from judicially constructed super-statutes, or political ideology.[95] Whatever the reason, the decline in overrides suggests an opening for negative legislation.

First, where consensus has broken down, coalitions that previously were able to craft new statutory language to override a court decision might need to turn to negative legislation. If

85 *See, e.g.*, Nourse & Schachter, *supra* note 55, at 610–13 (lobbyists are regularly involved in congressional bill drafting).

86 Cross, *supra* note 10, at 368 (describing settlement and selective litigation strategies by interest groups).

87 Barrett, *supra* note 16, at 331–32 (collecting research examining congressional responses to appellate court decisions).

88 William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 Va. L. Rev. 275, 320 n.122 (1988) ("[I]nterest groups tend to be most influential when (1) they are trying to block rather than enact legislation, (2) the issues have low public and media visibility and are being addressed in forums friendly to the groups, and (3) they can count on support from public sentiment, other relevant groups, and/or key political figures.") (citing K. Schlozman & J. Tierney, Organized Interests and American Democracy 317 (1986)).

89 *But see supra* note 82. In cases with a limited range of statutory meaning, negation may have predictable consequences and greater political saliency.

90 Graber, *supra* note 53, at 44.

91 *See, e.g.*, Ann Southworth, *Elements of the Support Structure for Campaign Finance Litigation in the Roberts Court*, 43 Law & Soc. Inquiry 319, 324–29 (2018) (highlighting different interest groups participating in or funding campaign finance litigation at the Supreme Court).

92 For example, in the sentencing statute example above, the reinterpreting court could interpret the statute to allow consideration of intervening changes in law and not rehabilitation—an interpretation no member of Congress thought was correct. The possibility of such an outcome may deter legislators who prefer the status quo over the risk of an interpretation no one wants.

93 Bressman & Gluck, *supra* note 18, at 794 (congressional survey respondents felt that "legislation had to 'look' a certain way").

94 *Compare* Matthew R. Christiansen, William N. Eskridge, Jr., & Sam N. Thypin-Bermeo, *The Conscious Congress: How Not to Define Overrides*, 93 Tex. L. Rev. See Also 289, 306 (2015) (finding decline began in 1998) *with* James Buatti & Richard L. Hasen, *Conscious Congressional Overriding of the Supreme Court, Gridlock, and Partisan Politics*, 93 Tex. L. Rev. See Also 263, 264 (2015) (finding decline began after 1991). The discrepancy stems from scholarly disagreement over which legislation qualifies as override legislation.

95 Victoria F. Nourse, *Overrides: The Super-Study*, 92 Tex. L. Rev. See Also 205, 206 n.11 (2014).

parties can agree that a decision is incorrect but cannot agree on how to remedy the issue, sending it back to the courts is a next-best option.[96] Second, if growing ideological distance is driving a decline in overrides, odd bedfellows may emerge to challenge judicial interpretations that fix the meaning of a statute beyond each side's preferred range of interpretations.[97] Ideological opposites may wish to join forces to dislodge a centrist interpretation for a chance at their preferred outcomes.

Finally, if *Chevron* deference takes on a smaller role in administrative statutory interpretation,[98] courts, not agencies, will be the final interpreters of statutes addressing a wide range of social and economic matters. Whereas *Brand X*[99] incentivizes interest groups to lobby the executive branch to negate judicial interpretations of ambiguous statutes,[100] *Chevron*'s decline will direct that political activity back to Congress. These pressures may encourage Congress to wield its negation power more aggressively.

III. Negative Legislation and the Constitution

Negative legislation is no good if it is unconstitutional. The most obvious constitutional objection is that negative legislation imposes an impermissible rule of decision by telling a court how to interpret a statute. The Constitution forbids Congress from directing courts to reach a particular result in a particular case by prescribing a "rule of decision."[101] The test for identifying an impermissible rule of decision is that "Congress violates Article III when it compels findings or results under old law. But Congress does not violate Article III when it changes the law."[102]

The rule of decision argument against negative legislation is that, by stating that the judiciary incorrectly interpreted a statute, the legislature infringes on the judicial function to say what the law is in a specific case. This view has some intuitive force. Certainly, if Congress directed a court to interpret the operative statute in a hypothetical *Smith v. Jones* case such that *Smith* won or ordered that a judgment be declared "null and void,"[103] that legislation could be an inappropriate rule of decision.[104] But negative legislation as proposed here does neither of those things.

Negative legislation restricts how a court can interpret a statute, but it does so in an ordinary way. Imagine a law affecting birds. If a court interprets the law as applying to penguins, and Congress responds by amending the statute's definition section to exclude penguins from the definition of "bird," Congress is instructing the judiciary how to interpret "bird." That is, Congress mandates that courts interpret "bird" as excluding penguins. Similarly, negative legislation restricts the potential meanings a statute can bear by instructing courts not to interpret a statute in the same way another court interpreted that statute.

The Supreme Court takes a functional approach when examining the proper form of legislation. In *Robertson v. Seattle Audubon Society*,[105] the Court considered a rule-of-decision challenge to an environmental statute that cited two still-pending cases and that affected the outcome of those cases. The Court brushed aside the challenge. It stated that, to the extent the statute "affected the adjudication of the cases, it did so by effectively modifying the provisions at issue in those cases."[106] The new statute amended the underlying law by "deem[ing] compliance with new requirements to 'meet' the old requirements," thus altering the meaning of the original requirements.[107] It was immaterial whether Congress amended the original statute directly or enacted a separate statute citing caselaw to modify the original statute.[108] Either enactment "produced an identical task for a court"—the application of new law to existing facts.[109]

Negative legislation requires the court reinterpreting a statute to apply new law to existing facts. Negative legislation is new law. It can be either prospective or, within constitutional bounds, retroactive.[110] And, like most legislation, it is generally applicable.[111] The main difference is its method of transmitting legal content. A court interpreting negative legislation will have to read the negated opinion, identify the relevant interpretation, and construe the underlying statute to avoid the negated meaning.[112]

This is not meaningfully different from what a court must do in interpreting new statutory text. In altering the range of

96 *See* Nourse & Schacter, *supra* note 55, at 595–96 (recounting congressional staffer consensus that ambiguity created space for political agreement where each side "hope[s] that the courts will give [them] victory").

97 Bruce Yandle, et al., *Bootleggers, Baptists & Televangelists: Regulating Tobacco by Litigation*, 2008 Univ. Ill. L. Rev. 1225, 1228–30 (2008) (describing how groups with vast ideological differences can form consequentialist coalitions).

98 *See generally* Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 Admin. L. Rev. 725 (2007) (demonstrating how doctrinal changes have likely "hastened *Chevron*'s demise").

99 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

100 *See infra* notes 121–23 and accompanying text.

101 Bank Markazi v. Peterson, 136 S. Ct. 1310, 1322–23 (2016).

102 Patchak v. Zinke, 138 S. Ct. 897, 905 (2018) (plurality opinion).

103 Evans v. State, 872 A.2d 539, 549–50 (Del. 2005) (drawing on the original understanding of judicial power to find statute nullifying a court judgment unconstitutional under the Delaware Constitution).

104 *Bank Markazi*, 136 S. Ct. at 1323 n.17, 1326.

105 503 U.S. 429 (1992).

106 *Id.* at 440.

107 *Id.* at 439–40.

108 *Id.* at 440.

109 *Id.*

110 Landgraf v. USI Film Prods., 511 U.S. 244, 265–80 (1994) (discussing presumption against retroactivity and applicability of intervening change in law doctrines).

111 *Bank Markazi*, 136 S. Ct. at 1327–28 (general applicability is not a necessary quality of legislation).

112 Courts may resist negative legislation by distinguishing between their holding, judgment, and interpretive reasoning to protect favored interpretations. But courts engage in similar behavior when confronting statutory amendments. It is not obvious that negative legislation provides greater latitude to courts than override legislation in limiting the effect of amending law. *See* Deborah A. Widiss, *Shadow Precedents and the*

possible meanings, negative legislation does not revert the law to a time before the negated judicial decision so as to overturn the court's final judgment.[113] It substantively alters the meaning of a statute by responding to a judicial decision and reducing the future scope of potential statutory meaning. In doing so, it realizes what Abraham Lincoln described in his First Inaugural Address as the possibility to "overrule[a decision]" such that it "never become a precedent for other cases."[114] Negative legislation transforms the statute's meaning, thus creating new law.

Far from being unconstitutional, negative legislation strengthens the Constitution's structural separation of powers by equalizing the playing field between the courts, the executive, and the legislature. The power to negate the action of another branch of government is already a cornerstone of our system of checks and balances. Negative legislation is consistent with those negation powers and provides Congress a tool with which to respond more effectively to judicial lawmaking through statutory interpretation.

Courts deploy negation powers over Congress, the President, and the states. Most obviously, courts have the power to strike down unconstitutional laws.[115] But the courts also negate laws through other mechanisms. Federal preemption doctrine, for example, allows courts to enforce federalism by negating the effects of state laws that conflict with federal law.[116] And courts routinely negate executive actions, either by vacating a promulgated rule or administrative order or by remanding back to the agency to fix a procedural defect, or both.[117]

The President also has the power of negation. The clearest illustration is the veto power.[118] A President's veto sends an enrolled bill back to Congress, negating the effect of the original votes. Only if Congress can muster a majority vote strong enough to overcome the presidential veto—a veto of a veto—will the vetoed enrolled bill become law. The pardon power is another negation power. A pardon negates the effect of a court's conviction of a criminal defendant.[119] Further, as negative legislation precludes future courts from adopting a negated interpretation, a pardon prevents a future President from prosecuting an offender for a pardoned offense.[120]

Finally, the Supreme Court handed the President a third negating power in *Brand X*.[121] There, the Court held that an agency interpretation of an ambiguous statute can supplant a prior judicial construction of the same statute.[122] The rule "directs courts to give effect to the will of the Executive by depriving judges of the ability to follow their own precedent."[123] While this power goes a bit beyond pure negation in that it also requires the agency to propose a new interpretation, it shares key qualities with negative legislation.

Congress already has the power to negate the actions of the executive branch by virtue of the Congressional Review Act (CRA).[124] The CRA provides a fast-track legislative procedure for both houses of Congress to express disapproval of an administrative rule within sixty days of the rule's publication in the Federal Register. The CRA supplies standard language for a joint resolution indicating that "Congress disapproves the rule."[125] The resolution of disapproval, once passed in both chambers, acts as normal legislation and goes to the President's desk for signature or veto. If the resolution becomes law, the CRA prohibits the executive branch from promulgating any rule that is "substantially the same" without new legislative authorization.[126]

Separation of Powers: Statutory Interpretation of Congressional Overrides, 84 Notre Dame L. Rev. 511, 527–28, 531–34 (illustrating how courts absorb override legislation into statutory interpretation).

113 See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 227 (1995) (judiciary has the "last word . . . with regard to a particular case or controversy").

114 4 R. Basler, The Collected Works of Abraham Lincoln 268 (1953) (First Inaugural Address 1861).

115 *See* Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 S. Ct. Econ. Rev. 115, 121–132 (2004) ("Judicial Power" as understood at the founding includes the power to negate unconstitutional legislation.); Marbury v. Madison, 1 Cranch 137, 177–80 (1803).

116 Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1901 (2019) (describing preemption doctrine); Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 886 (2000) (federal statute and regulations preempted state tort law).

117 Merrick B. Garland, *Deregulation & Judicial Review*, 98 Harv. L. Rev. 505, 569–70 (1985) (describing administrative law remedies); *see also* Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 Seton Hall L. Rev. 108 (2001).

118 U.S. Const., Art. I, § 7 ("If he approve he shall sign it, but if not he shall return it.").

119 Nixon v. U.S., 506 U.S. 224, 232 (1993) ("The granting of a pardon is in no sense an overturning of a judgment of conviction by some other tribunal; it is an executive action that mitigates or sets aside *punishment* for a crime.") (quotation omitted) (emphasis in original); Knote v. U.S., 95 U.S. 149, 153–54 (1877).

120 *In re Aiken Cty.*, 725 F.3d 255, 263 n.6 (D.C. Cir. 2013) (Kavanaugh, J.). *See also Ex parte Grossman*, 267 U.S. 87, 120 (1925) ("The executive can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress.").

121 545 U.S. 967.

122 *Id.* at 982–83.

123 Baldwin v. United States, 140 S. Ct. 690, 694 (2020) (Thomas, J., dissenting from denial of certiorari). By increasing the power of the executive branch, *Brand X* also incentivizes interest groups to focus their lobbying efforts toward agencies rather than Congress since they can undo a judicial interpretation of ambiguous statutes without incurring the costs of new legislation. *See also* Macey, *supra* note 8, at 513–17.

124 Pub. L. 104-121, 110 Stat. 871 (1996). Professor Ganesh Sitaraman has proposed a CRA for Supreme Court statutory interpretation decisions. *See* Ganesh Sitaraman, *How to Rein in an All-Too-Powerful Supreme Court*, The Atlantic (Nov. 16, 2019), https://www.theatlantic.com/ideas/archive/2019/11/congressional-review-act-court/601924/. His proposal would create a fast-track procedure similar to the CRA that would avoid several legislative vetogates. Unlike the CRA, his CRA-for-the-Court would not be a negation tool. It would instead allow a joint committee to rewrite the interpreted statute. *See* Ganesh Sitaraman (@GaneshSitaraman), Twitter (Oct. 6, 2020, 9:44 AM), https://twitter.com/GaneshSitaraman/status/1313475155713314816 ("committee would rewrite statute"). If Professor Sitaraman's proposal is ever adopted, Congress could use it to fast-track negative legislation.

125 5 U.S.C. § 802(a).

126 5 U.S.C. § 801(b)(2).

Similar to negative legislation directed toward judicial exposition of statutory meaning, the CRA negates an executive branch action and prevents the executive branch from taking the same action in the future.

The power to negate is not foreign to our system of checks and balances. Rather, it is a feature of the system. Congress has the power to negate judicial statutory interpretations; it need only use the power. The other branches certainly do.

IV. Conclusion

This essay proposes a modest legislative innovation to place Congress on more equal footing with the judiciary in matters of statutory interpretation. Negative legislation is no panacea to judicial overreach or interpretive error, but it is a mechanism through which elected representatives can push back on errant judicial decisions. At the margins, negative legislation will curb judicial overreach and demonstrate that Congress has a voice in pronouncing what the law is, and what it is not.

We Are Free for a Reason

By David F. Forte

Religious Liberties Practice Group

A Review of:

Free to Believe: The Battle Over Religious Liberty in America, by Luke Goodrich (Multnomah), https://www.penguinrandomhouse.com/books/594481/free-to-believe-by-luke-goodrich/

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Other Views:

• Marci Hamilton, *No, American Religious Liberty Is Not in Peril*, Wall St. J. (July 26, 2019), https://www.wsj.com/articles/no-american-religious-liberty-is-not-in-peril-11564153070.

• Adam Sonfield, *In Bad Faith: How Conservatives Are Weaponizing "Religious Liberty" to Allow Institutions to Discriminate*, Guttmacher Inst. (May 16, 2018), https://www.guttmacher.org/gpr/2018/05/bad-faith-how-conservatives-are-weaponizing-religious-liberty-allow-institutions.

• Ronald Brownstein, *The Supreme Court Is Colliding With a Less-Religious America*, The Atlantic (Dec. 3, 2020), https://www.theatlantic.com/politics/archive/2020/12/how-supreme-court-champions-religious-liberty/617284/.

There is hardly a person in America who can equal Luke Goodrich's record of advocacy for religious liberty. Before the United States Supreme Court, Goodrich has succeeded in such seminal cases as *Burwell v. Hobby Lobby Stores, Inc.*,[1] *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*,[2] and *Little Sisters of the Poor v. Azar*.[3] He has defended Catholics, Evangelical Christians, Lutherans, Hutterites, Jews, Santeríans, Muslims, and Native Americans in their religious practices and institutions. As senior counsel to the Becket Fund for Religious Liberty, he is respected by both supporters and opponents for his skill and his character.

Luke Goodrich is a Christian, and that is the reason for his work and for his book. His faith is not an addendum to his life and career. Rather, it is the very grounding of his practice of law. His advocacy is as much a product of his beliefs as it is of his legal training. That is why his book, *Free to Believe: The Battle over Religious Liberty in America*, is unusual. It is not the observations of an arm's length expert (though expert he be) describing the trends, the doctrines, and the history of the religion clauses of the Constitution. It is not a memoir of the important place that he has occupied in the struggle of which he is a part. It is not a jurisprudential treatise. It is, instead, a reflection on why religious liberty—along with his defense of it—matters in his life and in the lives of his readers. It is not written for experts, but for the average interested reader. It is a Christian book, written by a Christian author. His book relies on biblical quotations as much as precedent or reasoning to justify his positions. At bottom, his book is a long letter by an Evangelical Christian to his co-religionists, though all readers can profit from his analysis and counsel.

In some way, all books are self-revelatory of their authors, but this book is explicitly so. When he speaks to his readers, one can see that Goodrich is also speaking to himself, developing his thoughts, refining his understanding of his place in his country and in his faith. Not all of his thoughts and positions are entirely consistent, nor should we expect that they would be in a person's quest to discover just why his life and his work matter.

Goodrich begins with a twofold warning. First, unless Americans, specifically Christians, are well prepared to defend religious liberty, they risk losing it. Second, there will never be a time when religious liberty will be fully secured. Trouble will always be with us. The quest is ever, the struggle unending.

Goodrich first discusses three ways "Christians Get It Wrong" when it comes to religious liberty. "Pilgrim" Christians, he declares, hold that religious liberty is the source and objective of the American political experiment. They expect that the government will and should protect them. But Goodrich notes

1 573 U.S. 682 (1914).

2 565 U.S. 171 (2012).

3 Zubick v. Burwell, 136 S. Ct. 1557 (2016).

that "Scripture teaches just the opposite. It says we should expect to be persecuted." He also emphasizes the plurality of American religious experience, the history of religious persecution in this country, including persecution by the original Pilgrims, and the reality that government promotion of Christianity is not necessarily good for Christianity. "Martyr" Christians, on the other hand, take the scriptural promise of persecution too far. They aver that persecution by any secular regime is, and will ever be, the lot of Christians. They opt to persevere in their faith, rather than engage in what they regard as a hopeless task of having the state ally with the values of religious freedom. But "the Martyr view" Goodrich avers, "distorts the teaching of Scripture." True, there will always be persecution, but Goodrich declares, "The saints in heaven aren't rejoicing at having been killed, they're crying out with a loud voice for God to avenge their blood." Further, Christian tradition going back to the early church has not seen persecution as a positive good, but has sought to resist it. Lastly, "Beginner" Christians value religious freedom, but are unsure of what its extent should be.

I found Goodrich's taxonomy of Christian beliefs about religious liberty interesting, but not at all what I have observed. In my experience, most believing Christians are engaged in the project of protecting religious liberty, resisting or at least resenting secular attacks, and seeking to preserve the freedom of Christian social and charitable institutions to be able to fulfill their calling. However, there is a growing number of former Christians who simply do not care about religion, or who affirmatively dismiss it.

Goodrich believes he has "a better way" for Christians to approach the issue of religious freedom than those in his threefold grouping. In describing his approach, he distills from what he calls "biblical justice" the core sense of what he thinks most Christians do believe is the reason for religious liberty: "[H]uman beings are created for relationship with God." That relationship "can never be coerced." When government interferes in that relationship, it is "perpetrating an injustice." Goodrich relies on both scripture and "centuries of religious tradition" to support his position.

Most religions would agree with the proposition that man is called upon to have some relationship with the divine. But some sects—including some Christians today and most Christians in the past—expect the government, or the prince, or the sultan, to affirmatively aid and further the particular favored religion. Goodrich, however, rejects any theocratic notion of America or its exceptionalism. Though many founders perceived a providential relationship between God and the United States, Goodrich declares frankly that America is not God's chosen people. It is the church that is the chosen body. "[U]nlike Israel, Caesar and God are now separate."

In other words, religion must be accorded a separate realm from the state within which man can seek the transcendent. That fundamental position is reflected also in Madison's Memorial and Remonstrance Against Religious Assessments, which Goodrich references, and developed with a more nuanced analysis in the work of Rick Garnett.[4]

Part Two of the book covers the most serious threats to religious liberty, and Goodrich discusses the conflict between the right to religious association and anti-discrimination laws and norms. He helpfully lists three elements of religious independence from state control: 1) the right to determine belief and doctrine, 2) the right of self-governance, and 3) the right of religious groups to "choose their members and leaders in accordance with their beliefs." This last, we might observe, is where contemporary demands for equality intrude the most into religious liberty. For example, in *Christian Legal Society v. Martinez*,[5] the University of California, Hastings College of Law disallowed its Christian Legal Society chapter from limiting who could be an officer or a member based on their religious beliefs. On the other hand, the expansion of the "ministerial exception" is giving religious institutions more of a safe harbor.[6]

Religion and the secular state, while institutionally separate, occupy the same physical and social space. Religion cannot be so free that its adherents are immune from state laws. No society of diverse religious beliefs (and non-beliefs) could operate on that basis. Goodrich suggests that "the limits of religious freedom are based on the government's duty to protect *other* rights." But in determining where one right can trump another, Goodrich does not offer a complete theory, a way to determine where the boundaries are between rights. Instead, he relies more on what he thinks that common sense and circumstance would determine as the proper balance among competing rights. His experience as a litigator representing different clients with distinctive situations and in particular circumstances leads to him proffer this variable formula. For those of us seeking a definable and appropriate standard for judges to follow, this litigator's approach fails to satisfy. On the other hand, he wins cases.

Goodrich knows that in a pluralistic society non-religious reasons for protecting a realm of religious liberty must be found. He offers three. The first is consequentialist: religious liberty benefits society. To begin with, in accord with the near-unanimous position of the Framers, Goodrich argues that religion "produces the moral virtue necessary for democratic self-government." Additionally, religions and their institutions bring forth an astounding amount of social benefit, from hospitals to food banks, from rehabilitation centers to homeless shelters. Religious individuals are more generous, law-abiding, and involved in their communities. Yet despite those documented facts, some persons today regard such religiously inspired good works as a threat. Goodrich has encountered that bias in his work. For example, he successfully defended the non-profit Boise Rescue Mission from a charge of discrimination under the Fair Housing Act, when the mission provided religious instruction to its residents.[7]

A second non-religious justification for religious liberty is that it protects other rights and liberties. In a powerful argument, Goodrich shows that rights are not created by the government, and

4 *See, e.g.*, Richard W. Garnett, *Do Churches Matter? Towards and Institutional Understanding of the Religion Clauses*, 53 Vill. L. Rev. 273 (2008).

5 561 U.S. 661 (2010).

6 Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 565 U.S. 171 (2012); Our Lady of Guadalupe School v. Morrissey-Berru, 591 U.S. __ (2020).

7 Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries, 657 F.3d 988 (9th Cir. 2011).

that when religious liberty marks off an area free of government interference, it gives sanctuary to other human rights. This leads the author to his third justification, namely, that religious freedom is a "fundamental human right." In other words, he grounds the justification for religious liberty in the natural law. Like Thomas Aquinas, the author argues that divine law (in his case, scripture) reveals what is also knowable by reason: that "when the government tries to coerce us in embracing its version of the truth . . . it is going against our very nature as human beings." Such a natural law understanding impels Goodrich to defend the right of a Muslim prisoner to grow a beard[8] and of a Native American to possess feathers of federally protected eagles.[9] As he sums up: "you don't have to care about the Bible to care about religious freedom."

The heart of the book is a description of the multiple threats to religious freedom—and Christianity in particular—that are present in America now, and against which Goodrich has battled. The seminal case on the Free Exercise Clause, *Employment Division v. Smith*,[10] came down in 1993. The *Smith* Court held, in an opinion authored by Justice Antonin Scalia, that neutral, generally applicable laws that burden religion do not violate the Free Exercise Clause. *Smith* is a case over which originalists divide. Goodrich is on one side of that divide: he calls it "one of the worst religious freedom decisions ever," giving two reasons for his condemnation. First, it overturned "decades of religious freedom precedent." Well, perhaps, but *Sherbert v. Verner* was only 27 years in the past when *Smith* was decided. Second, it threatened all religious practices because a law could only be struck down if it specifically targeted religion. Goodrich criticizes the *Smith* decision, but he points out that, in response to it, the nation reacted vigorously. Conservatives and liberals formed coalitions that passed a federal Religious Freedom Restoration Act and versions of the same in over thirty states. The Supreme Court struck down the federal RFRA in *City of Boerne v. Flores*,[11] but the state RFRAs remained effective.

Culturally, however, things became even worse. Twenty years later, many have come to see religion as a threat to equality, and an attempt to pass a RFRA in Indiana buckled before threats of boycotts by national companies and sports leagues. What has happened, of course, is that the drive for equality for gay and transgendered persons has gained such momentum that the moral distinctions that Christianity insists upon are regarded by many as bigoted discrimination. Indeed, Democrats in Congress are attempting to make that view into law. Goodrich chronicles how the cultural forces of moral relativism and the abortion rights lobby have increased the pressure to see religion as solely a private activity between consenting adults. In the meantime, religion as a cultural force in the United States has weakened. Fewer people attend church, and the Judeo-Christian cultural consensus has been diluted, as Goodrich sees it, by increasing secularism and religious diversity.

Goodrich responds to the threat posed by these cultural shifts by observing that the essence of religious moral teaching is indeed a discrimination, i.e., an imperative differentiation between moral and immoral behavior. Religious persons have a right to associate with one another based upon shared beliefs and to discriminate against those within their association who do not share those beliefs. Goodrich regards cases affirming religious independence from the application of labor laws to ministers as a watershed victory, and he was more right than he knew when he wrote the book. What the Supreme Court wrought in *Hosanna-Tabor* was extended in 2020's *Our Lady of Guadalupe School v. Morrissey-Berru*[12] to all persons who have a religious function within any religious organization. And, if commentary on the oral argument in *Fulton v. Philadelphia* is accurate,[13] the right of a religious institution to make moral distinctions and discriminations may come to be recognized for institutions such as religious adoption agencies.

In discussing the challenges to religious autonomy posed by those favoring abortion rights and gay rights, Goodrich recognizes the qualitative difference between racial discrimination and religious discrimination, the former having no moral basis and the latter grounded precisely on moral distinctions. He acknowledges that in cases such as *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[14] distinctions may be difficult to define clearly. In the end, he returns to his earlier justification for religious liberty: people have a fundamental right to associate and to have their religion enjoy a realm of legally protected behavioral independence from state control. Yet he ends that discussion on a melancholy note: "it's going to get worse before it gets better." Looking at the implications of Justice Gorsuch's opinion in *Bostock v. Clayton County*[15]—in which the Court held that Title VII's prohibition of sex discrimination also prohibits discrimination on the basis of sexual orientation and transgender status—Goodrich may be correct.

After his discussion of the social and ideological threats to religion, Goodrich returns to the main theme of his meditation on what Christian evangelicals should do in light of these threats: why should we protect the religious freedom of all people? As one example, he confronts the fact that many—particularly many Christians—see Islam as a threat. If one is to defend Christianity against the government, why should one protect a religion that some see as a direct danger to Christianity? Moreover, if salvation comes only through belief in Jesus Christ, why protect a religion that will keep persons away from their chance to be saved?

Here he offers three arguments, the first being, as before, consequentialist. It is in the Christian's self-interest to protect Muslim mosques against zoning discrimination, for example, for

8 Holt v. Hobbs, 574 U.S. 352 (2014).

9 McAllen Grace Brethren Church v. Salazar, 764 F.3d 465 (5th Cir. 2014).

10 494 U.S. 872 (1993).

11 521 U.S. 507 (1997).

12 591 U.S.__ (2020).

13 Jess Bravin, *Supreme Court Voices Skepticism of Philadelphia Nondiscrimination Ordinance Versus Catholic Agency*, Wall Street J., November 4, 2020, https://www.wsj.com/articles/supreme-court-voices-skepticism-of-philadelphia-nondiscrimination-ordinance-versus-catholic-agency-11604536048?page=1.

14 584 U.S.__ (2018).

15 140 S. Ct. 1731 (2020).

if the government can do it to them, it can do it to us. Ultimately, self-interest may not be a sufficiently principled argument, for what if one could show that it would be Christianity's self-interest (and thus the interest of all people to be saved) to limit the spread of non- or anti-Christian proselytizing? But here, Goodrich's eye on contemporary society is acute, and he notes that without religious liberty protections, Christianity itself would be deemed "a dangerous ideology in this country long before Islam is." Additionally, history is Goodrich's side: "It's difficult to find *any* historical examples of governments that claimed the power to stamp out dangerous belief systems and then wielded that power well."

His second argument is more wish than reality: "it helps more Muslims come to Christ." Although there have been some conversions from Islam to Christianity because of the examples shown by Christians, they remain few, and may be outdone in America by Christians who have converted to Islam.[16] Stronger is his confronting of Christians' fear of Muslims. Why are Christians fearful, he asks, when they are commanded in Matthew 10:28-31 not to be afraid? Goodrich does not say in words what I took to be his meaning here, that one only fears another religion because of the lack of faith in one's own. He could have usefully referenced modern allies of his position, such as St. John Paul II's effective "fear not" theme of his papacy.[17] Lastly, however, Goodrich returns to his earlier natural law argument. Protecting others' religious liberty, he writes, is a matter of justice because of who they are as human persons. All persons have the right freely to seek transcendent truth.

Relying primarily on the work of Michael McConnell, Goodrich reviews the history of the Establishment Clause in light of the current controversy over the question of religion in the public square. He rightly criticizes *Everson v. Board of Education*[18] as overturning 150 years of Supreme Court jurisprudence that had previously left establishment issues to the states and summarily describes the competing tests before the Supreme Court as the "*Lemon* Test"[19] and a test that respects religion as part of the historical culture of the country, citing *Town of Greece v. Galloway*.[20] He believes the latter test is the best approach to applying the Establishment Clause. In fact, there are three competing tests: 1) The *Lemon* Test, 2) Justice O'Connor's endorsement test,[21] and 3) the coercion test.[22] Goodrich believes that the first two tests have merged, and, in a practical sense, he may be right. In my view, his preferred test—religion as part of the historic traditions of the country—offers less protection to religion than the coercion test. The reason that Goodrich opts for more of a historical understanding of the role of religion is that he continues to be suspicious of a government that will support religious belief. The coercion test would allow governmental support of religion for social, moral, and educational ends. That may be going too far for Goodrich—too close a connection between government and religion. He emphasizes that it was the evangelical dissenting tradition in the early years of the country that called for a stricter separation, and he is wary of a test that might allow greater normative support by the government for religious belief.

Goodrich ends his work with a series of recommendations bred of his faith and his legal experience: let go of winning, strive only to do justice, love your enemies, return to Scripture, define your mission, seek alliances, rely on experienced legal advice, consider the political option, be Christlike.

This is a good and valuable book because it is exactly what it aims to be: practical advice in defending religious liberty from a scriptural Christian perspective. It often does not draw clear doctrinal lines or go very deep into theology, but theology is not the work of a lawyer who has real clients amid particular circumstances. The book understands, as a good lawyer and a good Christian would, that we are bound to advance the kingdom of God, but that the City of God cannot replace in our world the City of Man, and we should not indulge our pride by thinking we can bring it about.

The book also calls us back to first principles in understanding the nature of religion and liberty—that the latter is in the God-endowed nature of man, and that former is how men and women embrace as best they can, the Transcendent Good.

16 Besheer Mohamed & Elizabeth Podrebarac Sciupac, *The share of Americans who leave Islam is offset by those who become Muslim*, Pew Research Center (Jan. 26, 2018), https://www.pewresearch.org/fact-tank/2018/01/26/the-share-of-americans-who-leave-islam-is-offset-by-those-who-become-muslim/.

17 *See* John Paul II, *Redemptor Hominis*, March 4, 1979, *available at* http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_04031979_redemptor-hominis.html.

18 330 U.S. 1 (1947).

19 Lemon v. Kurtzman, 403 U.S. 602 (1971).

20 572 U.S. 565 (2014).

21 Lynch v. Donnelly, 465 U.S. 668, 690 (O'Connor, J., concurring) (1984).

22 Lee v. Weisman, 505 U.S. 577, 640 (Scalia, J., dissenting) (1992).

Originalism as King

By John C. Yoo

Federalism & Separation of Powers Practice Group

A Review of:

The President Who Would Not Be King: Executive Power under the Constitution, by Michael W. McConnell (Princeton), https://press.princeton.edu/books/hardcover/9780691207520/the-president-who-would-not-be-king

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Note from the Editor:

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Other Views:

• Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. (2001), *available at* https://digitalcommons.law.yale.edu/ylj/vol111/iss2/1/.

• The Lawfare Podcast: 'The President Who Would Not Be King,' (Jan. 26, 2021), https://www.lawfareblog.com/lawfare-podcast-president-who-would-not-be-king.

• Lee J. Strang, *Can Originalism Constrain the Imperial Presidency?*, 21 Federalist Soc'y Rev. 232 (2020), *available at* https://fedsoc.org/commentary/publications/can-originalism-constrain-the-imperial-presidency.

Reading Robert Bork's 1990 *The Tempting of America* can evoke a poignant wistfulness. *The Tempting of America* confirmed the rigorous originalism that a Justice Bork would have brought to a Supreme Court so badly in need of principles of interpretation. If Robert Bork had won confirmation, rather than Anthony Kennedy, the Supreme Court might have begun its journey toward originalism in 1987, rather than three decades later. With his intelligence and persuasiveness, Bork might have convinced the Justices to abandon the free-wheeling lawmaking that would produce *Planned Parenthood v. Casey*, *Obergefell v. Hodges*, and *NFIB v. Sebelius*.

Readers may have exactly the same feeling after finishing *The President Who Would Not Be King* by Michael McConnell, a law professor at Stanford Law School and a senior fellow at the Hoover Institution. It is worth a read, but not just because it presents an engaging, reasoned view on the scope of presidential power. It also gives us a glimpse of what might have been.

According to press reports and Beltway rumor at the time, President George W. Bush considered McConnell—at that time a judge on the U.S. Court of Appeals for the Tenth Circuit—for one of the vacancies left by Chief Justice William Rehnquist and Justice Sandra Day O'Connor. Only 50 years old at the time, McConnell had already enjoyed a distinguished career as a legal scholar, first at the University of Chicago and then the University of Utah, where he became perhaps the nation's leading originalist scholar of the Religion Clauses.

Instead, President Bush chose John Roberts. Roberts subsequently led the Court to uphold vast expansions of federal power, as in the Affordable Care Act case, and to interfere with the separation of powers, as in last year's case upholding the Deferred Action for Childhood Arrivals program. But worse yet, at critical times Roberts has seemed to tailor his decisions out of a concern for their political consequences. So he has fled from any consistent philosophy of judging and sought refuge in common-law acrobatics designed to narrow decisions, deny enduring principles, and disguise the Court as an impartial arbiter.

In *The President Who Would Not Be King*, McConnell puts the exact opposite traits on display. Questions of presidential power give us a good idea of how a Justice McConnell might have approached the job. As a scholar who has devoted most of his career to religion and individual rights issues, McConnell examines the President's powers to enforce the law, remove subordinates, and conduct foreign policy and war with a fresh eye and few, if any, pre-existing biases. Whether the reader ultimately agrees or disagrees with his answers, he or she comes away with respect for how McConnell works through the legal questions.

First, McConnell commits to a scrupulous originalism in interpreting the nature of executive power under the Constitution. His careful reading of the day-to-day proceedings of the Constitutional Convention in the summer of 1787 might make some eyes glaze over, but it is all in service to the Framers'

understanding of the text that they wrote and ratified. Not for McConnell are today's functional concerns for "accountability," "legitimacy," or "efficiency." McConnell does not seek to achieve the mythical "balance" between the branches so desired—but so mysteriously undefinable—by critics of the Presidency. McConnell sees the role of the law as enforcing the original understanding of the Constitution. "The founders' conception may or may not be the executive we want for the twenty-first century," he writes in the introduction. "It certainly is not what we have, or what the Supreme Court has fashioned for us, or what modern presidents claim. But who in the nation today thinks our current dispositions of power are ideal?" But, reminiscent of Donald Rumsfeld's line about whether the United States should have invaded and occupied Iraq with better equipment, McConnell basically says that we go to work with the Presidency the Framers gave us, not the one we wish they had.

Second, McConnell anchors his analysis in the constitutional text. He takes us on a tour of history, beginning with British understandings of the powers of the Crown versus Parliament, slowly and carefully marching through the experience of Constitution-making in Philadelphia, and then filling in details with early practice in the Washington, Adams, and Jefferson administrations. But he doesn't journey through these events to recreate the world of the Founders or to make broader points of political theory, unlike, say, scholars who follow in the footsteps of Leo Strauss, Harvey Mansfield, and Harry Jaffa.

Instead, McConnell follows specific historical paths only that relate directly to the constitutional text. For example, he goes to great pains to demonstrate that the Committee on Detail—about which little is known—introduced "audacious innovations" to the text of Article II. But McConnell does not stray into the major questions swirling about the Constitutional Convention, such as its treatment of slavery or the Great Compromise between the large and small states. He relies on history, but only a usable history, much like a judge relies only on the factual evidence needed to reach a judgment.

His focus on a usable past does not prevent McConnell from making some unique contributions. Many of the episodes about which he writes, such as the failures of the revolutionary state constitutions, the debates on the floor of the Philadelphia Convention, and Congress's early enactments, have already appeared in legal journals and specialist books. But McConnell synthesizes them into a whole that provides a coherent vision of the Founders' presidency. Until now, Charles C. Thach's *The Creation of the Presidency, 1775-1789: A Study in Constitutional History*, though first published in 1925 (as usual, the Liberty Fund has printed an excellent affordable edition), had provided the best place to start when researching a question on the executive power. *The President Who Would Not Be King* will supplant Thach as the new starting point for future students of the Presidency.

McConnell introduces two more discrete insights into our understanding of the Presidency. First, he resurrects a point first made by University of Chicago Professor William W. Crosskey, whose two-volume *Politics and the Constitution in the History of the United States* (1953) attempted to defend the New Deal on the ground that the Constitution gave Congress plenary power to regulate the economy and society. Crosskey made the implausible argument that the Framers did not intend Article I, Section 8 to enumerate Congress's limited powers. Instead, he argued, it lists only the Crown prerogatives that the Founders had chosen to transfer away from the executive. Therefore, Crosskey concluded, the Framers must have intended to give Congress broad, unenumerated power unlimited by Article I, which he believed performed a separation of powers, rather than a federalism, role.

There are a number of reasons why Crosskey missed the mark on the nature of federalism. But McConnell resuscitates Crosskey's theory to illuminate presidential power. He reads Articles I and II as disposing of the prerogatives held by the British King, as the Founders knew them through a mixture of British precedent, Blackstone's *Commentaries*, and recent colonial history. McConnell carefully reviews the royal prerogatives and traces where they end up in the constitutional scheme: many go to Congress (regulating trade, raising the military, coining money), some remain with the Executive (enforcing the law, Commander-in-Chief, issuing pardons), and others are shared (making treaties, making judicial and cabinet appointments). McConnell is surely right that the Founders approached the task of drafting the constitutional text in this way, and viewing Articles I and II through this lens can lead to surprising insights, such as clarifying the power over immigration.

Nevertheless, this textualist approach to the separation of powers does not escape the fundamental question that has faced us ever since the Founding: Who exercises the executive powers not textually addressed in Articles I or II? Neither Article, for example, explicitly assigns the power to set foreign policy, which under the British constitution had fallen under the King's prerogatives. Foreign policy famously sparked the first greatest division among the Founders over presidential power when President Washington declared that the United States would remain neutral in the wars of the French Revolution. Hamilton defended the Neutrality Proclamation on the ground that Article II, Section 1's declaration that "the executive Power shall be vested in a President of the United States of America" grants to the President all federal executive powers not specifically taken away elsewhere in the Constitution. In response, Madison claimed that most unenumerated powers should rest with Congress, due to America's anti-monarchical history, Article II's other limited textual powers, and the legislature's central role in all matters.

Presidents, judges, and scholars have argued that the answer must come from Article II, Section 1's vesting of the executive power in the President. But different theories of the executive can yield different interpretations of the Vesting Clause. The "unitary executive" theory—which holds that the President alone enjoys the unenumerated executive powers of the federal government—generates the corollary that the Vesting Clause contains substantive powers, such as the power to wage hostilities abroad short of war. Other theories argue that the clause is more procedural and primarily limited to management of the executive branch's personnel (what I sometimes refer to as the President as head of HR theory) or just law execution.

McConnell's second contribution addresses this gap in the constitutional text. If his approach to the constitutional text has it right, the Framers would have left the foreign affairs power and other executive powers to the President. Otherwise, why

would they have carefully chosen which royal prerogatives to transfer to Congress? They must have assumed that the Vesting Clause's phrase "the executive power" would create a Presidency that could still operate as an effective, republican branch of government. "Most of the enumerations of executive power incorporate limitations designed to reduce the scope of the corresponding prerogative power that had been exercised by the king," McConnell writes. "The various enumerations do not have the appearance of a comprehensive and systematic description of the necessary powers of a functioning executive branch." Had Madison prevailed, McConnell could have observed, the nation would be incapable of conducting any foreign policy at all. The nation narrowly avoided disaster in the War of 1812 because President Madison—putting his theories to the test—ceded leadership in war to Congress.

Article I's enumeration of powers does not give Congress the right to set our attitudes toward other nations beyond trade and declaring war—it does not give Congress, for example, the ability to recognize whether Israel's capital is Jerusalem or to communicate with our embassies abroad. But to root the foreign relations power in the President's right to receive ambassadors—as some do—is laughable. McConnell observes that this latter view "would entail such a latitude of construction as to make the limiting language of the Constitution illusory" (one gets the feeling that this amounts to a terrible insult in the McConnell household). Given that foreign relations was considered an executive power in the Anglo-American constitutional tradition, that it was not vested in Congress in Article I, and that it does not arise from any powers enumerated in Article II, McConnell concludes that the power must come from Article II, Section 1's Vesting Clause. Recent claims that "the executive power" only conveys the power of law enforcement, McConnell observes, are "demonstrably incorrect" due to his careful review of the royal prerogatives.

Taking his own unique path, McConnell ultimately reaches the same destination as Hamilton, and later joined by Presidents Washington, Jefferson, Jackson, Lincoln, and FDR. In my scholarly work, I have defended the same view and shared many of McConnell's assumptions and methods. But if McConnell had become Chief Justice, and I had somehow ended up an Associate Justice on his Court (I think this could well have caused many worthies to head for our northern neighbor), I may well have dissented from his opinions from time to time over differences in originalist method.

The question of war will illustrate. McConnell takes the view generally advanced by most presidential and foreign relations scholars since the Vietnam War: the Declare War Clause gives Congress the sole authority to decide whether to wage war, except for self-defense in the case of sudden attacks. I have argued that the Declare War Clause does not give Congress the sole authority to begin military hostilities abroad, but instead that the Constitution creates a political—rather than legal—process where the Article I and II branches can use their respective war-related powers to struggle for primacy in conducting hostilities. Why we reach conflicting views reveals important differences in the practice of originalism.

First, originalists should agree that the constitutional text controls, and that history matters only insofar as it helps us recapture the Framers' understanding of the words that they ultimately adopted. McConnell makes an important contribution to our understanding of the Presidency by reminding us to carefully study the actual text used in Article II and to compare its structure and design not just to Article I, but to the British constitution. He is right that only the constitutional text should guide our interpretation of presidential power, rather than contemporary beliefs about the proper balance of power between the branches or functional ideas about the best way to arrange government functions.

But I think that on war powers, McConnell might pass by the text too quickly as he proceeds to the history. We agree that the Crown possessed the power to raise the military, make war, and conduct war as Commander-in-Chief (and we both reject the implausible notion that the Commander-in-Chief power is just a title and that Congress could order all military decisions, down to tactics). We also agree that the constitutional text disperses these powers, giving many of them to Congress. But we diverge over whether allocating the power to "Declare War" in Article I gives Congress control over starting war, except for cases of self-defense. "In a significant departure from the British model," McConnell argues, "the framers assigned the power to initiate war to Congress, not to the President. This was no surprise."

At this point, McConnell goes quickly to the drafting history of the Declare War Clause as well as early practice. But the constitutional text should give him more pause. It seems to me that an interpreter should look to other portions of the Constitution to glean any available insights before turning to the history—especially when comparing provisions of the original Constitution, which composed a single document written and ratified at the same time. Here, Article I, Section 10 reveals the shortcomings of the Declare War Clause:

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

This provision creates exactly the system that McConnell outlines. States cannot "engage" in war "without the Consent of Congress." Section 10 even has the explicit exception for self-defense ("unless actually invaded"), and even one for anticipatory self-defense (taking action to preempt an "imminent" attack) which Article I, Section 8 lacks, but which most read into it anyway (as they must). If the Framers had wanted to require congressional permission before the President could wage war, they simply could have repeated this exact language and replaced "No State shall" with "The President shall not." Or to put the point differently, McConnell's view requires the belief that the Framers wrote with uncharacteristic sloppiness and confusion in Article I, Section 8's Declare War Clause, and then two sections later used more detailed, careful language to mean exactly the same thing. As Chief Justice John Marshall reminded us in *McCulloch v. Maryland*, we must read different words in the Constitution to mean different things. Marshall reasoned that "necessary" in the Necessary and Proper Clause did not mean indispensable, as

Jefferson would have had it, because Article I, Section 10 also limited a state's powers to impose imposts and duties "except what may be *absolutely* necessary for executing its inspection laws." The Framers inserted "absolutely" in Article I, Section 10, but not in Article I, Section 8 before "necessary"; therefore, Jefferson's inclusion of "indispensable" before "necessary and proper" had to be wrong. Article I, Sections 8 and 10 similarly suggest that the President's power over war is broader, and Congress's narrower, than McConnell thinks, because different language must convey different meanings.

When it comes to the Framing history, McConnell carefully reviews the history of the drafting and ratification of the Constitution as it relates to war powers. Much of this history cuts against the idea that the Framers would have used the Declare War Clause as a shorthand for giving Congress control of all military hostilities. Vietnam War-era critics argued that a presidential role in launching wars ran counter to the anti-monarchical origins of the American Revolution. If the Framers rebelled against King George III's dictatorial powers, they reasoned, surely they would not give the President much authority. This is a variation of Madison's failed arguments as Helvidius, just as my view is an extension of Hamilton's as Pacificus. It is true that the revolutionaries reacted to the British monarchy by creating weak executives at the state level. But as McConnell properly acknowledges, the anti-executive reaction did not last so long as to dominate the constitution-making years. When the Framers wrote the Constitution in 1787, they rejected these failed experiments and restored an independent, unified chief executive with its own powers in national security and foreign affairs.

Indeed, Anglo-American political theory at this time posited that the unpredictability and high stakes of foreign affairs made them unsuitable for legislation. Instead, foreign affairs demand swift, decisive action—sometimes under pressured or even emergency circumstances—that is best carried out by a branch of government that does not suffer from multiple vetoes or delay caused by disagreements. Legislatures were too large and unwieldy to take the swift and decisive action required in wartime. Our Framers replaced the Articles of Confederation—which had failed in the management of foreign relations because they had no single executive—with the Constitution's single President for precisely this reason. Even given access to the same information as the executive branch, Congress's loose, decentralized structure could paralyze American policy while foreign threats loom. Article II represented an effort to restore, rather than further diminish, the executive after the failures of revolutionary government.

This historical background should provide the context for a narrow reading of the Declare War Clause. McConnell agrees that British and early American history shows that Anglo-American governments rarely, if ever, declared war before waging military hostilities. He further agrees that declarations of war, as described by Blackstone, played the primarily legal functions of notifying the enemy of the status of hostilities under international law or giving the government more leeway in domestic affairs. But declarations of war did not play a role in authorizing hostilities under domestic constitutional law. In the century before the Constitution, as McConnell accepts, Great Britain—where the Framers got the idea of declaring war—fought numerous major conflicts but declared war only once beforehand. Indeed, in the Philadelphia Convention, the original drafts of the Constitution had given Congress the power to "make" war, but the delegates amended it to "declare," so as, Madison's notes report, to make clear the President could "repel sudden attacks."

But we should ask what importance the records of the Philadelphia Convention should have in the interpretive enterprise. McConnell is no purist in the originalist enterprise. He thinks that the differences between "original intent" and "original public meaning" are "exaggerated." Both, he says, "will necessarily rely on much the same sources and methods." Thus, he considers evidence starting from British constitutional history, through the Philadelphia Convention and ratification debates, and ending with the practice of early administration, "with the objective eye of a linguist or historian, unpolluted by modern politics or results-orientation," but without drawing distinctions as to their significance for interpretation. Here, I dissent from Chief Justice McConnell. It seems to me that the records of the state ratification debates and the surrounding pamphlet wars in public must have primacy of place over the Philadelphia Convention. Of course, the choices made in Philadelphia were critical. But they were unknown to those who ratified the Constitution—the limited records we have, primarily notes taken by Madison, were not published until after his death in 1836. They could not have influenced the votes of the delegates to the state ratifying conventions, who were the ones legally authorized to accept or reject the Constitution. In modern legislative parlance, the records of the Philadelphia Convention amount to the secret discussions of an interest group that had drafted a proposed bill, while the state ratifying debates represent the official record created by the legislators who alone have the power to introduce the bill and ultimately make it law.

The reason why Madison's Notes are so popular in interpretation is because they record the arguments and choices made by one group of delegates, at one time, in one place, in one proceeding. The ratification is far more difficult to investigate as effectively, as the process was decentralized and dispersed in time and space, with arguments in one convention not necessarily appearing in others. But it is far more important, I think, because of the legally authoritative power of the state conventions. And if one looks at the records of the ratification process, it is difficult if not impossible to conclude that the participants in the debates both in and outside the convention halls believed that giving Congress the power to declare war presented a significant check on the President's ability to start military hostilities. In debates where Anti-Federalists attacked the innovation of a unitary executive, Federalists did not rely on the Declare War Clause to claim that only Congress could authorize military hostilities.

Instead, the Federalists expected Congress's power of the purse to serve as the primary check on presidential war. The 1788 Virginia ratifying convention was perhaps the most important one—the Constitution narrowly escaped defeat there, some of the country's greatest leaders debated there, and the Constitution reached the necessary ninth vote for ratification there. During the Virginia Convention, Anti-Federalists attacked the military powers given to the President. Patrick Henry declared (as McConnell recognizes): "If your American chief be a man of

ambition and abilities, how easy is it to render himself absolute! The army is in his hands, and if he be a man of address, it will be attached to him." James Madison, leading the Federalists, did not defend by invoking the Declare War Clause to show that only Congress could start wars. Rather, he responded with the power of the purse: "The sword is in the hands of the British king; the purse is in the hands of the Parliament. It is so in America, as far as any analogy can exist."

Despite the startling absence of the Declare War Clause from the ratification debates, McConnell still concludes that it gives the power to Congress to control all offensive military action. In this respect, he follows arguments put forward by Michael Ramsey and Sai Prakash, who separately have argued that "declare war" was the everyday language that 18th century Americans would have used to mean "authorize" or "initiate" war. Ramsey and Prakash tried to prove their point by assembling examples drawn from the statements of politicians and writers of the period that use "declare" and "begin" war interchangeably—of which there are many. McConnell furthers this line of argument by relying heavily on post-ratification practice, particularly Congress's authorization of hostilities during the Quasi-War of 1798 with France. Congress not only authorized the naval conflict but carefully regulated how American ships were to carry it out. The Supreme Court upheld Congress's right to control the nature of the hostilities in a series of cases over prizes (though the power over captures is explicitly given to Congress, which ought to limit these cases' relevance). The broader reading of the Declare War Clause, therefore, "enjoys the weight of early evidence . . . we may conclude that congressional authorization is required before the President may employ the armed forces in offensive military operations that constitute acts of war." But we might ask why post-ratification evidence on the colloquial meaning of a constitutional provision should count in the process of interpretation, as the early Presidents and Congresses may well have gotten the Constitution wrong. Otherwise, *Marbury v. Madison* was wrong to find that the First Congress had violated Article III by adding cases to the original jurisdiction of the Supreme Court.

On this last point, we might ask why McConnell would prefer the colloquial meaning of "declare" war to its more precise legal meaning. McConnell acknowledges that declaring war had fallen into disuse and that it had a narrow legal purpose that did not include authorizing military hostilities under domestic law. His general approach to presidential power—carefully tracing how the Framers re-allocated the Crown's prerogatives—should militate in favor of preferring the legal, rather than the popular, meaning of constitutional terms. For example, McConnell asks how British legal sources, colonial charters and state constitutions, political theorists and convention delegates used the phrase "executive power." He does not undertake a general survey to see what Americans colloquially meant by "executive power"—in fact, he rejects the conclusions of scholars who have attacked the substantive reading of the Vesting Clause for linguistically reducing "executive" to "execute." Instead, McConnell's Crosskey-esque approach to reading constitutional texts should have led him to view the President as having the ability to launch military hostilities, subject to Congress's control over the purse and the creation of the military—which were a total check over major wars before the post-WWII creation of our enormous, offensive standing armed forces.

This criticism over war, however, should not detract from the overall enterprise. McConnell's work should assume a place on the bookshelf of foundational legal works on the American presidency. It makes a series of judicious choices among competing theories, rigorously uses originalist sources and methods, and generally reaches the right conclusions about the executive power. While I may dissent on war powers, it is because I share McConnell's own methods. I think McConnell, whether Chief Justice or leading scholar and teacher, would find that the best of compliments.

Which Rights Are We Mediating?

By Anthony Sanders

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A Review of:

How Rights Went Wrong: Why Our Obsession With Rights Is Tearing America Apart, by Jamal Greene (Houghton Mifflin Harcourt), https://www.hmhbooks.com/shop/books/how-rights-went-wrong/9781328518118

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Other Views:

• Kurt Lash, *The Privileges or Immunities Clause and Unenumerated Rights*, Law & Liberty (Mar. 21, 2019), https://lawliberty.org/the-privileges-or-immunities-clause-and-unenumerated-rights/.

• Mark Pulliam, *The Pernicious Notion of 'Unenumerated Rights'*, American Greatness (Mar. 12, 2019), https://amgreatness.com/2019/03/12/the-pernicious-notion-of-unenumerated-rights/.

• Samuel Moyn, *Why Do Americans Have So Few Rights?*, The New Republic (Mar. 9, 2021), https://newrepublic.com/article/161561/americans-rights-jamal-greene-book-review.

• Thomas Koenig, *Review: Jamal Greene's "How Rights Went Wrong,"* Merion West (Apr. 10, 2021), https://merionwest.com/2021/04/10/review-jamal-greenes-how-rights-went-wrong/.

"Is that right in the Constitution?" Columbia law professor Jamal Greene thinks there is a big problem with that question. Not because he does not think the Constitution protects rights, or even that it protects too many rights. But because, he argues, under today's constitutional law, if the answer is "yes," then the person exercising the right near-automatically wins a court case regardless of the facts and the other interests involved, and if the answer is "no," then the opposite occurs. His alternative approach of rights "mediation" would require us to ask additional questions, such as: What other rights does that right conflict with? How can we come to a compromise between these conflicting rights? And how do the specifics of this case mean we might protect the right differently than we have protected it in other situations?

Professor Greene labels the either/or method he is attacking "rightsism." In his new book *How Rights Went Wrong: Why Our Obsession With Rights Is Tearing America Apart*,[1] he takes a cherished pillar of much of modern progressive legal doctrine—Footnote Four of *United States v. Carolene Products Co.*[2]—and blames it for what his fellow progressives see as dysfunctional in today's legal discourse. His diagnosis and suggested cure are multifaceted and open ended. He argues we rely too much on courts, and not enough on other institutions, to solve what he sees as conflicts of rights. He nevertheless thinks courts should feel empowered to order remedies federal courts are not used to ordering, such as funding positive rights like heath care. He likes compromise and recommends remedies that please no one, but would, he thoughtfully contends, turn down the temperature in our public life and public discourse. Along the way he looks to the experience in constitutional courts in other countries,

1 Jamal Greene, How Rights Went Wrong: Why Our Obsession With Rights Is Tearing America Apart (2021) [hereinafter How Rights Went Wrong].

2 304 U.S. 144, 152 n.4 (1938). The famous footnote reads:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

including Canada, Germany, India, and South Africa, for how their mediation of rights has led, in Greene's view, to superior outcomes both for the stakeholders involved and for their political cultures.

His solutions are sometimes very specific, but at other times frustratingly vague. He does give some concrete examples and solutions in a few culture war areas, including the religious liberties/same-sex marriage conflict, disability rights, affirmative action, and campus speech. Yet he also leaves a massive—yet tantalizing—question on the table: what might his approach offer those seeking to protect economic liberties? And along the way he discusses legal history that, although familiar to many students of the Supreme Court, contains new lessons.

I highly recommend the book to anyone interested in modern rights discourse, debates over the Supreme Court's role in our lives, the balance between the Court and other institutions, and where our current rights paradigm—whether you think of it as "rightsism" or not—came from. I enjoyed it very much, but also disagreed with many of its arguments. I also found a way that conservatives and libertarians might find common ground with Professor Greene.

There are many commentaries other critics can make about much of the book, and I leave most of those for scholars with a particular expertise. For example, his chapter on campus speech—where he calls for much more deference to institutions of higher learning in combating acts of perceived harassment and mediating that with free speech rights—is best tackled by those in the thick of that volatile area. This review's focus is on subjects where the book leaves me either unconvinced or inspired: I am unconvinced by Greene's disregard for the negative/positive rights distinction of the classical liberal tradition, but I am inspired by the possibilities of a "Justice Harlan" approach to economic liberties. We will turn to those subjects after a short summary of Greene's argument and some comments on his framing of the Bill of Rights.

I. More Rights than Most at the Founding

Greene begins with the Founding era, and although the book's purpose is not a detailed exegesis of the rights enumerated at that time—as a long-time critic of originalism,[3] the exact meaning of the Bill of Rights in 1791 is not his top concern—the way he explains the first ten amendments to the Constitution makes for rich reading. The various protections in the Bill of Rights, Greene contends, are not all simple guarantees for individuals standing up to the federal government, with judges looming in the background ready to enforce them. Instead, much of the language of those amendments hands off rights protections to other institutions, such as juries, the militia, and state legislatures.[4] Although a strong critic of the fact that many rights at that time only applied to white men, Greene states, "Still, the Founders had a point. A rights culture too focused on individuals outsources rights recognition and enforcement to judges, who are not well suited to performing the sensitive mediation needed to reconcile the rights of diverse citizens."[5] Other institutions can better mediate: "Managing the mass proliferation of rights claims requires institutions well suited to reconciling competing values."[6] He says the Founders' vision applied that reconciliation through preserving slavery and subjecting minorities and women to local forms of domination. But even so he thinks there is "great value" in these alternative methods of mediating rights without the ugly side of that vision.[7] His treatment of the jury as a method of applying community values to the criminally accused is particularly well taken, keeping in mind contemporary critiques of the modern breakdown of the criminal jury trial.[8]

But Greene is also missing a few pieces of that early rights history: state constitutions, the concept of powers delegation, and the contested meaning of the Ninth Amendment. And it undermines his later analysis. He spends little time on rights in state constitutions of the period, and in that short time points out that some of them often used aspirational words like "ought" whereas the Bill of Rights used mandatory language such as "shall,"[9] implying state rights guarantees were not as enforceable. But this aside depreciates the rich protection of rights found in those state constitutions. Examiners of early state constitutionalism have been busy lately,[10] and out of their examinations we can conclude that state declarations or bills of rights were taken seriously, including by judges.[11] Greene discusses how a right was not at the time understood to be a trump against a community's own "right" to regulate itself. And individual rights were not, it is true, seen as absolute trumps. But neither were they considered outside of judicial enforcement. Further, these early state declarations of rights included open-ended language, such as what Professor Steven Calabresi calls "Lockean Natural Rights Guarantees": words like those penned by George Mason in May 1776, shortly thereafter adapted by Jefferson for the Declaration of Independence, and straight out of the social contract philosophy of John Locke.[12] The seeds of unenumerated rights enforcement by judges—which entails a bigger role for judicial engagement

3 For one of many of Greene's thoughtful critiques of originalism, see Jamal Greene, *Fourteenth Amendment Originalism*, 71 Md. L. Rev. 978 (2012).

4 How Rights Went Wrong at 13 ("Rather, they cared about preserving the primacy of local representative bodies.").

5 *Id.* at 8.

6 *Id.* at 31.

7 *Id.*

8 *See, e.g.*, Clark Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 Geo. Mason L. Rev. 719 (2020).

9 How Rights Went Wrong at 11.

10 *See, e.g.*, Andrew T. Bodoh, *The Road to "Due Process": Evolving Constitutional Language From 1776 to 1789*, 40 T. Jefferson L. Rev. 103, 121 (2018); Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299 (2015).

11 *See* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 929-39 (2003) (detailing the use of judicial review by state judges under state constitutions in the period before the 1787 Constitutional Convention).

12 *See generally* Calabresi & Vickery, *supra* note 10. We can find numerous examples of these clauses, descended from Mason's draft, even today. Perhaps the best is Pennsylvania's: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring,

in protecting individual liberty than does Greene's description of the Bill of Rights—were there from the beginning. Today's judge-centric view of rights enforcement thus has deep roots in our system.

Also, there is a nuance in how rights were understood in the early republic that Greene (like many others) does not mention. Although rights were seen as an important concept, so was powers delegation. That is, the delegation by the people to the government of a good deal of power *but not all power*. By this I do not mean the states' well-known delegation to the federal government of certain enumerated powers.[13] I mean the Lockean concept of the delegation of individual sovereignty to state governments—a social contract between man and state at its most basic level. For example, the Pennsylvania Constitution of 1790 proclaimed at the end of its declaration of rights that "[t]o guard against the transgressions of the high powers which we have delegated" to the Commonwealth of Pennsylvania, the declaration of rights was "excepted out of the general powers of government."[14] This implies a limitation on state power beyond just that of rights. This approach later appears in examinations of the scope of the police power, in which the concept of rights sometimes does not appear[15]—an absence which seems odd to our modern eyes. This language does not imply a nightwatchman state by any means, but it does demonstrate that during the Founding era legislative power was seen to be limited, and not just by rights. This non-absolute delegation of individual sovereignty adds to, not subtracts from, a role for judges in enforcing the resulting limitations because, as with enumerated rights, it indicates the political branches were not meant to wield plenary power and could not be relied on to self-police that fact. That is another reason for a judicial role in the Founding era beyond what Greene envisions.

Further, Greene asserts, without argument, that the Ninth Amendment was meant to assign the protection of "other" rights "retained by the people" to the states.[16] This implicitly takes a side in the long-running battles on the meaning of the Ninth Amendment. For decades, scholars have heatedly debated various views on the Ninth, some of which are more idiosyncratic than others. But the two most visible sides are those of scholars such as Kurt Lash[17] and Akhil Amar[18] who insist that the amendment is a tool of federalism, and those such as Randy Barnett[19] and Dan Farber[20] who argue the Amendment protects unenumerated rights just as strongly as other amendments protect enumerated rights. Scholars like Barnett and Farber disagree on *what* those unenumerated rights are, but the conclusion that those rights are constitutionally protected—plus the contention that they are judicially enforceable—puts judges in a much more central position than Greene's mediating-institutions view. This, again, has implications for his later argument when he points to the Ninth and Tenth Amendments in support of a positive rights understanding of the Constitution.

II. Anticanon Fodder

Greene moves on to the Civil War, Reconstruction, and later the Progressive era through telling the story of three cases in the "anticanon." Greene wrote on the anticanon in 2011 when a number of scholars were arguing about what should be included in that category.[21] These are cases that are not just wrongly decided, but "famously *wrong*, forming an 'anticanon' of cases that all mainstream lawyers must reject."[22] "Mainstream" is doing a lot of work there, it turns out. He includes *Dred Scott* and *Plessy v. Ferguson* and tells the story of how both used (and perverted) the concept of rights in enforcing white domination over minorities. But the third on the list, *Lochner v. New York*, is a very different case.

Greene uses *Lochner* as a jumping off point to discuss later developments, which makes it very fitting for the case to have a large role in his story, and there will be more to say about the case below. But it is worth briefly mentioning here that it seems odd to fit it in through the anticanon device, even on Greene's own terms. When Greene argued that *Lochner* belonged in the anticanon ten years ago,[23] he noted the recent revisionism on *Lochner* and its legacy.[24] This included discussing Professor David Bernstein's work on the case, which culminated in Bernstein's book (also published ten years ago).[25] Greene even admitted in the article—which many progressive scholars are loath to do—that "the *Lochner*-era Court upheld vastly more challenged state laws than it invalidated,"[26] and thus that it was not quite the bogeyman it is often made out to be.

possessing and protecting property and reputation, and of pursuing their own happiness." Pa. Const. art. I, § 1.

13 *See* U.S. Const. art. I, § 8; *id.* amend. X.

14 Pa. Const. of 1790, art. IX, § 26.

15 *See, e.g.*, Dorsey v. State, 44 S.W. 514, 515 (Tex. Crim. App. 1898) (stating "We do not agree to the doctrine that under this power, or any other, the Legislature can make criminal the mixture or mingling of articles of food which are wholesome and nutritious, and prohibit the sale thereof" without using the term "right").

16 How Rights Went Wrong at 29.

17 Kurt T. Lash, The Lost History of the Ninth Amendment (2009).

18 Akhil Reed Amar, The Bill of Rights 120 (1998). Amar argues that the Ninth Amendment protects the collective right of self-government in the states, which can be called a "collective rights" view of the amendment, but which overlaps with the federalist views of Lash and others.

19 Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 Tex. L. Rev. 1 (2006).

20 Daniel Farber, Retained by the People: The "Silent" Ninth Amendment and the Constitutional Rights Americans Don't Know They Have (2007).

21 Jamal Greene, *The Anticanon*, 123 Harv. L. Rev. 379 (2011). A number of scholars participated in a symposium (held on April Fools' Day, 2011) discussing what makes up the "anticanon." *See* Edward J. Larson, *Anti-Canonical Considerations*, 39 Pepp. L. Rev. 1, 1 (2013).

22 How Rights Went Wrong at 34.

23 Greene, *The Anticanon*, *supra* note 21, at 417-22.

24 *Id.* at 417 ("*Lochner* revisionism has become something of a cottage industry as libertarians have become more prominent at think tanks, in politics, and in the legal academy.").

25 David E. Bernstein, Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform (2011).

26 *Id.* at 419-20.

Greene certainly did not defend *Lochner*, and he clearly stated that despite the revisionism it "remains firmly within the anticanon."[27] But it was a bit odd that his more nuanced view of the case in that article did not transfer to this book. Indeed, Vanderbilt law professor Suzanna Sherry—no friend of *Lochner*—has stated she thinks the case is no longer in the anticanon because of work by those like Bernstein.[28] Yet in Greene's latest discussion, Sherry's work is not noted, nor is Bernstein's.

In any case, Greene uses *Lochner* in *How Rights Went Wrong* not to discuss the evils of protecting the right to contract or whether it was a concerted attack on social welfare legislation. Thankfully, he largely stays away from those stereotypes. Indeed, in keeping with his message of preferring mediation to absolutism, he says, "The sin of *Lochner* isn't that the Court identified *a right to contract*, protected by judges—a common view of its error—but rather that it didn't also see *a right to labor*, protected through politics."[29] Instead, he focuses on *Lochner* to examine the dissents in the case, of Justice John Marshall Harlan and Justice Oliver Wendell Holmes. Greene explicitly says Holmes is the bad guy, because he makes rights an either/or proposition, while Harlan is the hero because of his mediative approach.[30] Yet, it is Holmes' message that is the law today, while Harlan's is lost.[31]

Holmes' lone dissent dismissed Joseph Lochner's right to contract claim as simply not supported by the Constitution at all. To Holmes, other than a few narrow rights, the Constitution gives legislatures free rein (the Lockean spirit of the Pennsylvania Constitution of 1790 would have been an alien to him).[32] Harlan, on the other hand, recognized a right to contract, but he saw the state's police power as broadly allowing for economic and social legislation.[33] Some right to contract claims might succeed, but the Court should allow "reasonable" laws to survive. Greene claims we would be much better off if we had adopted Justice Harlan's method of mediating between the "rights," as Greene describes them, on both sides of our conflicts.[34] But Holmes' dissent carried the day, and we now have a world where everyone is scrambling to have their rights recognized, instead of having their rights weighed against other rights.

III. The Frankfurter Plot

It was through intrigue that Justice Holmes' *Lochner* dissent burst forth into our law in the form of Footnote Four of *United States v. Carolene Products Co.*[35] in 1938. The story of how this happened is a highlight of Greene's book. Greene first goes into some detail with the biographies of Holmes and Harlan (and pulls no punches on Holmes' well-known despicable character).[36] He then shifts to the real center of the story, Felix Frankfurter. Greene describes Frankfurter as an idolizer of Holmes who almost single-handedly popularized Holmes' *Lochner* dissent.[37] (He also brilliantly describes Frankfurter as "that guy,"[38] i.e. an obsessive social climber.) If not for his efforts, the dissent might have remained a forgotten lone opinion in an otherwise rather idiosyncratic right to contract case. Greene argues that through Frankfurter's informal and formal influence, both before and after FDR placed him on the Court, the modern bifurcation of rights as an on/off switch became our law, which Greene describes as follows: If a right is textually in the Constitution, is needed to protect democracy, or protects "discrete and insular minorities," it might receive a good deal of protection. If it is not one of those, it receives almost none. This then was expanded in the *Griswold*/*Roe* right to privacy cases (that Greene examines with no sacred cows[39]), but otherwise it remains how we look at rights today.

Thus, to Greene, Footnote Four is the problem. Rights are used as trumps over anything else, and the name of the game is to get your interest labeled a "right" so you can bludgeon the other side with it. And he is entirely correct to blame Footnote Four for much of what ails modern rights jurisprudence. The bifurcation of rights into being very protected or not at all protected has little justification and leaves far too many Americans high and dry in their interactions with the state.[40]

As for his solution to this problem, he takes a few wrong turns, especially when he ignores how we even get to referring to many of the interests he advocates as "rights." But he also is silent on an implication that seems to inevitably follow from his solution. And that implication—that there might be more of a role for economic liberty in the law—is something that many

27 *Id.* at 417.

28 Suzanna Sherry, *Why We Need More Judicial Activism*, *in* Constitutionalism, Executive Power, and the Spirit of Moderation 22 (Giorgi Areshidze et al. eds., 2016).

29 How Rights Went Wrong at 40.

30 *Id.* at 44.

31 Here and throughout this review "Justice Harlan" means the first Justice John Marshall Harlan, not his grandson, also named John Marshall Harlan, who served on the Supreme Court from 1955 to 1971. But it should be noted that Greene also approvingly discusses the second Harlan's jurisprudence as continuing his grandfather's mediative tradition—and how the Warren Court missed his lead. *Id.* at 84 ("Just as the older Harlan accepted a right to contract that had to be balanced, with care, against the need for reasonable regulation, his grandson recognized a right to privacy that likewise called for a temperate balance against government interests.").

32 Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

33 *Id.* at 76 (Harlan, J., dissenting).

34 How Rights Went Wrong at 54-56.

35 304 U.S. 144, 152 n.4 (1938).

36 How Rights Went Wrong at 44-54. Among Greene's many apt comments on Holmes is "The law can become grotesque in the hands of such a person." *Id.* at 48.

37 *Id.* at 63 ("If Holmes was the patron saint of the Progressive legal movement, Frankfurter was its high priest. His fingerprints were everywhere in the federal government during the New Deal era.").

38 *Id.* at 60.

39 *Id.* at 68-86.

40 Footnote Four critiques, and critiques of rights bifurcation, are their own cottage industry, but for a few highlights, see Randy E. Barnett, *Scrutiny Land*, 106 Mich. L. Rev. 1479 (2008); Daniel A. Farber & Philip P. Frickey, *Is* Carolene Products *Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 Calif. L. Rev. 685 (1991); Bruce A. Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713 (1985).

conservatives and libertarians (but perhaps not many progressive law professors) might be pleased with.

IV. What Is a Right?

But before moving to economic liberty, we must discuss something Greene advocates that conservatives and libertarians will find hard to accept. A fundamental difference between Greene's vision for American constitutionalism and the classical liberal view of the Constitution is what constitutes a "right." Greene never really answers this question. But he definitely thinks that the Constitution recognizes—maybe not outright protects, but at least recognizes—positive rights.[41] One example he discusses in his *Lochner* analysis is the right to safety in workplaces, and how the courts of the time could have incorporated that into a more mediative analysis: "Understanding turn-of-the-century labor and safety laws as *rights protective* could have helped align new thinking about equality and the basic trappings of a well-lived life with old thinking about legislatures rather than courts as the primary sites for turning those ideas into reality."[42] He sees this protection of what he calls rights (which in the context of *Lochner* itself would mean a right to be free from being offered to work more than sixty hours in a week or ten hours in a day) as part of the Constitution. How? He explains that "[l]egislatures seeking to shield vulnerable members of the community from the new dangers of the industrial age were attending to the rights of their citizens in just the way the Bill of Rights seemed to contemplate, most explicitly via the Ninth and Tenth Amendments."[43]

Of course, the Ninth and Tenth Amendments—to the extent they apply to the powers of state legislatures (again, Greene glosses over the opposing view that the Ninth Amendment protects individual rights)—recognize that the states have powers not surrendered to the federal government. The Tenth Amendment in particular does not recognize what has traditionally been called a "right" (it only uses the word "powers"), other than what is often loosely described as a people's "right to self-government."[44] That phrase is a perfectly fine way to describe popular sovereignty. But making the move from recognizing that states have legislative powers to seeing those *powers* as protecting *positive and constitutional* rights, such as the right of employees for employers not to require work weeks of a certain length, turns rights into more than just shields against the government. It dispenses with governmental powers and interests and turns everything into rights.

This may seem pedantic and linguistic. What does it matter if a legislature's attempt to regulate relations between private parties, such as work hours, wages, or birth control coverage, is called a power or a protection of rights? It matters because it affects what courts are seen as doing. If all Greene is asking for is that courts be given more leeway in mediating between what we normally see on one side as constitutional rights—free speech, freedom of religion, a right to privacy—and on the other side as the state's interest (as courts generally pair them up), then his solution would be straightforward. Probably some kind of intermediate scrutiny, or rational basis plus, or what have you, allowing for all kinds of nuance in looking at the competing interests and the granular intentions, effects, and potential compromises of the particular dispute.

But that is not what he wants. Instead, by framing what we normally call the government's side a "right," he sees the court's job as a mediation not between freedom and coercion, but between freedom and freedom, from different points of view. This allows for court-ordered remedies that require the deployment—not the abstention—of state power, like ordering the government to provide resources. But, in a more nuanced fashion, it also allows a different framing of the resolution of a case like *Lochner*. Instead of simply ruling for the government because the state has the power to make the challenged rule, like Holmes would have done, a court can defer to the legislature because the legislature has *already* performed a mediation between the rights of various groups, à la Harlan.

And this is where it seems Greene will likely lose many conservatives and libertarians. Not because he advocates more allowance for social welfare legislation than Justice Rufus Peckham, the author of *Lochner*, but because he brands so many more things constitutional rights than does the traditional Lockean view without much justification for the tectonic shift. It is a fine sentiment to believe that state legislatures and Congress protect *constitutional rights* when they adopt regulations that restrict business practices, curtail campaign finance spending, or require reasonable accommodations of the disabled. But the constitutional architecture needed to make this jump is not there. Just because the Tenth Amendment says that all powers the federal government does not have are reserved to the states or to the people does not mean that a vast amount of what those powers might be used to protect are therefore "rights." As for the Ninth Amendment, using it to get to "social welfare legislation equals constitutional rights" is an awfully big lift, even for those who see it as a federalism clause.

This vision of positive constitutional rights contrasts with the often maligned but irrepressible understanding of unenumerated—but almost wholly negative—constitutional rights. Ever since George Mason penned the first Lockean Natural Rights Guarantee, discussed above, American constitutions have—with substantial justification—tempted an interpretation that protects rights beyond those explicitly enumerated, but hardly ever strays far beyond those of the Lockean variety, i.e. rights against government coercion. Versions of Mason's clause were used to protect negative rights in the antebellum era.[45] And whatever the contested meaning of the Ninth Amendment itself, only a few decades after it was drafted, state constitutional

41 *See, e.g.*, How Rights Went Wrong at 182 ("The enforcement of positive rights in particular—rights to receive a benefit or support, as opposed to rights against being burdened—invites the political branches into a *conversation* about rights that has become too rare in our modern age of judicial supremacy.").

42 *Id.* at 42.

43 *Id.*

44 *See, e.g.*, Raoul Berger, *Benno Schmidt vs. Rehnquist and Scalia*, 47 Ohio St. L.J. 709, 710 (1986) ("Simply stated, the judicial creation of such 'individual rights' deprives the people and the states of the right to self-government guaranteed to them by the tenth amendment.").

45 *See generally* Calabresi & Vickery, *supra* note 10.

writers started sticking versions of it in their own bills of rights.[46] These provisions referred (and still refer) to rights "retained by the people" (meaning not delegated to the state) and, as I have elsewhere argued, have no defensible reading other than protecting individual rights.[47] Indeed, in the early 19th century, some courts espoused a general natural rights jurisprudence sometimes without any textual constitutional umbilical cord at all.[48] The *Lochner* era's use of the Due Process Clause to protect some—but by no means all—negative liberties is in line with this tradition, as is even the modern Court's protection of contraception and sexual intimacy.[49] The fact that constitution writers and judges from Mason to Justice Anthony Kennedy have outlined and enforced unenumerated constitutional rights from our earliest beginnings, but have done little to articulate them, let alone enforce them, as *positive* rights is evidence of what architecture is out there. Plenty for negative rights, not much for positive.

This is not to say that American constitutionalism has no experience with positive rights. Every state constitution provides for a public education in some way, often with explicit rights terminology.[50] And courts have in recent decades used remedial mechanisms to try to force legislatures to better guarantee that right.[51] Thus, when American constitutions want to recognize positive rights, they can do so. Indeed, states' experience with educational rights litigation—mixed, to put it mildly—counsels additional caution to any effort to judicially guarantee positive rights.[52] But in any case, given that the federal constitution does not textually protect positive rights (at least of the social welfare kind), there is really no justification for federal courts recognizing positive social welfare benefits as rights. Thus, for conservatives and libertarians worried about the textual or structural underpinning of any constitutional vision, jumping to Greene's rights framework seems to be a bridge that cannot be crossed. (It should be noted that equal protection is an area where the positive/negative rights division is much blurrier, and although conservatives and libertarians may not ultimately agree with them, Greene makes some thought-provoking arguments in his discussion of equal protection and disability.[53])

More fundamentally, in his calls for legislatures to play a greater role in mediating rights and for courts to order legislatures to provide those rights as a remedy, Greene's analysis lacks a skeptical realism. In his view of rights mediation, the individual right on one side is weighed against the legislature's interest (and the rights that the legislature is trying to protect) on the other. Greene acknowledges that legislatures sometimes have malign intentions, and he says those intentions should come into play in a court's analysis when, for example, a facially neutral law actually is designed to discriminate against a disadvantaged minority. Indeed, in many cases he thinks that malign outcomes—not just intentions—should come into play. But it seems that for most legislation—such as garden-variety social welfare legislation—Greene thinks the legislature should be assumed to be acting in good faith as voicing the actual wishes of its constituents to try to solve a social problem. He is not alone in this assessment, of course. However, if we truly are to get into the particulars and nuance of mediating, that calls for an honest critique of the sausage-making of legislatures, and not the "face of the statute" view that prevails in most constitutional challenges. And as decades of analysis in public choice economics will tell us,[54] that looks extremely messy, and often extremely detrimental to the government's cause in a court case.

Take a challenge to an occupational licensing law. We know from various studies that occupational licensing is generally pushed by those already in the occupation in order to raise barriers to entry and push prices higher.[55] This is commonly known as rent seeking.[56] Although there may sometimes be a public benefit to

46 Anthony B. Sanders, *Baby Ninth Amendments and Unenumerated Rights in State Constitutions Before the Civil War*, 68 Mercer L. Rev. 389, 403-17 (2017).

47 *Id.* at 433-43.

48 Susanna Sherry, *Natural Law in the States*, 61 U. Cin. L. Rev. 171, 182-221 (1992) (detailing numerous "natural law" cases from several states).

49 The rights to use contraception and to engage in private consensual sexual activity are both negative freedoms from government coercion. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Lawrence v. Texas, 539 U.S. 558 (2003).

50 Roni R. Reed, *Education and the State Constitutions: Alternatives for Suspended and Expelled Students*, 81 Cornell L. Rev. 582, 582 (1996).

51 Areto A. Imoukhuede, *Enforcing the Right to Public Education*, 72 Ark. L. Rev. 443, 464-66 (2019).

52 *See, e.g.*, William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 Colum. L. Rev. 1897, 1907-15 (2017) (discussing legislative inaction in the face of judicial rulings). Greene provides examples from other nations where court recognition of positive rights has actually led, he claims, to real changes. India's experience with providing lunch to students is one he relies on. How Rights Went Wrong at 102. Yet even there the record of providing positive rights, especially in contrast to market alternatives, should be deflating to supporters of positive rights. The jaw-dropping fiasco of India's schools is beautifully told in James Tooley's book *The Beautiful Tree*, where he details the failures—unrelated to a lack of funding—of India's public schools to simply teach, let alone educate, the nation's children and the consequent heavy reliance on private schools by even the poorest of its citizens. James Tooley, The Beautiful Tree 21-25 (2013). All this with a judicial system enforcing the positive right to an education.

53 How Rights Went Wrong at 171-94 (chapter on disability rights).

54 For a short summary of this vast literature, see William F. Shughart II, *Public Choice*, The Library of Economics and Liberty, https://www.econlib.org/library/Enc/PublicChoice.html (under the heading "Legislatures" explaining how "[s]mall, homogeneous groups" lobby for benefits to the detriment of the uninformed general public).

55 *See generally* Morris M. Kleiner, Licensing Occupations: Ensuring Quality or Restricting Competition? (2006); Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 Harv. J.L. Pub. Pol'y 209 (2016); Occupational Licensing: A Framework for Policymakers 22 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf (report of the Obama White House).

56 *See* Matthew D. Mitchell, *Rent seeking at 52: an introduction to a special issue of public choice*, 181 Pub. Choice 1, 1 (2019) ("When either economic surplus or real resources can be transferred involuntarily, individuals and groups who might be favored or disfavored have an incentive to expend effort seeking or opposing those transfers. Such efforts often are socially wasteful and ought to be considered alongside other costs of transfers such as deadweight losses. . . . [This idea] was eventually dubbed 'rent seeking.'").

licensing, in occupations as diverse as cosmetology[57] and funeral arranging,[58] licensing laws often not only leave consumers and prospective entrepreneurs worse off, but they are *designed* to do so.[59] The laws are generally pushed by the regulated industries themselves, not the general public, and there is no informed consensus among the public that these laws are the best way to protect any "right." Greene admits that this very kind of rent seeking happened in the infamous *Williamson v. Lee Optical of Oklahoma, Inc.*,[60] which formalized the modern rational basis test.[61] Under Greene's approach, it seems that the understanding that much legislation is of this nefarious variety should enter into any mediation by the courts. Yet Greene does not say how courts should account for this extremely common phenomenon which abounds in the legislative bodies that he claims the Constitution intends to be the primary protectors—and mediators—of our rights. He does not take this into account, even though it seems like an important part of the story.

V. A Grand Bargain?

But even though he does not challenge the anticompetitive seedy underbelly of real-world legislative power, Greene seems to offer a way that doing so could become part of our constitutional law. And that is through his praise for Justice Harlan's *Lochner* dissent. The theory underlying Harlan's dissent is not a more ecumenical alternative to that of Justice Holmes. It is in fact what courts commonly did in the *Lochner* era. If we adopted Justice Harlan's method of deferring to legislative judgments, we actually would go back to much of the larger jurisprudence of that era, not to a golden age of mediation that never happened. We would certainly want to update it to a more cosmopolitan understanding of the Constitution, as described below. But that updated-past-for-the-future might be something many people, from Greene to libertarians, could embrace. Perhaps.

A colleague of mine at the Institute for Justice once quipped that if the standard from Justice Harlan's dissent were the law in economic liberty claims today—instead of the modern rational basis test—we would win all of our cases. This might be an overstatement, but it is accurate in suggesting that Harlan's dissent would make winning cases in this area a lot easier than it is today. Harlan's dissent counseled deference to legislative judgments, but it permits more balancing of the rights and interests on both sides than the rational basis test of *Lee Optical*. It would be a world where entrepreneurs could challenge many currently unassailable restrictions on the right to earn a living, or the right to contract, or other economic liberties, with a greater chance of success. We can see this by examining a case Greene does not mention, but that has recently received a once-a-century level of news coverage: Justice Harlan's 1905 opinion in *Jacobson v. Massachusetts*.[62]

The relationship (or lack thereof) between *Jacobson* and our modern rights jurisprudence has been hotly debated since the COVID-19 pandemic began,[63] but that confusing conversation is outside of our present purposes. What is relevant here is the relationship between *Jacobson* and *Lochner*, its near-neighbor in the U.S. Reports. Mr. Jacobson's challenge to a vaccination mandate lost 7-2 at the Court, with no written dissent. Three days later, the Court heard oral argument in *Lochner*, and two months later, it issued its (in)famous 5-4 decision, along with the two (in)famous dissents.[64] As you might surmise considering those numbers, three Justices—Melville Fuller, Henry Brown, and Joseph McKenna—voted in the majority in both cases, agreeing both that a particular vaccination mandate did not violate the Due Process Clause and that a specific maximum-hours law for bakers did. Although to our modern eyes it might seem astonishingly inconsistent for a judge to vote as those three did, a comparison of the language used in the various opinions demonstrates otherwise.

In assessing the vaccination order's constitutionality, Harlan declared for the *Jacobson* Court:

> if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.[65]

Harlan and six of his colleagues concluded that the state easily met this standard, and the opinion provided a slate of scientific data supporting the effectiveness of the smallpox vaccine.[66] When we move to *Lochner* itself, Harlan's approach was no different. Indeed, he quotes that exact sentence from *Jacobson* in his *Lochner* dissent.[67] Now there is some tension both within that sentence and between it and other language in each of Harlan's opinions. Which is more important: the "real and substantial" relationship (which sounds fairly demanding of the government), or the "beyond all question" requirement (which seems to counsel more judicial deference)? He says both "real and substantial" and variants of "there must be no doubt" multiple times.

But there is also similarly squishy (or should we say "mediative"?) language in Justice Peckham's majority opinion in *Lochner*. Peckham says the appropriate question to ask is:

> Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his

57 Dick M. Carpenter II, et al., License to Work 9 (2d ed. 2017), https://ij.org/wp-content/themes/ijorg/images/ltw2/License_to_Work_2nd_Edition.pdf.

58 Lana Harfoush, *Grave Consequences for Economic Liberty: The Funeral Industry's Protectionist Occupational Licensing Scheme, the Circuit Split, and Why it Matters*, 5 J. Bus. Entrepreneurship & L. 135, 137 (2011).

59 *See* Larkin, *supra* note 55, at 235, n.129.

60 348 U.S. 483 (1955).

61 How Rights Went Wrong at 67.

62 197 U.S. 11 (1905).

63 *See, e.g.*, *Recent Case, In re Abbott*, 134 Harv. L. Rev. 1228 (2021).

64 *Jacobson* was decided on February 20, 1905, while *Lochner* was argued on February 23 and 24 and decided on April 17.

65 *Jacobson*, 197 U.S. at 31 (citing Mulger v. Kansas, 123 U.S. 623, 661 (1887) (opinion also by Harlan, J.)).

66 *Id.* at 31 n.†.

67 *Lochner*, 198 U.S. at 68 (Harlan, J., dissenting).

> personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?[68]

Thus, the difference between Peckham and Harlan—the Harlan of both *Jacobson* and *Lochner*—is one asks if a law is "unreasonable, unnecessary and arbitrary," whereas the other inquires if it has a "real and substantial" relation to valid ends or is "beyond all question" unconstitutional. There seems to be a difference there, but not a chasm. Both standards are in the same ballpark, indeed on the same infield. Justice Holmes is several blocks away, asking only if the right is fundamental.

How Peckham and Harlan then apply these standards to the Bakeshop Act depends, to a large degree, on their interpretation of the facts. As David Bernstein has pointed out, Peckham's largely fact-free opinion—where he purported to rely on "statistics regarding all trades and occupations"[69] without actually providing those statistics—probably was relying on Mr. Lochner's brief, which *did* provide statistics.[70] Lochner's attorneys cited a variety of medical articles, including one from *The Lancet*, providing evidence that bakers were not dissimilar in various health and workplace safety measures from other occupations that the New York legislature had left alone.[71] In contrast, Harlan cited explicitly his own contrary evidence.[72] Indeed, Harlan concedes that "the question is one about which there is room for debate and for an honest difference of opinion."[73] And it is because of this room for debate that Harlan disagreed with his colleagues, including the three who had signed on to his *Jacobson* majority.

Harlan further elucidated his views on the proper scope of deference three years later in *Adair v. United States*,[74] a challenge to a federal bar on firing employees based on union membership. The Court applied the "real and substantial" standard and found the mandate unconstitutional, with Harlan writing the majority opinion and Holmes authoring another dissent. How did Harlan square this result with *Lochner*?

> Although there was a difference of opinion in that case among the members of the court as to certain propositions, there was no disagreement as to the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by legislation. The minority were of opinion that the business referred to in the New York statute was such as to require regulation, and that, as the statute was not shown plainly and palpably to have imposed an unreasonable restraint upon freedom of contract, it should be regarded by the courts as a valid exercise of the State's power to care for the health and safety of its people.[75]

And how does that contrast with the law in the present case?

> While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another.[76]

Far from offering an alternative to the jurisprudence of his time, here Harlan fits right in with the *Lochner* era.

The reason for the present comparison of these various opinions is not to emphasize that Harlan was different from Holmes. That everyone agrees with, and it is why Greene makes Harlan the hero. And it certainly is not to say that Greene thinks his approach would result in vitiating protections for union membership. Greene believes nothing of the kind. It is to say that Harlan's approach was in fact not so different from Peckham's. Thus, adopting Harlan's approach would give someone challenging an economic regulation—depending, of course, on the facts—a real and substantial chance to have it declared unconstitutional.

A response to this is that the *Lochner*-era Court applied this standard—whether it be Harlan's or Peckham's—selectively, and that it made some of the same "rightsism" errors Greene says courts do today. And that criticism is absolutely warranted. It was another two decades, after all, before the Court began its long beat-around-the-bush effort at incorporating the Bill of Rights.[77] As Gerard Magliocca has detailed, the Court of the late 19th century repeatedly shunned applying the rights of the accused against the states—perhaps (he argues) because of worries over labor agitation—while at the same time beginning its application of property rights and economic liberty to the states via the Fourteenth Amendment.[78] The Court did occasionally apply non-economic liberties against the states, such as in the parental choice cases of *Meyer v. Nebraska*[79] and *Pierce v. Society of Sisters*;[80] and it occasionally used property rights to protect minorities, as in

68 *Lochner*, 198 U.S. at 56.

69 *Id.* at 59.

70 David E. Bernstein, Lochner v. New York*: A Centennial Retrospective*, 83 Wash. U. L.Q. 1469, 1495 (2005).

71 *Id.*

72 *Lochner*, 198 U.S. at 70-71 (Harlan, J., dissenting).

73 *Id.* at 72 (Harlan, J., dissenting).

74 208 U.S. 161 (1908).

75 *Id.* at 174.

76 *Id.*

77 *See* Gitlow v. New York, 268 U.S. 652 (1925) (first applying a right in the Bill of Rights to the states). The Court is often credited with having begun this earlier with the Takings Clause, but that was actually not an incorporation case, but simply a case applying the Due Process Clause of the Fourteenth Amendment. Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897).

78 Gerard N. Magliocca, *Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?*, 94 Minn. L. Rev. 102, 105-08 (2009).

79 262 U.S. 390 (1923).

80 268 U.S. 510 (1925).

Buchanan v. Warley[81] (but not in *Plessy v. Ferguson*,[82] of course). To our modern eyes, however, this overall imbalance is inexcusable.

So let's not excuse it. There is something of a Grand Bargain in Greene's endorsement of Harlan's approach. To be sure, Greene does not explicitly offer such a bargain, but it is lying there waiting to be picked up and examined. On the one hand, he is suspicious of the modern strict scrutiny approach for many rights. He also wants to raise up other rights that make some uncomfortable, including not just positive rights, but discrimination claims under disparate impact theories.[83] On the other hand, he seems open to allowing claims to go forward under a Justice Harlan standard that today are dead-on-arrival under the *Lee Optical* rational basis test. Of course, many libertarians would ask to keep strict scrutiny and apply it to every negative right. But libertarians and others who are open to viewing Harlan's standard as a pragmatic way to enhance the protection of Lockean rights such as economic liberty might think about what a balancing approach could give, for example, entrepreneurs who cannot start a business because of rent-seeking lobbyists and property owners who cannot build cheaper housing because of NIMBY zoning laws. Something that remains unclear is how the positive rights Greene also wants would work under this rubric—would they just nullify economic liberty in the end anyway? Would they reproduce rational basis by other means?

That's not in the book. But the book does include a tantalizing reference to a case the Institute for Justice brought challenging a Missouri law that required prospective African-style hair braiders to get a cosmetology license.[84] This required them to pay thousands of dollars to receive 1,500 hours of cosmetology training, almost none of which involved hair braiding.[85] The challenge to this senseless requirement was defeated in the Eighth Circuit Court of Appeals in an all-too-typical paean to judicial restraint and deference to the legislature. Greene mentions the case in his introduction as one that failed because of "rightsism." As I neared the end of the book, I kept hoping it would reappear, like an intriguing character from the first scene of a movie. But then, to my disappointment, it never did, not even in a secret scene after the credits closed.

I finished the book wondering how Greene's suggested approach might have brought hope to those braiders. If Greene wants to take Justice Harlan seriously, it seems that hope is there. Without endorsing a Grand Bargain, there is a grand amount that progressives like Greene and classical liberals like me can discuss in their mutual ire at the "rightsism" of Footnote Four and Justice Oliver Wendell Holmes. I look forward to discovering what common ground could be there.

81 245 U.S. 60 (1917).

82 163 U.S. 537 (1896).

83 How Rights Went Wrong at 104-07.

84 How Rights Went Wrong at xiii ("Two Missouri women, Ndioba Niang and Tameka Stigers, claimed the right to braid hair without completing a 1,500-hour training course and obtaining a cosmetology license. They lost.").

85 Niang v. Carroll, 879 F.3d 870, 874 (8th Cir. 2018), *vacated as moot*, 139 S. Ct. 319 (2018).

In the Rush to Reform, Prudence Is Among the Highest Duties: How to Responsibly Reform Cash Bail

By Craig W. Trainor

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• Insha Rahman, *Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration*, 46 Fordham Urban L.J. 845 (2019), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2767&context=ulj.

• Tiana Herring, *Releasing people pretrial doesn't harm public safety*, Prison Pol'y Initiative (Nov. 17, 2020), https://www.prisonpolicy.org/blog/2020/11/17/pretrial-releases/.

• *After Cash Bail: A Framework for Reimagining Pretrial Justice,* Bail Project (2020), https://bailproject.org/after-cash-bail/.

• Sean Kennedy, *This bail reform is a bad idea*, N.Y. Daily News, Mar. 27, 2019, https://www.nydailynews.com/opinion/ny-oped-bail-reform-is-a-bad-idea-20190327-xjdpo3ynanhtzpmi4l7icqrzky-story.html.

• Jamiles Lartey, *New York Tried to Get Rid of Bail. Then the Backlash Came.*, Politico, Apr. 23, 2020, https://www.politico.com/news/magazine/2020/04/23/bail-reform-coronavirus-new-york-backlash-148299.

• Chelsey Sanchez, *As Donations Pour in, Bail Fund Organizers Want to Overhaul the System,* Harpers Bazaar (June 8, 2020), https://www.harpersbazaar.com/culture/politics/a32782804/bail-funds-george-floyd-protests-pretrial-detention/.

• Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 Harv. L. Rev. 1125 (2018), https://harvardlawreview.org/2018/02/bail-reform-and-risk-assessment-the-cautionary-tale-of-federal-sentencing/.

Over the last two decades, the politics of American criminal law has made strange bedfellows. Christian conservatives and libertarians have found common cause with progressives and left-wing criminal justice activists to reduce America's jail and prison population. For Christian reformers, their faith commitments inform their advocacy, "as evidenced by the prominent role that Prison Fellowship Ministries has played in nearly all the efforts" at reform.[1] Libertarians, with their maximalist view of freedom, support "the repeal of all laws creating 'crimes' without victims" and, thus, were reformers before reform was a movement.[2] Progressives and left-wing activists view the American criminal justice system as structurally racist because it "has the highest incarceration rate in the world, and the overwhelming burden of contact with the system has fallen on communities of color, especially African Americans."[3] Plainly, if our system is racist, as left-of-center reformers allege, reform is a moral imperative.

The reform lobby seeks a host of changes to the status quo, from reducing prison populations through abolition of mandatory minimum sentences to scaling back proactive law enforcement, such as broken-windows policing and the lawful use of *Terry* stops to remove guns from the street.[4] Other reforms appear more calibrated toward improving the electoral fortunes of the

1 Eli Lehrer, *The Party of Prison Reform*, The Weekly Standard (Mar. 18, 2013), *available at* https://www.washingtonexaminer.com/weekly-standard/the-party-of-prison-reform.

2 Libertarian Party Platform, *available at* https://www.lp.org/platform (last visited March 2021).

3 Connor Maxwell & Danyelle Solomon, *Mass Incarceration, Stress, and Black Infant Mortality: A Case Study in Structural Racism*, Center for American Progress, (June 5, 2018), *available at* https://www.americanprogress.org/issues/race/reports/2018/06/05/451647/mass-incarceration-stress-black-infant-mortality.

4 *See, e.g.*, Press Release, ACLU, ACLU Advocates For Abolition Of Mandatory Minimums Before U.S. Sentencing Commission (May 27, 2010), *available at* https://www.aclu.org/press-releases/aclu-advocates-abolition-mandatory-minimums-us-sentencing-commission; Justin Peters, *Loose Cigarettes Today, Civil Unrest Tomorrow: The racist, classist origins of broken windows policing*, Slate, Dec. 5, 2014, *available at* https://slate.com/news-and-politics/2014/12/edward-banfield-the-racist-classist-origins-of-broken-windows-policing.html; Vincent Warren, *The Case against Stop-and-Frisk*, Open Society Foundations (2016), *available at* https://www.opensocietyfoundations.org/voices/case-against-stop-and-frisk.

reformers, such as restoring the voting rights of convicted felons.[5] Reformers have recently turned their attention to cash bail.[6]

When someone is arrested, courts are empowered to impose cash bail conditions on the defendant to ensure that he appears at his next court appearance and does not commit future crimes while at liberty. Reformers argue that cash bail disadvantages the poor while privileging those who can afford to make money bail, and, thus, that it disproportionately harms communities of color. They further argue that criminal defendants who cannot make bail are more likely to accept coercive guilty pleas and sacrifice their constitutional right to trial. Taken together, they reason, the cash bail system is fundamentally unfair. These claims have merit and have long deserved a hearing. To mitigate these harms, states should eliminate the cash bail system and replace it with a regime that permits judges to release or detain criminal defendants based on an analysis of the risk that they will fail to appear for their court appearances or commit crimes while at liberty.

I. Bail in the United States

Bail reform has the potential to be a noble enterprise. Where its purpose is to reduce the number of criminal defendants who are incarcerated awaiting trial for nonviolent offenses for lack of financial resources, it is worthy of support. Defendants who can afford to make bail are released while they await trial. Defendants who cannot afford to make bail remain incarcerated. This is concerning because it creates the appearance, if not the reality, of a two-tiered system of justice. As a result, the public's faith in the criminal justice system erodes.[7] This is a compelling reason to reform the cash bail system. It has the added virtue of being race neutral and, therefore, consonant with the demands of our color-blind Constitution.[8]

But reform for reform's sake is not necessarily a virtue. Reform must be carefully crafted, with an eye toward mitigating the harm it aims to address, but equally watchful for the unintended consequences that can attend dramatic change.[9] To that end, it is important to examine the history of bail and its evolution from a system to ensure a criminal defendant's appearance in court to a regulatory means of crime control.

A. The Purpose of Bail From the Colonial Era to the Present

In the early 17th century, when the English began to settle in what would become the United States, they brought English common law with them.[10] An 1876 American Law Register explained:

> The power belonging to the English Court of King's Bench to bail in all cases, belongs equally to the courts of general jurisdiction in the states of this country, deriving their systems of jurisprudence from the common law of England, except as the same may be controlled, or limited by constitutional or statutory provisions. This power is necessarily incident to the power to try, acquit, and finally discharge a prisoner.[11]

Thus, "the American understanding of bail is derived from 1,000-year-old English roots."[12]

The historic object of bail is to allow a presumptively innocent criminal defendant to remain at liberty pretrial while ensuring his future appearance in court. With monetary skin in the game, a defendant has an incentive not to abscond. If he fails to appear in court, then his bail is forfeited. Accordingly, bail works

5 Nicole D. Porter, *Top Trends in State Criminal Justice Reform, 2019*, The Sentencing Project (2020), *available at* https://www.sentencingproject.org/publications/top-trends-in-state-criminal-justice-reform-2019.

6 Some modest reform efforts have garnered mainstream acceptance. On December 21, 2018, President Donald Trump signed into law "The First Step Act," which passed the House and Senate with wide margins of support. *See* Adam Shaw & Judson Berger, *Trump signs criminal justice reform bill*, Fox News, Dec. 21, 2018, *available at* https://www.foxnews.com/politics/trump-signs-criminal-justice-reform-bill. The legislation primarily provides for (1) correctional reform to prevent recidivism among federal prisoners, (2) downward adjustments for mandatory minimum prison sentences for certain federal drug offenders, and (3) reauthorization of the Second Chance Act, which provides federal grants for reintegration programs for adult and juvenile offenders. *See The First Step Act of 2018: An Overview*, Congressional Research Service, Mar. 4, 2019, *available at* https://crsreports.congress.gov/product/pdf/R/R45558.

7 *See* Brief of Amici Curiae Current and Former District, State, and Prosecuting Attorneys, and State Attorneys General in support of Plaintiff-Appellee at 3, filed February 14, 2020, Booth v. Galveston Cnty., Dkt. No. 19-40785 (5th Cir. Sept. 18, 2019), *available at* https://fairandjustprosecution.org/wp-content/uploads/2020/02/FJP-Booth-v.-Galveston-County-Amicus-Brief-Appeal-File-Stamped.pdf ("More broadly, a system that is perceived as unfair will erode a community's confidence in law enforcement and the justice system."). *Cf.* State v. Medina, 197 Vt. 63, 103 (2014) ("The public's faith in the criminal justice system to treat the accused fairly is bolstered through the use of identification techniques that lend greater accuracy to the process.").

8 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520-21 (1989) (Scalia, J., concurring) ("I share the view expressed by Alexander Bickel that '[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.' At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," *Plessy v. Ferguson,* 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)."). (internal citations omitted).

9 James Q. Wilson, *A Life in the Public Interest*, Wall St. J., Sept. 21, 2009, *available at* https://www.wsj.com/articles/SB10001424052970204488304574424752913834312 (When considering changes to social policy, we do well to meditate on "the law of unintended consequences. Launch a big project and you will almost surely discover that you have created many things you did not intend to create.").

10 Lawrence M. Friedman, Law in America 23-24 (2002).

11 *The Power of Courts to Let to Bail,* The American Law Register (January 1876), *available at* https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2730&context=penn_law_review.

12 Timothy R. Schnacke, Michael R. Jones, & Claire M. B. Brooker, *The History of Bail and Pretrial Release*, Pretrial Justice Institute 1 (2010), *available at* https://b.3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf.

to "accommodate both the defendant's interest in pretrial liberty and society's interest in assuring the defendant's presence at trial."[13]

B. Pretrial Detention as a Means of Regulatory Crime Control

This rationale remained in place for centuries until America experienced the great crime wave of the 1960s. Barry Latzer, a criminologist and emeritus professor of criminal justice at the John Jay College of Criminal Justice, explained the nature of the 1960s crisis:

> By the end of the [1960s], all of this optimism evaporated in a blizzard of violence and killings. Riots, crime, and disorderly protests accompanied increasingly audacious challenges to authority figures and, indeed, authority itself. In 1968, an astonishing 81 percent of the American public told interviewers that law and order had broken down altogether in the United States.
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> Between 1960 and 1970, rates of violent crime (essentially, murder, rape, robbery, and serious assaults) in the United States more than doubled, from 161 per 100,000 to 364. Murder rates rose 55 percent, while robbery rates climbed over 91 percent.[14]

On December 10, 1969, the National Commission on the Causes and Prevention of Violence, which was created by President Lyndon Johnson on June 6, 1968, to address political assassinations and individual acts of violence, among other disorders, issued its final report, stating, "Violent crime (particularly street crime) engenders fear—the deep-seated fear of the hunted in the presence of the hunter. Today this fear is gnawing at the vitals of urban America."[15]

Amid the ruins of the crime epidemic, President Richard Nixon, who won election in 1968 on a platform that emphasized law and order, issued a statement to Congress on January 31, 1969, concerning the District of Columbia. Under the rubric of "Crime and Administration of Justice," he asserted that "a meaningful assault on crime requires actions on a broad array of fronts."[16] To make police more effective and "to make justice swifter and more certain," he proposed 12 major proposals for action.[17] On "Bail Reform," President Nixon highlighted that:

> Increasing numbers of crimes are being committed by persons already indicted for earlier crimes, but free on pretrial release. Many are now being arrested two, three, even seven times for new offenses while awaiting trials. This requires that a new provision be made in the law, whereby dangerous hard core recidivists could be held in temporary pretrial detention when they have been charged with crimes and when their continued pretrial release presents a clear danger to the community.[18]

This presidential call to action resulted in the District of Columbia Court Reform and Criminal Procedures Act of 1970, in which "Congress for the first time permitted judicial officers to consider danger to the community in establishing conditions of release in noncapital cases."[19] Based upon this statute, Congress enacted the Bail Reform Act of 1984, which "provided for pretrial detention based solely on future danger to the community for the first time on a nationwide scale."[20]

C. Fat Tony Salerno Constitutionalizes Regulatory Pretrial Detention

In 1987, the Supreme Court addressed a constitutional challenge to the 1984 act that was brought by Anthony "Fat Tony" Salerno—then the boss of the Genovese crime family, a powerful organization within the Italian-American Mafia—who was indicted for violating the Racketeer Influenced and Corrupt Organizations Act and detained pretrial for dangerousness. He argued that pretrial detention based upon a defendant's likeliness "to commit future crimes" violates due process because the Constitution "holds persons accountable for past actions, not anticipated future actions."[21]

In *Salerno v. United States*, Chief Justice William Rehnquist stated that the due process question turned on whether the 1984 act provides for pretrial detention as a regulatory matter or as a punitive one. Punitive detention without conviction, he reasoned, violates due process; regulatory detention with appropriate procedural safeguards does not. Writing for the Court, the Chief Justice approved of the procedural protections the act afforded defendants to challenge pretrial detention and found that the law "clearly indicates that Congress did not formulate the pretrial detention provision as punishment for dangerous individuals."[22] Congress instead "perceived pretrial detention as a potential solution to a pressing societal problem"—specifically, "the alarming problem of crimes committed by persons on release."[23]

On firm constitutional ground, the 1984 act represented a watershed moment for bail in the United States. At the federal level, bail would no longer be employed solely to ensure criminal defendants appeared in court, but it would also be set to protect the public from defendants with a propensity to keep offending while under the court's jurisdiction on pending criminal matters.

13 Ariana K. Connelly & Nadin R. Linthorst, *The Constitutionally of Settling Bail Without Regard To Income: Securing Justice Or Social Injustice?*, 10 Ala. C.R. & C.L. L. Rev. 115, 118 (2019) (alterations omitted).

14 Barry Latzer, The Rise and Fall of Violent Crime in America 106-10 (2016).

15 *To Establish Justice and To Ensure Domestic Tranquility*, National Commission on the Causes and Prevention of Violence (1969), *available at* https://www.ojp.gov/pdffiles1/Digitization/275NCJRS.pdf.

16 Richard M. Nixon, *Statement by the President on Actions and Recommendations for the Federal City*, January 31, 1969, *available at* https://books.google.com/books?id=52QgAAAAMAAJ&pg=PA265&lpg=PA265&dq.

17 *Id.*

18 *Id.*

19 Michael Harwin, *Detaining for Danger under the Bail Reform Act of 1984: Paradoxes of Procedure and Proof*, 35 Ariz. L. Rev. 4, 1091, 1093 (1993).

20 *Id.* at 1094.

21 Salerno v. United States, 481 U.S. 739, 744-45 (1987).

22 *Id.* at 747.

23 *Id.* at 742-47.

Today, in the federal system, the District of Columbia, and every state in the Union—except New York—judges are empowered, in some way or another, to consider the threat a criminal defendant presents to public safety when ruling on the conditions of a defendant's pretrial release.[24] It is axiomatic that, by virtue of his detention, a jailed defendant is denied the opportunity to harm the public. Likewise, he is deprived of the opportunity to abscond.

II. Racial Disparities and Bail Determinations in Practice

Any serious discussion of bail reform requires an examination of bail's historical pedigree and purpose, particularly where this system is being scrutinized in the present for "racial disparities on pretrial and bail outcomes," as the U.S. Commission on Civil Rights recently explored.[25] As a threshold matter, bail's historical roots and aim are race neutral. A legal regime "derived from 1,000-year-old English roots" is, by definition, unconcerned with the complex racial dynamics of the American experiment.

A. In Modern America, Judges Decide Conditions of Release on Principle

In deciding bail, judges are not lawfully permitted to consider the race of a criminal defendant.[26] Rather, a judicial determination on a defendant's pretrial status is controlled, in the main, by two questions: (1) whether the defendant is likely to appear in court when his presence is required, and (2) whether he poses a risk to the public. The late legal scholar and D.C. Circuit Judge Robert Bork explained the centrality of neutral legal principles in the application of law:

> A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved. The legal principle to be applied is never neutral in its content, of course, because it embodies a value that is to be applied to the exclusion of other contending values. . . . [But] the value-laden principle must be *applied* neutrally.[27]

When a judge decides questions of pretrial release, neutral principles require that he ignore extraneous factors—such as the race or ethnicity of the defendant—that have no bearing on whether a defendant will return to court or threaten the public. One's racial identity is an accident of birth. It has no predictive outcome on how likely one is to flee or commit additional crimes. As a result, a judge must apply the bail laws "consistently and without regard to his sympathy or lack of sympathy with the parties before him."[28]

In my law practice, I have represented nearly 1,000 criminal defendants. Many of my clients have been black or Hispanic. Many have had limited financial resources. I cannot think of a case in which a judge appeared to factor in my client's race when determining bail.[29] I have certainly had cases where I believed my clients should have been released on their own recognizance. I argued vigorously for their release, but the judges thought otherwise. That, however, is the nature of discretion and the multifactor analysis that bail decisions entail.[30] My disagreement with the wisdom of these determinations does not a civil rights violation make.[31]

B. Cash Bail Disproportionately Affects Poor Defendants

Whether a "cash bail system disproportionately results in the pre-trial incarceration of poor individuals and people of color" is a legitimate question, but it has an obvious answer.[32] It should go without saying that cash bail disproportionately results in poor people being incarcerated more than people of means.[33] Poor people are poor; thus, they generally do not have the money to

24 Rafael A. Mangual, *Reforming New York's Bail Reform: A Public Safety-Minded Proposal*, Manhattan Institute (March 5, 2020), *available at* https://www.manhattan-institute.org/reforming-new-yorks-bail-reform ("New York is now the only state that does not allow judges to consider public safety in any pretrial release decisions.").

25 Letter from Katherine Culliton-Gonzalez, Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, to author (January 4, 2021) (on file with author).

26 Washington v. Davis, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.").

27 Robert H. Bork, The Tempting of America: The Political Seduction of the Law 78 (1997) (quoting Professor Herbert Wechsler).

28 *Id.* at 151.

29 This observation naturally takes into account that "'[o]utright admissions of impermissible racial motivation are infrequent.'" William v. Dart, 967 F.3d 625, 638 (7th Cir. 2020) (quoting Hunt v. Cromartie, 526 U.S. 541, 553 (1999)). Rather, my experience hews closely to the standard courts use when interrogating claims of intentional racial discrimination: "A policy's use of facially neutral criteria raises an inference of impermissible intent when those criteria map so closely onto racial divisions that they allow racial targeting 'with almost surgical precision.'" *Id.* (quoting North Carolina State Conference of the NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016)).

30 Under New York's pre-reform bail system, a defendant had a right to seek release on his own recognizance or bail, with a public policy presumption in favor of pretrial release. People v. Mohammed, 171 Misc. 2d 130, 134 (Kings Cnty. Sup. Ct. 1996). The court enjoyed wide discretion in fixing the terms of release upon considering the criteria set forth in Criminal Procedure Law § 510.30(2)(a)—specifically, (1) the defendant's character, reputation, habits, and mental condition; (2) his employment and financial resources; (3) his family ties and the length of his residence, if any, in the community; (4) his criminal record; (5) whether he failed to appear for prior court appearances; (6) the severity of the crime charged; and (7) the likelihood of conviction and the length of sentence to follow.

31 If a criminal defendant has a good-faith basis to believe that a judge did factor in his (the defendant's) race in making a bail determination, he can seek relief under 42 U.S.C. § 1983 for a denial of equal protection in violation of the Fourteenth Amendment. *See* Williams, 967 F.3d at 637-39.

32 Culliton-Gonzalez Letter, *supra* note 25.

33 Given some of the rhetoric on bail reform, it bears noting that "pretrial detention based on wealth is unconstitutional." Russell v. Harris Cnty., No. H-19-226, 2020WL6585708, at *23 (S.D. Tex. Nov. 10, 2020) ("Although pretrial detention based on wealth is unconstitutional, a state may detain a felony arrestee before trial if it has a compelling reason to do so," namely, "to ensure the arrestee's presence at trial," and "if the arrestee presents a danger of committing new crimes.") (internal citations and quotation marks omitted). *Cf.* United States v. Weigand, 492 F. Supp. 3d 317, 319 (S.D.N.Y. 2020) ("But equal protection works both ways. If defendants are to be treated similarly, without regard to wealth,

make cash bail when they are arrested.[34] I have had white clients who could not afford to make bail and were detained pretrial. The same was true for my black clients who could not afford to make bail. In my experience, disparate cash bail outcomes between black and white criminal defendants are explained by economics, not race.

Assuming a black defendant and a white defendant are similarly situated by offense charged and criminal history, cash bail disparities fall harder on black defendants because of the higher proportion of black people living below the poverty line.[35] The United States Census Bureau released a study in 2020 that found, on the one hand, the poverty rate for blacks and Hispanics reached historic lows in 2019. But on the other hand, the "poverty rate for blacks was 18.8%; for Hispanics, it was 15.7%"; and for whites and Asians, it was "7.3%."[36] This state of affairs is a larger and far more complex question than that of racially disparate outcomes in pretrial detention.

C. The Cash Bail Debate Should Focus on Poverty, Not Racial Politics

Some in the reform camp, however, reject economic reality in favor of a more sinister narrative—namely, the criminal justice system is systemically racist. According to the Aspen Institute, systemic or "structural racism is defined as a system of public policies, institutional practices, cultural representations, and other norms that work in reinforcing ways to perpetuate racial inequality."[37] If one accepts this definition, as the Center for American Progress does, then our "criminal justice system is perhaps the clearest example of structural racism in the United States" because "[1] African American adults are five times more likely to be imprisoned than white Americans," and "[2] African Americans are twice as likely as their white counterparts to have a family member imprisoned at some point during their childhood."[38]

These are sobering statistics, to be sure, but they do not reveal much about the *causes* of these disparities. The idea that racial disparities in the criminal justice system are the result of racism is taken for granted, rather than proved, including in arguments about cash bail. For instance, Color of Change, which describes itself as a racial justice organization, claims that:

> The money bail system perpetuates racism in the justice system that disproportionally targets people of color, especially Black people. Reliance on a money-based pretrial system disadvantages people of color who are more likely to be living in poverty, allows the system to exacerbate overcharging and coerce guilty pleas, deprives people of rights to defend their innocence, and extracts wealth from poor and Black communities.[39]

This searing indictment is heavy on rhetoric, but it does not attempt to prove its claim that cash bail targets people of color. In this way, it is representative of arguments put forth by activists who insist on making cash bail reform about race, rather than about color-blind justice for all regardless of wealth.

D. Eliminating Cash Bail Will Not Alleviate the Problem of Violent Crime in the Black Community

Yet the facts about racial disparities in the criminal justice system are deeply troubling, particularly as they relate to violent

then Weigand cannot be detained when an otherwise similarly situated indigent defendant would be released.").

34 Bail conditions that are "unaffordable" do not offend the Constitution. Walker v. City of Calhoun, 901 F.3d 1245, 1258 (11th Cir. 2018) ("The basic test for excessive bail is whether the amount is higher than reasonably necessary to assure the accused's presence at trial, and that as long as the primary reason in setting bond is to produce the defendant's presence, the final amount, type, and other conditions of release are within the sound discretion of the releasing authority.") (quoting United States v. James, 674 F.2d 886, 891 (11th Cir. 1982)) (internal quotation marks and alterations omitted).

35 The lack of economic parity among groups explains disparities that result in poorer defendants being held on bail when all things are equal except the racial identity of the offender. But neither material poverty nor racism explains bail disparities among defendants who have prior criminal convictions or previous warrants for failing to appear in court. In these instances, a court is more likely to set a high bail on a defendant because of his demonstrated inability to follow the law. The defendant's past behavior compels the present result. Even criminologists sympathetic to claims of racism have found that "'Racial differences in patterns of offending, not racial bias by police and other officials, are the principal reason that such greater proportions of blacks than whites are arrested, prosecuted, convicted and imprisoned.'" Heather Mac Donald, *Is the Criminal Justice System Racist?*, City J. (Spring 2008), *available at* https://www.city-journal.org/html/criminal-justice-system-racist-13078.html (quoting Michael Tonry, Malign Neglect (1996)).

36 John Creamer, *Inequalities Persist Despite Decline in Poverty for All Major Race and Hispanic Origin Groups*, U.S. Census Bureau (Sept. 15, 2020), *available at* https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html.

37 Maxwell & Solomon, *supra* note 3 (citing Aspen Institute Staff, *11 Terms You Should Know to Better Understand Structural Racism*, Aspen Institute Blog, July 11, 2016, https://www.aspeninstitute.org/blog-posts/structural-racism-definition).

38 *Id.* Although growing in popularity, the concept of structural or systemic racism in the United States is far from settled. *E.g.,* Harvey C. Mansfield, *The 'Systemic Racism' Dodge*, Wall St. J., Sept. 18, 2020, *available at* https://www.wsj.com/articles/the-systemic-racism-dodge-11600454532 ("Systemic racism ignores the agency of black citizens, leaving them nothing to do except protest in the streets or cheer from the sidelines. Meanwhile, whites are told by the same idea that all their past efforts against whites supremacy have been in vain. . . . 'Systemic racism' is a bogus description that issues in an accusation made in doubtful faith that contradicts itself."); Shelby Steele, *The Inauthenticity Behind Black Lives Matter*, Wall St. J., Nov. 22, 2020, *available at* https://www.wsj.com/articles/the-inauthenticity-behind-black-lives-matter-11606069287 ("Thus, for many blacks today—especially the young—there is a feeling of inauthenticity, that one is only thinly black because one isn't racially persecuted. 'Systemic racism' is a term that tries to recover authenticity for a less and less convincing black identity. This racism is really more compensatory than systemic. It was invented to make up for the increasing absence of the real thing."); Thomas D. Klingenstein & Ryan P. Williams, *America is Not Racist*, American Mind, June 3, 2020, https://americanmind.org/salvo/america-is-not-racist/ ("America is not a racist country. America is a country that has strived, imperfectly but passionately, to live up to its founding promise that all men are created equal. There is not—and will never be—a greater barrier to racism, or to tyranny in any form, than this American idea. The reckless charge that American law enforcement is 'systemically racist' is also not true.").

39 Testimony of Erika Maye, Deputy Senior Campaigns Director for Criminal Justice, Color of Change, before the U.S. Commission on Civil Rights (Feb. 26, 2021), *available at* https://www.usccr.gov/pubs/briefing-reports/2021-02-26-The-Civil-Rights-Implications-of-Cash-Bail.php.

crime, which is the offense category most likely to land a criminal defendant in pretrial detention. The Bureau of Justice Statistics, an agency within the United States Department of Justice, reports that "more than half of all homicides in the U.S. are committed by black people, despite the fact that they make up only 13 percent of the population."[40] Moreover, "most of their victims are also black. FBI data also reveal that blacks disproportionately commit a range of other crimes, including manslaughter, rape, robbery, and aggravated assault."[41]

According to the Center for Disease Control, in 2015, "the homicide rate for blacks aged 10 to 34 was 13 times the rate for whites."[42] The same study found that "violence also exacts enormous and disproportionate social and economic costs in minority communities" that "include medical, educational, and justice system costs, reduced labor market productivity, decreased property values, and disruption of community services."[43] There was nothing about the systemic racism of the criminal justice system—or the cash bail system specifically—in the report.

Until American society is ready to contend honestly with these facts, overheated rhetoric and totalizing explanations and solutions advanced by partisan interest groups will do little more than stir up division and alienate good-faith stakeholders trying to address tough issues that do, in fact, disproportionately affect minority communities.[44] Where to strike the balance between a defendant's pretrial liberty interest and the public's interest in safety is such a question. This debate would benefit from epistemic humility—accepting that our knowledge is provisional and contingent, and that we should engage reform with caution because, as Edmund Burke admonished, the "private stock of reason . . . in each man is small" and "individuals would do better to avail themselves of the general bank and capital of nations and ages."[45]

III. Eliminating Cash Bail Would End a Two-Tiered Justice System

With Burkean virtue in mind, we can acknowledge our limitations, proceed prudentially, but still engage in bold reform. After all, the Old Whig himself observed that "A state without the means of some change is without the means of its conservation."[46] To the extent that the cash bail system creates unnecessary disparities based upon defendants' financial conditions, then eliminating cash bail is the most sensible response to the concerns of stakeholders on all sides, provided appropriate measures are implemented in tandem with ending bail.

Cash bail visits a hardship on defendants based on their poverty rather than their dangerousness. As previously discussed, poverty falls harder on the black community, which already has an understandable "distrust" of the police "given the history in this country," according to former Attorney General William Barr.[47] The harm is compounded by the civil disabilities that attend detention, including the risk of losing one's job, housing, or parental custody. These negative consequences apply to incarcerated pretrial defendants in jurisdictions that have eliminated cash bail, of course; but when judicial options are narrowed by the primacy of cash bail, the instances of pretrial detention increase, along with the parallel consequences, given the general material deprivation of the majority of people who commit crimes.[48] These facts militate in favor of eradicating cash bail.

The principal argument against ending a money bail system is that judges should have the option to impose it in individual

40 Christine Rosen, *Accepting Crime, Abolishing Punishment*, Commentary (Mar. 2021), *available at* https://www.commentarymagazine.com/articles/christine-rosen/crime-police-prison-liberalism/. *See also* FBI, 2019 Crime in the United States Expanded Homicide Data Table 3, *available at* https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-3.xls.

41 Rosen, *supra* note 40.

42 Kameron J. Sheats, et al., *Violence-Related Disparities Experienced by Black Youth and Young Adults: Opportunities for Prevention*, Am. J. Prev. Med. (Oct. 2018), *available at* https://stacks.cdc.gov/view/cdc/80674/cdc_80674_DS1.pdf.

43 *Id.*

44 Although the issue of crime in the black community has become increasingly taboo, serious academics and commentators have recognized the necessity of addressing the problem earnestly. Writing in *The Public Interest*, political scientist John DiIulio observed:

> America does not have a crime problem; inner-city America does. The poverty gap between blacks and whites in this country may be shrinking, but the crime gap between them has been growing. No group of Americans suffers more when violent and repeat criminals are permitted to prey upon decent, struggling, law-abiding inner-city citizens and their children than what Hugh Pearson, writing in the *New York Times*, called "black America's silent majority." As Harvard Law Professor Randall Kennedy keenly observed recently in the *Wall Street Journal*: "what is really at stake in many controversies with racial overtones is not simply an interracial dispute but an actual or incipient intraracial conflict. Although blacks subject to draconian punishment for crack possession are burdened by it, their black law-abiding neighbors are presumably helped by it . . . ."

John J. DiIulio, Jr., *The question of black crime*, The Public Interest (Fall 1994), *available at* https://www.nationalaffairs.com/storage/app/uploads/public/58e/1a4/e52/58e1a4e5280b2928520075.pdf. *See also* Heather Mac Donald, *A Grim—and Ignored—Body Count*, City J. (Nov. 2, 2020), *available at* https://www.city-journal.org/media-silence-on-black-on-black-violence ("When I speak on policing, I have been told repeatedly by white listeners that hearing the data on disproportionate black crime makes them 'uncomfortable.' This feeling is not the response of a white supremacist; it is the response of someone who is in the dark about racial disparities in criminal offending or who wishes that those disparities would go away in the service of racial harmony and equality.").

45 Edmund Burke, Reflections on the Revolution in France 76-77 (Pocock ed. 1987).

46 *Id.* at 19.

47 Devan Cole, *Top Trump officials claim there's no systemic racism in US law enforcement agencies as Americans flood streets in protest*, CNN, June 10, 2020, *available at* https://www.cnn.com/2020/06/07/politics/systemic-racism-trump-administration-officials-barr-carson-wolf/index.html. Notably, in the same interview, Attorney General Barr rejected the notion that "the law enforcement system is systemically racist."

48 The Prison Policy Initiative, a left-wing advocacy group, found that "people in jail had a median annual income of $15,109 prior to their incarceration, which is less than half (48%) of the median for non-incarcerated people of similar ages. People in jail are even poorer than people in prison and are drastically poorer than their non-incarcerated counterparts." They concluded that "examining the median pre-

cases where detention is unduly harsh but release without adequate incentive is insufficient to ensure a defendant appears in court.[49] This is fair, but the option itself is the source of reform discontent: defendants who cannot afford bail cannot afford bail, no matter where they fall on the spectrum of risk. Moreover, there exists a middle ground between bail and detention—supervised release. Release on supervision allows a defendant to return home pretrial but requires an accredited pretrial services agency monitor him to ensure he appears in court and provide him, if necessary, with social and mental health services and drug treatment to reduce the risk of pretrial recidivism.[50]

At any rate, judges often have to make tough calls—prudential judgements—and deciding where to fall on detention or release is one of them. As in life, the criminal justice system is comprised of pragmatic trade-offs, in which ambiguities and conflicts are resolved imperfectly. Bail reform is no exception.

IV. With the End of Cash Bail, Judges Must Be Empowered to Detain Pretrial Defendants Who Threaten Public Safety

There is a necessary corollary to eliminating cash bail: Responsible reform must empower judges to remand criminal defendants where they present a strong risk for failure to appear in court or danger to the public.[51] New Jersey's pretrial release system serves as a blueprint for how to eliminate cash bail without sacrificing public safety.

A. New Jersey's Bail Reform Is a Model for the Nation

On January 1, 2017, New Jersey implemented bail reform. The new law eliminated cash bail, allowing judges to determine the conditions of a defendant's release based on specified risk: (1) the likelihood the defendant will fail to appear in court; (2) the likelihood the defendant will commit another crime while on release; and (3) the likely effect releasing the defendant will have on public safety.[52]

To assess these risk levels, the state uses a risk evaluation tool called a "Public Safety Assessment" or "PSA."[53] The PSA uses an algorithm that assesses nine factors—including a defendant's age and previous criminal history, whether there are allegations of violence in the current charge, and whether he has a history of failing to appear in court—to determine whether a defendant should be released pretrial with or without conditions or detained.[54] Defendants deemed dangerous can be remanded to pretrial detention. Defendants who pose a lower risk to the public or for failure to appear in court can be released with court-mandated monitoring (supervised release), which might involve reporting by phone to pretrial services or weekly in-person reporting while wearing an electronic ankle bracelet.

As a result of this reform, New Jersey's pretrial detainee population plunged from 7,137 on January 1, 2017, to 4,967 on January 31, 2017, a decrease of 30 percent.[55] From January 2018 to September 2018, the state saw a 32 percent decrease in homicides, 13 percent decrease in rapes, 18 percent decrease in assaults, 37 percent decrease in robberies, and 30 percent decrease in burglaries, when compared with statistics from the same period in 2016.[56]

The Garden State's experience teaches that states can responsibly eliminate cash bail, reduce its attending disparities, and keep more nonviolent offenders at liberty pretrial, while also protecting the public from recidivist defendants. Pretrial incarceration rates in lower-income and minority communities will inevitably decrease as a result.

B. Don't Let the Perfect Be the Enemy of the Good

This regime is not without objection, particularly with respect to alleged racial bias when determining an individual's risk score. The concern emanates from ProPublica's reporting on Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) software.[57] COMPAS uses an algorithm to assess a defendant's pretrial risks or a convicted inmate's propensity for recidivism. ProPublica, an investigative journalism outfit, reviewed "more than 10,000 criminal defendants in Broward County, Florida, and compared their predicted recidivism rates with the rate that actually occurred over a two-year period."[58] Although the journalists found that "the algorithm correctly

incarceration incomes of people in jail makes it clear that the system of money bail is set up so that it fails: the ability to pay a bail bond is impossible for too many of the people expected to pay it." Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time*, Prison Pol'y Initiative, May 10, 2016, *available at* https://www.prisonpolicy.org/reports/incomejails.html.

49 *Cf.* Sean Kennedy, *No, Maryland's cash bail system doesn't hurt the poor. It's a great equalizer.*, Wash. Post, Dec. 9, 2016, *available at* https://www.washingtonpost.com/opinions/no-marylands-cash-bail-system-doesnt-hurt-the-poor-its-a-great-equalizer/2016/12/09/88312ba0-bc03-11e6-91ee-1adddfe36cbe_story.html ("If a defendant has no means to pay, he or she is likely to have little else to stay for, either. Property . . . is an incentive for the accused to stay as much as cold, hard cash being bonded over to the state as security against a defendant skipping town.").

50 *See, e.g.,* Supervised Release, NYC Mayor's Office of Criminal Justice, *available at* https://criminaljustice.cityofnewyork.us/programs/supervised-release/.

51 Any state's bail regime is subject to constitutional constraints, which means criminal defendants enjoy the full panoply of procedural safeguards that attend detention, such as a detention hearing with the right to counsel, the right to provide testimony, present witnesses, and offer evidence to ensure detention is warranted as the least restrictive condition necessary to accomplish the regulatory goal of protecting the community from dangerous persons and ensuring defendants appear in court. *See Salerno*, 481 U.S. at 742.

52 Criminal Justice Reform Information Center, N.J. Courts, *available at* https://njcourts.gov/courts/criminal/reform.html.

53 *Id.*

54 *Id.*

55 Blair R. Zwillman, *New Jersey Leads the Way in Bail Reform*, N.J. Lawyer, No. 318, at 16 (June 2019).

56 *Id.*

57 Julia Angwin et al., *Machine Bias*, ProPublica, May 23, 2016, *available at* https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

58 Julia Angwin et al., *How We Analyzed the COMPAS Recidivism Algorithm*, ProPublica, May 23, 2016, *available at* https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm.

predicted recidivism for black and white defendants at roughly the same rate (59 percent for white defendants, and 63 percent for black defendants)," it also found that "Black defendants were often predicted to be at higher risk of recidivism than they actually were," and that "White defendants were often predicted to be less risky than they were."[59]

Despite the unsettling nature of these findings, it is judges, not algorithms, that determine the conditions of a defendant's release. The algorithm provides an intelligent recommendation, but it does not replace judicial discretion in which the neutral principles that guide release control. Moreover, the article mentions in passing the most compelling rejoinder to the claims of racial bias: COMPAS does not know the race of the defendant being assessed. Among the 137 variables COMPAS examines, from employment and criminal history to education levels, from whether a defendant grew up with both parents to whether he is quick to anger, race is not one of the factors, and rightfully so. While no software is perfect, COMPAS relies upon historical data, and that is a neutral and largely scientific enterprise. Journalist Christopher Caldwell examined this controversy and observed that "to obtain a less 'biased' result . . . one would need to 'unknow' facts that were present in the data set."[60] In general, we want more facts, not fewer. The choice is not between impersonal artificial intelligence, on the one hand, and the existing and now controversial system, on the other hand. Rather, it is between the status quo and striking a sensible balance that ensures a defendant appears in court and does not commit additional crimes while on release, while also making certain that a nonviolent defendant who does not pose a risk as to either gets the benefit of pretrial liberty.

In the end, there are no ideal solutions in human affairs, only trade-offs. As eminent economist and social theorist Thomas Sowell explained, "trade-offs are all that we can hope for, [and] prudence is among the highest duties. Edmund Burke called it 'the first of all virtues.' 'Nothing is good,' Burke said, 'but in proportion and with reference'—in short, as a trade-off."[61] New Jersey's example demonstrates that successful reform in which cash bail is eliminated calls for employing smart risk assessment software, even with its imperfections. That is a trade-off reform advocates of good will should welcome.

C. The Tragedy of New York's Bail Reform Experiment

If New Jersey is a national model for how to create intelligent, effective, and fair bail reform, then New York is a cautionary tale showing how not to do it. On January 1, 2020, New York's bail reform took effect, eliminating pretrial detention and cash bail for most nonviolent felonies and almost all misdemeanor offenses (except for sex offenses, domestic offenses, and hate crimes).[62] Unlike the federal government, the District of Columbia, and 49 other states, New York does not permit its judges to set bail or detain pretrial defendants who pose a threat to the public. The deleterious effects on public safety were immediate.

On March 5, 2020, New York Police Department Commissioner Dermot Shea publicly shared proof that bail reform was harming public safety. The commissioner noted that, when considering these statistics, "Each number represents a victim":[63]

- Since January 1, 2020, 482 suspects who had been arrested for serious felonies were released without bail only to commit another 846 new crimes. Over a third of these crimes (299 of them) were among the seven most serious offenses: murder, rape, robbery, felony assault, burglary, grand larceny, and grand larceny auto.
- All of the 482 suspects could have had bail set on them prior to January 1, 2020, so they could have been incarcerated without the ability to commit more crimes.
- Crime in January 2020 spiked 30% from January 2019. Crime in February 2020 spiked 20% over the previous year. In total, the first two months of 2020 saw 803 more serious crimes committed than the same time the year prior.

Crime continued to increase throughout the year. During the 2020 July 4th weekend, there were "44 shooting incidents with 63 victims," which represents 16 more incidents and 21 more shooting victims "over the same three days last year."[64] The prior month was equally Hobbesian. In June 2020, the NYPD recorded 39 murders, nine more than in June 2019.[65] Shootings also doubled, with 89 incidents in 2019 and 205 in 2020.[66] The NYPD reported on July 5 "that all of the nearly 100 gun violence victims have been from minority communities, as were 97 percent of June's shooting victims."[67] By the end of 2020, New York City had seen a 97% increase in shootings and a 45% increase in murders.[68] There were 462 homicides in 2020—143 more

59 *Id.*

60 Christopher Caldwell, The Age of Entitlement: America Since the Sixties 202 (2020).

61 Thomas Sowell, A Conflict of Visions 17 (revised ed. 2007). Aristotle explained that prudence or "practical wisdom" is man's "true and reasoned state of capacity to act with regard to the things that are good or bad for man" and a "reasoned and true state of capacity to act with regard to human goods." Aristotle, The Nicomachean Ethics 106 (Oxford University Press ed. 2009).

62 Mangual, *supra* note 24.

63 Editorial Board, *NYPD provides hard proof that no-bail law is causing crime spike*, N.Y. Post, Mar. 5, 2020, *available at* https://nypost.com/2020/03/05/nypd-provides-hard-proof-that-no-bail-law-is-causing-a-crime-spike/.

64 Brian Price, *9 Dead, at Least 42 Shot in Roughly 15 Hours as Violence Rages Over Weekend*, NBC News, July 5, 2020, https://www.nbcnewyork.com/news/local/bullet-strikes-nypd-patrol-vehicle-misses-officers-sitting-inside/2500243/.

65 *Id.*

66 *Id.*

67 *Id.*

68 Rocco Parascandola & Thomas Tracy, *Violence adds to NYC's 2020 death toll, with 97% jump in shootings and 45% increase in murders—criminal carnage not seen in 14 years*, N.Y. Daily News, Jan. 1, 2021, https://www.nydailynews.com/new-york/nyc-crime/ny-nypd-closes-book-on-2020-20210101-hbaknpnvxfflvj432oum6s3ewe-story.html.

victims than in 2019.[69] The city also had 754 more shootings in 2020 than in 2019.[70]

As NYPD Commissioner Shea explained, "we're seeing significant spikes in crime. So either we forgot how to police New York City, or there's a correlation" with bail reform.[71] "If you let out individuals that commit a lot of crime," he reasoned, "that's precision policing in reverse and we're seeing the effects in a very quick time, and that is why we're so concerned."[72] More emphatically, the NYPD's official press release simply announced: "Criminal justice reforms serve as a significant reason New York City has seen this uptick in crime."[73]

One commentator explored the historical parallels between the urban crime wave of the 1980s and today:

> It wasn't merely scared white folks who were concerned about rising crime; people of color who lived in poor neighborhoods were far more likely to be the victims of crime than anxious suburbanites and had long expressed concerns for their safety. As civil-rights leader A. Philip Randolph said in 1964, "while there may be law and order without freedom, there can be no freedom without law and order."[74]

The criminal justice reform lobby tends to ignore the adverse consequences—which invariably harm poor individuals and people of color disproportionally—that materialize when reform is untethered to public safety, as New York's model demonstrates. Ignoring existential-level violence is not an option for many in our most vulnerable communities.

V. When Engaging Reform, Beware the Wolf and Remember Our Neighbors

The elimination of cash bail is an idea whose time has come. But where cash bail is eliminated, judges must be armed with the legal authority to detain pretrial defendants who pose a threat to the community. New York is an outlier in depriving them of this authority.

The Empire State would have likely remained isolated on this front but for the events of 2020. The tragic death of George Floyd and the resulting protests and riots have fueled more acceptance of eccentric ideas that were initially conceived on the fringe of the criminal justice reform lobby. Progressive prosecutors have campaigned on nullifying provisions of the penal law by refusing to prosecute whole categories of offenses.[75] Primal screams to defund the police and abolish prisons appear, as a matter of logical necessity, to require eliminating pretrial detention completely.

The more extreme voices in the reform camp, to their credit, do not dissemble nor hide their ambitions. They are forthright in their demand for revolutionary change. One prison abolition group explained that "abolition isn't just about getting rid of buildings full of cages. It's also about undoing the society we live in because the PIC [prison industrial complex] both feeds on and maintains oppression and inequalities through punishment, violence, and controls millions of people."[76] One cannot read such assertions without summoning the counsel of Justice Antonin Scalia's greatest dissent:

> Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.[77]

New York's experience demonstrates that the weight of these radical ideas would fall, as they always do, on lower-income and minority communities. That is not an outcome that any of us should tolerate. We can and should reform the cash bail system, but we should do so without placing our vulnerable neighbors in harm's way.

69 *Id.*

70 *Id.*

71 Gabrielle Fonrouge, *NYPD Commissioner Dermot Shea blames bail reform for 2020 crime spike*, N.Y. Post, Jan. 24, 2020, https://nypost.com/2020/01/24/nypd-commissioner-dermot-shea-blames-bail-reform-for-2020-crime-spike/.

72 *Id.*

73 Katie Honan, *NYPD Officials Say New Bail Law Is Leading to a Crime Increase*, Wall St. J., Mar. 5, 2020, https://www.wsj.com/articles/nypd-officials-say-new-bail-law-is-leading-to-a-crime-increase-11583445963.

74 Rosen, *supra* note 40.

75 Craig Trainor, *Taking on "Progressive Prosecutors,"* City J. (Feb. 7, 2021), *available at* https://www.city-journal.org/taking-on-progressive-prosecutors.

76 Rosen, *supra* note 40.

77 Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

If the Framers Despaired, Should We?

By Stephen B. Presser

Federalism & Separation of Powers Practice Group

A Review of:

Fears of a Setting Sun: The Disillusionment of America's Founders, by Dennis C. Rasmussen (Princeton), https://press.princeton.edu/books/hardcover/9780691210230/fears-of-a-setting-sun

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Other Views:

• John O. McGinnis, *"Sinking in Luxury, Sloth, and Vice,"* Law & Liberty (Feb. 25, 2021), https://lawliberty.org/book-review/sinking-in-luxury-sloth-and-vice/.

• Thomas Koenig, *We Should All Be Madisonians*, The Dispatch (Apr. 13, 2021), https://thedispatch.com/p/we-should-all-be-madisonians.

• Francis Wilkinson, *Even America's Founders Were Disillusioned With America*, Bloomberg Opinion (Mar. 22, 2021), https://www.bloomberg.com/opinion/articles/2021-03-22/america-s-founders-were-disillusioned-with-america-too.

The last few years have seen a movement to denigrate the men in the late 18th century who were instrumental in fighting our Revolution and in establishing the Constitution. Much of this is on the grounds that many of them (most, if not all, of the framers from the South) were slaveholders, and the 1789 Constitution preserved their right to maintain their "peculiar institution." So it is that lately framers' statues have been toppled or removed, and there is talk, even, of renaming old and established universities such as Washington & Lee.

And yet, those Founders' visages peer at us from our coins and currency, biographies of framers continue to pour from the presses, and one Founder, Alexander Hamilton (who was actually against slavery) was the subject of a wildly successful Broadway musical. Another Founder, John Adams, was the hero of a popular television series, and monuments to George Washington and Thomas Jefferson still draw tourists to our nation's capital. To this day, *The Federalist*, the work of three of those Founders—Hamilton, James Madison, and John Jay—remains the authoritative guide to interpreting the Constitution, and if the Founders are now not quite the mythical heroes they once were, their influence still looms large.

Why should that be, given that they lived two centuries ago, and the country has so dramatically changed since then? Part of the veneration we have for the founding generation is probably accounted for by the fact that in this country we have no monarchy, no aristocracy, and no established church—institutions that elsewhere serve to bind together the nation. What we do have (or had until very recently) was a general faith in our laws and Constitution, the product of the framing era, and thus a natural interest in the men who produced them.

Every now and then, a debunking work on the framers appears, and it is now fashionable among many of our legal academics to dismiss the Constitution as an anachronism—fit perhaps for the 18th century, and a country of 3 million, but hardly appropriate for a 21st century country with one hundred times the population, much more ethnic and cultural diversity, and a vastly greater geographical territory.

Dennis Rasmussen's effort is something different, though, and he claims that his is the first monograph actually to explore in depth how the Founders themselves became disillusioned with what they had done, and, indeed, in some cases, with the American people. His thesis in *Fears of a Setting Sun: The Disillusionment of America's Founders* is that virtually all of the framers came to lose faith in the future of their country. Anyone who has read the early 19th century correspondence between Adams and Jefferson (resumed after a period of estrangement)[1] knows that the two came to the realization that the nation they viewed from their old age was different from the one they had

1 *See, e.g.*, Gordon Wood, Friends Divided: John Adams and Thomas Jefferson (2017).

initiated. But Rasmussen appears to suggest that one could say something similar about Washington, as well as Hamilton. Indeed, of the framers examined here, only Madison enters old age (and he lived longer than any of the others) with his optimism about the country still intact.

One does wonder what the purpose of Rasmussen's endeavor is. He makes it clear that one reason he wrote the book was that no one had attempted anything similar before, and he invokes the explicit approval of his project of the dean of early American historians, Gordon Wood,[2] whose work he often refers to. Indeed, Wood himself wrote a similar work on the framers, *Revolutionary Characters*, a few years ago.[3] That book presents Wood's view that the democratic nation that eventually arose from the Revolution was something very different from what the framers had anticipated, and that they had created a situation unlikely to produce great men of their caliber. As Rasmussen says, "No less an authority on the period than Gordon Wood has written that the bustling democratic society that the American Revolution unleashed, 'was not the society the revolutionary leaders had wanted or expected.'"[4]

Rasmussen is out to show not just that the Founders' views changed, but that they were eventually *disillusioned*. Perhaps if Rasmussen's thesis is correct, it might lead us to wonder if what the Founders created—the Constitution in particular—ought not to be subjected to the veneration it has enjoyed, but if Rasmussen is a critic of the Constitution, it's not completely clear. Indeed, it's not at all certain that Rasmussen believes that the framers are not due the adoration they have been accorded over much of our history. This book, is, surprisingly, a splendid and very readable summary of the achievements, politics, morals, and character of the framers, and Rasmussen actually makes a fair case that we should continue to hold them in high esteem. There may even be a bit of a problem with the idea that we ought to make much of their disillusionment, if such there was.

In any event, there is much here that has relevance to our current fractious political situation, and this is, when all is said and done, one of the best-written and enticing reviews of the founding generation ever published. What then, does Rasmussen have to say about the Founders, and what ought we to conclude about his conclusions?

His basic thesis is simply and repeatedly stated: the five key Founders Rasmussen examines grew disillusioned with the country they had founded in various ways. George Washington, during his second term as President, grew to be horrified by the rise of political parties (in particular the opposition to him led by Thomas Jefferson and James Madison). Alexander Hamilton, who served as Washington's Secretary of the Treasury, observing the working of the new United States Constitution, concluded that the federal government it provided for was not sufficiently vigorous or energetic to do what the country needed it to do. John Adams, first Washington's Vice President and then his successor in the Presidency, concluded that the American people did not have the necessary virtue to maintain a republic and that, instead of understanding the character of republican government, the American people were too inclined to democracy. Thomas Jefferson, who succeeded Adams as President, by 1820 concluded that sectional divisions over the slavery issue would break apart the nation if they didn't lead to a race war. Only James Madison, who succeeded Jefferson as President, remained essentially an optimist.

Even those who've read multiple biographies of these key Founders will still find some powerful insights here, revealed not only because of Rasmussen's familiarity with the key secondary sources, but also because of Rasmussen's detailed examination of the primary sources, particularly the framers' personal correspondence, but also their pamphleteering (in the case of Hamilton) and their scholarly writing (in the case of Adams and Madison).

I. George Washington

Rasmussen does an excellent job backing up his assertion that George Washington was "the one truly indispensable figure of the Founding Era,"[5] not just because he was a great general in the Revolutionary War, but because, for a while at least, he could stand above party and faction (both of which he abhorred). By the sheer force of his prestige in presiding over the Constitutional Convention, Washington was able to persuade his fellow Virginia delegates to approve the new document, ensuring it received the necessary states for ratification. Washington's influence was so great that both Alexander Hamilton and Thomas Jefferson—whose aims for the new nation were so divergent—both accepted positions in Washington's cabinet, assuring that his administration had the talent and the broad support it needed.

Washington's embrace of Hamilton's plan to incorporate a national bank (which Jefferson and Madison opposed) was crucial in putting the nation on a secure financial footing, along with Hamilton's funding of the national debt, and the attendant compromise in 1790 moving the nation's capital from the North to the South. Things were not as smooth in Washington's second term, when there was a rebellion in western Pennsylvania (over the excise tax on whiskey), and when the split between the Hamiltonian Federalists and the Jeffersonian Republicans broke into open journalistic warfare, and into the kind of partisan acrimony that is not uncommon in our own time. Still, Rasmussen makes out a plausible case that no President has ever accomplished more than did Washington.

Rasmussen makes a convincing suggestion that Washington's Farewell Address (drafted by Hamilton, but reworked by Washington himself) was the third most important American document (after the Declaration of Independence and the Constitution).[6] Rasmussen's Chapter 3, on the Farewell Address, nicely demonstrates that Washington, insofar as he lambasted sectional and party differences and warned against entangling foreign alliances, actually set forth a program for consensus in American politics that, over the next two centuries, often was

2 Dennis C. Rasmussen, Review of Fears of a Setting Sun: The Disillusionment of America's Founders ix (2021) [hereinafter Rasmussen].

3 Gordon Wood, Revolutionary Characters: What Made the Founders Different (2006).

4 Rasmussen at 3.

5 *Id.* at 17.

6 *Id.* at 45.

adhered to, and often worked. Rasmussen also notes the Farewell Address's expressed hope "that the promotion of morality, religion, and education might help to foster moderation."[7] But that hope, at least according to Rasmussen, was not something that could realistically be maintained. Indeed, Rasmussen claims that during the 1798-1800 quasi-war with France, in the Adams administration, when Washington acted in support of Adams's efforts against America's internal and external enemies, Washington's "unmatched integrity, judgment and independence had given way to the kind of blinkered partisan animus that he had so long abhorred. It was a sad end to an illustrious public career."[8]

Here, though, Rasmussen may underestimate the force of the perception on the part of Washington and many other Federalists that their domestic political opponents—and those opponents' alliances with France and other European powers—really did pose a threat to the nation's continued independence. Rasmussen claims that Washington eventually was plunged into a deep despair for the nation he had helped found, when the man regarded as the father of his country acknowledged that

> I have, for sometime past, viewed the political concerns of the United States with an anxious, and painful eye. They appear to me, to be moving by hasty strides to some awful crisis; but in what they will result—that Being, who sees, forsees, and directs all things, alone can tell.[9]

It's quite possible, however, that this may have been more an expression of Washington's religious faith, or a kind of Christian pessimism about the nature of life on earth, than doubts about the Founders' design.

II. Alexander Hamilton

Rasmussen nicely demonstrates Hamilton's doubts about the Federal Constitution and, indeed, limns Hamilton's admiration for the *British* Constitution, with its monarchy and aristocracy. Given Hamilton's later and successful defense of our Constitution in *The Federalist*, it is jarring to be reminded that if Hamilton had had his way, we would have had a life term for the President (in effect, an elective monarch), and life terms not only for federal judges, but also for United States Senators. Rasmussen joins Gordon Wood in remarking that Hamilton was no friend to "Democracy," but Rasmussen acknowledges that no one worked harder than Hamilton in getting the Constitution accepted. He wrote 51 of the 85 essays in *The Federalist*, the original aim of which was to get the population of his native New York (and its delegates to the ratifying convention) to support the proposed Constitution.

Rasmussen also demonstrates that *The Federalist* was far from the only polemical undertaking by Hamilton, and that if Washington was indispensable, Hamilton's contribution to the founding was second only to Washington's. Given the objective data Rasmussen presents of Hamilton's activities before, during, and after Washington's two terms, Washington's primacy in indispensability may actually be in some doubt.

Just as Rasmussen suggests that Washington may have overreacted to the Republican opposition to the Federalists, Rasmussen appears to suggest that Hamilton went too far when he railed against the opposition from Jefferson and Madison to his financial program. He criticizes Hamilton's characterization of those two titans as "rabid" and "indiscriminate" and Hamilton's claim that they were willing "to risk rendering the Government itself odious."[10] And yet given the extraordinary mendacity of the Jefferson-influenced opposition press, surely Hamilton had a point.[11]

III. John Adams

As with each of the others, Rasmussen has a splendid grasp of the essential character of John Adams, in some ways the most intriguing and least understood of the Founders.[12] Without the charisma of Washington, the sophistication of Jefferson, or the financial wizardry of Hamilton, what Adams had going for him was his superb grasp of history and law, his tenacity, and the virtue that, towards the end of his life, he felt lacking in the American people. Like Hamilton (whom he loathed), Adams was no friend to democracy and, overshadowed by the larger-than-life figures of other Founders, until recently Adams was not much in the popular mind.

Unlike Washington, Jefferson, and Madison, the American people, through their electors, repudiated Adams as President after only one term, and it is likely that Adams simply never connected with his fellow Americans as did the others. Nevertheless, interest in Adams has been on the upswing, and he did have accomplishments that entitle him to some veneration. He's the only one of the Founders to be succeeded as President by his own son (only one other President, George H.W. Bush, has managed that), and John Adams founded a dynasty almost unparalleled in American life and letters.[13] John's wife, Abigail, who has come to be something of a heroine to modern feminists, was apparently his intellectual equal, also a talented correspondent, and, of course, the person responsible for holding his household together during the large part of their long marriage when he was on assignment for his country.

Somehow Adams managed to get himself hated by both Hamilton and Jefferson, although presumably for different reasons; Hamilton thought him incompetent, and Jefferson

7 *Id.* at 48.

8 *Id.* at 55.

9 *Id.* at 58.

10 *Id.* at 79.

11 For one take on the battle between the Federalists and the Jeffersonian Republicans which finds more merit in the views of the Federalists and more duplicity on the part of the Jeffersonians, see Stephen B. Presser, The Original Misunderstanding: The English, the Americans and the Dialectic of Federalist Jurisprudence (1991).

12 For a brilliant and accessible one-volume biography making a great case for Adams's importance as a Founder, lawyer, and constitutional theorist, see R.B. Bernstein, The Education of John Adams (2020).

13 His great grandson, Henry Adams, wrote one of the great American autobiographies, The Education of Henry Adams (1909), which won the Pulitzer Prize and was selected by the Modern Library as the best American book of non-fiction. Henry Adams's magisterial History of the United States of America 1801-1817 (9 vols. 1881-1891) is regarded as a masterpiece. Henry's brother Brooks was another talented historian, lawyer, and political scientist, and the Adams family included a brace of other important officials and professionals.

thought him insufficiently democratic. Rasmussen concentrates on Adams's disappointment with the American people and their penchant for luxury and licentiousness. Rasmussen notes that Gordon Wood thought Adams's extreme pessimism accounts for much of his behavior, and Rasmussen gives at least one fine instance of this when he quotes Adams's worries about the acrimony over slavery: "If the gangrene is not stopped, I can see nothing but insurrections of the blacks against the whites and massacres by the whites in their turn of the blacks . . . till at last the whites exasperated to madness shall be wicked enough to exterminate the negroes."[14]

And yet Rasmussen makes a convincing argument that Adams's own great virtue in making peace with France in 1800—even over the fierce opposition of Hamilton and his fellow Federalists, and even though Adams knew it would probably result in his losing the election (and it did)—entitles Adams to be regarded as a savior of his country. Adams himself was not particularly gracious about his loss and, like Donald Trump (also a misunderstood figure in his way), he chose not to attend the inauguration of the man who defeated him for the Presidency.

But whatever pessimism Adams may have had about the country, and even his own Federalist party, Rasmussen is too careful a biographer not to acknowledge that towards the end of his life, and especially after he resumed his friendship with Jefferson, after many years of adversity, Adams achieved happiness, and he even lived long enough to see his son follow him into the White House. Rasmussen notes that Adams still worried about the country descending into vice, aristocracy, and corruption, and it's likely Adams died still feeling that the country hadn't really understood and appreciated the virtuous sacrifices he had made on its behalf. But when he died at age 90 on July 4, 1976, the fiftieth anniversary of the Declaration of Independence, it must have been with a great sense of a life well lived.

IV. Thomas Jefferson

Adams's great political rival, Jefferson, died on the very same day, after the two had reconciled. If Adams had constantly been pessimistic about America, as Rasmussen suggests, Jefferson had not; indeed, Rasmussen may not be particularly successful in presenting Jefferson as a man disillusioned with his country. Rasmussen admits that until the final decade of Jefferson's life, he was optimistic and untroubled by the increasing democracy that so disturbed Hamilton and Adams. Indeed, as Rasmussen points out, Jefferson loved the masses and feared "luxury and privilege," although, either hypocritically or paradoxically, Jefferson himself lived a luxurious and privileged life.[15]

Why wouldn't Jefferson feel good about his country? It elected him President twice, and then it elected two of his closest political allies, Madison and James Monroe, each to two terms after his. Nevertheless, Jefferson—although one of the best known and (until recently) most revered of the Founders—was a man of elusive character.

Even setting aside the possibility that he sired a line of descendants with his late wife's enslaved half-sister, Sally Hemmings, Jefferson was an unscrupulous politician who might have been at home in our own time. He subsidized mendacious journalists during his race against John Adams, and in his favoring of his own region, he nearly split the country apart with his Embargo Act against Great Britain.

It is the slavery issue that most piques Rasmussen's interest, however, and that is the hook that allows him to present Jefferson as obsessed with worry about the fate of his country. Rasmussen explains well Jefferson's early opposition to slavery, and then his lessening objection to it as time went on. Because of what Jefferson perceived as the North's strong opposition to slavery, and what he understood to be the South's tenacity in seeking to preserve it and to extend it into the Western territories, Jefferson thought it was inevitable that sectional conflict over slavery would result in a civil war, or even a race war in the South. Jefferson believed slavery would decline if its reach were expanded territorially, and Rasmussen suggests that this view was on the "fringe." Rasmussen even goes so far as to suggest that on this aspect of the issue of slavery Jefferson was "delusional," along with both Madison and Monroe.[16] Rasmussen may here be giving us more his view than the Founders'.

Rasmussen has a point, though, that slavery was the issue that most made Jefferson pessimistic about the fate of the nation, and Rasmussen has some solid and famous letters of Jefferson to back up the Virginian's apparent despair. There is his frequently quoted observation that the sectional conflict over slavery revealed in the 1820 Missouri Compromise was "like a fire ball in the night, [which] awakened and filled me with terror. I considered it at once as the knell of the Union." Rasmussen argues that Jefferson believed a civil war was inevitable, and he points out that in the same letter he wrote that

> I am now to die in the belief that the useless sacrifice of themselves, by the generation of '76 to acquire self government and happiness to their country, is to be thrown away by the unwise and unworthy passions of their sons, and that my only consolation is to be that I live not to weep over it.[17]

Admittedly this is pretty bleak stuff, but Rasmussen acknowledges that some scholars have concluded that Jefferson was deliberately overstating his views to his correspondent, who used Jefferson's letter to further his own political ambitions, which Jefferson had apparently wanted him to do. Still, Rasmussen believes that those 1820 sentiments truly reflected Jefferson's feelings, and Rasmussen himself concludes that "the great optimist had lost his faith in the American experiment."[18]

There was much, says Rasmussen, to drive Jefferson to this loss of faith. His health was beginning to fail (although he lived six more years), he was deeply in debt (so deep that Monticello eventually fell out of the hands of his family), and the centralization of national power and the increasingly commercial nature of the South were anathema to him. He thought Henry Clay's "American

14 Rasmussen at 143.

15 *Id.* at 149-50.

16 *Id.* at 174.

17 *Id.* at 175.

18 *Id.* at 178.

System" of the national bank, tariffs, and internal improvements would be antithetical to the desires of many Southerners, and that it would further the existing inclinations toward secession. Jefferson's continuing zeal for "states' rights," Rasmussen points out, was even regarded by Jefferson's extraordinarily sympathetic biographer, Dumas Malone, as something that "bordered on fanaticism."[19]

And yet if one reads Jefferson's correspondence resulting from the renewed friendship with Adams, one discovers a much mellower Jefferson,[20] one who takes some solace in religion, and one who seems much more at peace with himself than appears in the picture Rasmussen paints. It is, of course, impossible to know what Jefferson really thought, and that problem is endemic for the other figures in this book as well. How do we weigh and balance particular letters and expressed sentiments, and can we ever really know the emotional states of those long dead?

In a short chapter before coming to Madison, Rasmussen does a credible job of pointing out that a number of the lesser Founders—specifically George Mason, Patrick Henry, Sam Adams, Elbridge Gerry, Gouverneur Morris, John Jay, and John Marshall—all worried about the future of the nation and, in particular, the inevitability of armed sectional conflict. Their worries were, of course, justified, but does that mean that their efforts were in vain? And how does Rasmussen explain Madison's optimism, which runs counter to his central thesis? This is the subject of the last few chapters.

V. James Madison

Until recently, Madison was generally regarded as the "father" of the Constitution, probably due to the fact that he was instrumental in the passage of the Bill of Rights, and also because his published Notes on the Constitutional Convention were an invaluable record. Madison has also been a subject of great interest lately because his malleable views on the interpretation of the Constitution have been used to support the currently popular progressive academic belief that the document is a "living Constitution" the interpretation of which has always been subject to change in the interests of changing times and changing popular and political desires.[21]

To his credit, Rasmussen nicely and quickly debunks Madison's paternity of the Constitution by noting that of the 71 proposals Madison put forward at the Constitutional Convention, he lost on 40 of them. But eventually he did warm to the Constitution, and especially to the states rights' interpretation embraced by his friend and mentor, Jefferson. Like Hamilton, he even became one of the foremost advocates for ratification when he authored several of *The Federalist Papers*.

Curiously, Rasmussen explains Madison's continued optimism principally by the fact that Madison was gifted with a sunnier personality than many of the other framers. He simply wasn't as worried about the future of slavery as was Jefferson, he wasn't as concerned with a lack of virtue in the people as was Adams, he wasn't as alarmed about a weak executive as was Hamilton, and he wasn't as upset about political parties as was Washington (indeed, Madison was himself a rather smooth and clever political operative, as was Jefferson). Madison was, Rasmussen explains, a pragmatist who was not about to let the perfect be the enemy of the good, and having lived longer than the other framers noted here, and having seen the Constitution function tolerably for 50 years, Madison had good reason to be optimistic.

Rasmussen sees Madison as the exception that proves the rule of the Founders' discontent. But his explanation for Madison's behavior in terms of the qualities of his personality does raise a fundamental question about Rasmussen's thesis. Could it be that what Rasmussen regards as the framers' disillusionment about their creation is not actually a reflection of reality, but may have more to do with transient human emotions? After all, it is a feature of human nature to believe, especially as one enters old age, that things are not as good as they once were, and that the current generation simply doesn't have the wherewithal to do as well as their forbears.

Another possible reason for the seeming despair of some framers at the state of the country was their Christian beliefs, particularly that our earthly existence is a pale imitation of the Kingdom of God, and that given the temptations and foibles of humans, perfection in the City of Man is simply impossible. Rasmussen hints at Hamilton's desire for a "Christian Constitutional Society," and he even quotes Ron Chernow's brilliant perception that Hamilton hoped that "this new society would promote Christianity, the Constitution, and the Federalist Party, though not necessarily in that order of preference."[22] Adams was probably as religious as Hamilton, Washington appears to have agreed with Adams that the country couldn't flourish without religion, and even Jefferson (thought by his opponents to be an atheist), towards the end of his life appears to have sought solace in religion. A deeper understanding of the framers' views might come from exploring their religious beliefs, but this is not something Rasmussen attempts.[23]

One can find matters left out in any book, however, and, even if one is not completely persuaded by Rasmussen's provocative thesis, he has still managed to give us one of the best, most pungent, and most penetrating brief reviews of the key Founders. More than that, Rasmussen actually has a fair amount of political wisdom to offer in our fractious times. Even if he wishes to temper "our often-excessive admiration for the founding, the Constitution, and the government they produced," he concedes that "there are equally good reasons to refrain from

19 *Id.* at 190.

20 See, on this point, Wood, Friends Divided, *supra* note 12, and Bernstein, *supra* note 12.

21 *See, e.g.*, Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (1996), Mary Sarah Bilder, Madison's Hand: Revising the Constitutional Convention (2017), Jonathan Gienapp, The Second Creation: Fixing the Constitution in the Founding Era (2018).

22 Rasmussen at 98.

23 For a current plea that religion and morality are indispensable to proper political life, see Ken Starr, Religious Liberty in Crisis: Exercising Your Faith in an Age of Uncertainty (2021).

following the Founders into outright disillusionment."[24] After all, he notes, we ended slavery, we are not currently facing secession or civil war, and we have a much better media than was available to the founding generation (one could quibble with the latter two points).

Nevertheless, he ends this excellent little book with a reminder that it is unrealistic to expect that with "the right tweak" to our political system—"eliminating the electoral college, ending the filibuster in the Senate, establishing fixed term limits for Supreme Court Justices," or any other of a variety of reform proposals—we "might fix all that ails us." A flawless utopia, he notes, is unobtainable. His conclusion that "The founders' penchant for meeting deep disappointment with steadfast resolve is one that we would do well to emulate in the face [of] our own political tribulations"[25] suggests that even if Rasmussen began with the idea of disparaging the Founders and their creation, his careful study actually reminds us of why we should cherish them and what they left us.

24 Rasmussen at 229.

25 *Id.* at 231.

Religious Schools, Collective Bargaining, & the Constitutional Legacy of *NLRB v. Catholic Bishop*

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Other Views:

- Ross Slaughter, *The NLRB's Unjustified Expansion of Catholic Bishop Is a Threat to All Employees at Religious Institutions*, On Labor (May 24, 2021), https://onlabor.org/the-nlrbs-unjustified-expansion-of-catholic-bishop-is-a-threat-to-all-employees-at-religious-institutions/.
- Jenny Samuels, *The Supreme Court's Conversion on Religious Exemptions and the Future of Employment*, On Labor (April 5, 2021), https://onlabor.org/the-supreme-courts-conversion-on-religious-exemptions-and-the-future-of-employment/.
- Catholic High School Ass'n of Archdiocese v. Culvert, 753 F.2d 1161 (2d Cir. 1985), *available at* https://casetext.com/case/catholic-hs-assn-of-archdiocese-v-culvert.

It would be difficult to find a corner of American labor law more anomalous than the one covering religious schools. Nearly half a century ago, in *National Labor Relations Board v. Catholic Bishop*,[1] the Supreme Court excluded those schools from the Board's jurisdiction. It did that by reading the National Labor Relations Act narrowly: it reasoned that because the Act never mentioned religious schools, Congress must have meant to exclude them. In other words, the Court anticipated Justice Neil Gorsuch's Canon of Donut Holes.[2]

That logic was, to put it generously, unorthodox. But the Court had its reasons. It paid little attention to the statutory language, focusing instead on the effect any other interpretation would have had on the schools' constitutional rights. Had the Board been given jurisdiction over the schools, it would have been responsible for policing collective bargaining and investigating alleged unfair labor practices in religious schools. Both activities would have forced it to question the schools' motivations in various contexts, which would have led it into disputes often grounded in religion. And in that way, the Board risked colliding with core First Amendment activity. Unwilling to stomach that risk, the Court avoided it by reading an exception into the law.

The Court's decision, however, was hardly the last word. In the decades that followed, the Board launched effort after effort to reassert jurisdiction over the schools. It formulated multiple tests and theories, each of which aimed to bring the schools back under its purview. Perhaps predictably, those theories were rebuffed by lower courts. The courts saw the theories for what they were: post hoc attempts to limit *Catholic Bishop*'s scope. And the courts proved more than willing to defend *Catholic Bishop*'s core holding, despite its counterintuitive rationale.

They proved less willing, however, to apply the same rigor to similar efforts by the states. Even as the Board was trying and failing to reassert jurisdiction, states were rushing to fill the gap. New York, New Jersey, and Minnesota applied their own labor-relations laws to religious schools. They reasoned that *Catholic Bishop* addressed only the scope of federal statutory law; it had nothing to say about state law. And courts gave that logic their stamp of approval. They held *Catholic Bishop*'s black-letter holding dealt only with the NLRA. It had no import for questions of state law.

That approach presents us with a puzzle. It is well accepted that one should not read a decision only for its core holding.[3]

1 440 U.S. 490 (1979).

2 *See* Bostock v. Clayton Cnty., No. 17-1618, slip op. at 19 (June 15, 2020) ("Nor is there any such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception.").

3 *See* Bryan A. Garner et al., The Law of Judicial Precedent 89 (2016) ("Courts must therefore deduce legal rules not only from the language of opinions, but from their underlying logic as well.").

The rationale producing that holding is at least as important.[4] And *Catholic Bishop*'s rationale should have led courts to reject the application of state labor-relations laws to religious schools. At *Catholic Bishop*'s core was the doctrine of constitutional avoidance: the Court strained to read the Act as it did because a different reading would have produced an unacceptable risk to First Amendment rights. And courts have long recognized that the First Amendment applies with the same force to the states as it does to the federal government. The same analysis, then, should have applied whether jurisdiction was being asserted by the Board or by a state agency. In either case, *Catholic Bishop* should have led lower courts to avoid a conflict by denying states regulatory jurisdiction.

Yet for whatever reason, they failed to approach the question that way. And so a dichotomy has persisted in the law. Even today, after the Board has given up any hope of reinserting itself into religious schools, state agencies continue to regulate them. That is, states continue to do exactly what *Catholic Bishop* said the Board could not. And with each passing year, the dichotomy grows harder to defend. The Supreme Court has repeatedly emphasized that the First Amendment protects religious schools' control over their internal affairs—including their relationships with their employees. Meanwhile, scholars, lower courts, and the Supreme Court itself have questioned one of the key precedents used to justify state involvement in religious schools—*Employment Division v. Smith*.[5]

This tension cannot hold. At some point, courts will recognize the illogic of allowing states to do what the Board cannot in this context. The Board cannot require religious schools to bargain with a union because to do so would put constitutional rights at risk. That risk is no less present when the regulator is a state agency. And though courts currently distinguish between the two situations, that distinction is untenable. It has no principled undergirding. It appears to be no more than an unnoticed inconsistency—a wrinkle in the law yet to be ironed out.

In an ideal world, the states would wield the iron themselves. They would recognize the potential damage to First Amendment rights and would withdraw from religious schools. But in the real world, they have shown no inclination to do so. More likely, they will back out only when they face the coercive force of a court order. Courts perpetuated this inconsistency by failing to give *Catholic Bishop* its full effect. It will be up to courts to set things right.

I. *Catholic Bishop* and Its Aftermath: The Board Moves Out, and States Move In

The story of the Board's jurisdiction is one of slow mission creep. Technically, the Board has jurisdiction over nearly all private employers.[6] Its reach extends to the full scope of Congress's power under the Commerce Clause, which means that the Board can regulate any employer whose activity has a substantial effect on interstate commerce.[7] But the Board has always exercised less than that full power. It has adopted voluntary jurisdictional limits, stated in terms of annual revenue.[8] Depending on the type of employer, these revenue floors can go as high as $500,000 a year.[9] If an employer generates less than that, it falls outside the Board's jurisdiction.[10]

Besides these revenue limits, the Board has sometimes declined jurisdiction over certain industries or activities on an ad hoc basis. For example, it has excluded horse-racing tracks from its scope by regulation.[11] And at various points in its history, it has declined jurisdiction over student athletes, explaining that its involvement in their relationship with schools wouldn't advance the NLRA's goals.[12]

For years, that was the approach the Board took toward nonprofit schools.[13] The schools, it reasoned, had only a limited effect on interstate commerce, and it made little sense to dedicate resources to policing their labor relations. So the Board declined jurisdiction over them, effectively carving out an ad hoc exception.[14]

But in the 1970s, it abandoned that approach.[15] Instead, it decided that some schools had a large enough effect on commerce to justify regulation.[16] So it started asserting jurisdiction.[17] But even then, it continued to impose some limits. In particular, with religious schools, it drew a line between "completely religious" institutions and those that were merely "religiously associated."[18] It declined jurisdiction over the former, but claimed full authority over the latter.[19]

Catholic Bishop brought that approach to the Supreme Court. The case involved two sets of high schools: one operated by the Catholic Church in Chicago, the other by the Diocese

4 *See id.*

5 494 U.S. 872, 887–88 (1990).

6 *See* 29 U.S.C. § 151 (declaring Congress's intent to reduce labor unrest affecting commerce).

7 *See id.*

8 *See Jurisdictional Standards*, Nat'l Labor Relations Bd., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/jurisdictional-standards (last visited April 23, 2021).

9 *Id.*

10 *See id.*

11 29 C.F.R. § 103.3.

12 *See* Brown Univ., 342 N.L.R.B. No. 42 (July 13, 2004); *but see* Columbia Univ., 364 N.L.R.B. No. 90 (Aug. 23, 2016) (reversing course and allowing student workers to unionize). The Board recently withdrew a rule that would have reversed *Columbia* and declined jurisdiction over student workers. *See Student Assistants*, Nat'l Labor Relations Bd. (March 15, 2021), https://www.nlrb.gov/about-nlrb/what-we-do/national-labor-relations-board-rulemaking/student-assistants (announcing withdrawal of proposed rule).

13 *See Catholic Bishop*, 440 U.S. at 497 (citing Trustees of Columbia University, 97 N.L.R.B. 424 (1950)).

14 *See id.* (describing Board's historical approach to church-run schools).

15 *See id.* (citing Cornell University, 183 N.L.R.B. 329 (1970)).

16 *Id.* (citing 29 C.F.R. § 103.1).

17 *Id.*

18 *See* Roman Catholic Archdiocese, 216 N.L.R.B. 249, 250 (1975).

19 *See id.*

of Ft. Wayne–South Bend.[20] Both sets of schools offered secular and religious instruction, using both lay and religiously trained teachers.[21] In the mid-70s, two unions petitioned to represent the teachers. The Board accepted the petitions and certified election units comprising all full- and part-time teachers. It excluded, however, all "religious faculty," a term it did not define.[22] Despite this carveout, the schools resisted the petitions. They argued that government-mandated bargaining—even limited to lay teachers—would violate their First Amendment rights. As religious institutions, they enjoyed a protected sphere of autonomy over their internal affairs. And bargaining, they said, would drain their discretion over those affairs and invade their autonomy.[23]

The Board disagreed. Applying its "completely religious" test, it found that the schools were too secular to qualify for an exemption. For example, they had sought and received accreditation from a secular regional authority.[24] They had also admitted non-Catholic students, employed non-Catholic teachers, and offered a mix of religious and secular instruction.[25] Indeed, their secular instruction looked much like the instruction found in any secular college-prep course.[26] So the schools could not claim to be "completely religious"; they were merely associated with a religious institution, which would not justify an exemption.[27]

On review, the Seventh Circuit rejected the Board's reasoning.[28] The court saw no proper way to distinguish between "completely religious" and "religiously associated" schools. To draw that distinction, the Board would have to measure an institution's "degree of religiosity," and such an inquiry "would perforce involve [the Board] in answering the sensitive question as to how far religion pervades that institution."[29] That was a question the Board, as a government agency, had no constitutional competence to answer.[30]

But the Board's test wasn't the only problem. The court reasoned that even had the Board developed a more workable test, government-mandated bargaining would still have interfered with the schools' internal affairs. By definition, collective bargaining takes some control from management and gives it to a union.[31] Management and the union effectively share control over key decisions affecting wages and working conditions. And in a religious institution, control over management can have doctrinal significance. For example, canon law gave the bishop complete control over parochial schools.[32] His discretion over their activities was a matter of doctrine.[33] But mandatory bargaining would have forced him to share his discretion with a third party.[34] Important institutional decisions would no longer be his to make: they would instead require consultation and negotiation.[35] That kind of shared control could not be squared with the church's internal law.[36]

Nor did the problem stop with bargaining itself. To ensure bargaining proceeded apace, the Board would have to investigate alleged unfair labor practices.[37] And those investigations would inevitably draw the Board into religious disputes. For example, in *Catholic Bishop*, the schools had terminated three teachers. The schools offered religious reasons for the terminations: one teacher had exposed biology students to unapproved sexual theories; another had married a divorced Catholic; and a third had refused to restructure a course according to instructions from the religion department. The Board admitted that had these been the schools' true motivations, it would have owed them some kind of "reasonable accommodation."[38] Yet it still ordered the schools to put the teachers back to work. In the Board's view, the schools had acted not for their purported religious motivations, but for unlawful discriminatory ones—they had retaliated against the teachers for union activity.[39]

For the court, that kind of second-guessing was inappropriate when dealing with religious schools. The Board could not properly assess the schools' motivations when those motivations implicated religious doctrine.[40] Government officials have no competence in religious matters; they cannot inquire into the veracity or sincerity of an asserted religious belief. Yet under the Board's approach, that kind of inquiry would occur whenever the Board investigated an action the school took for ostensibly religious reasons.[41] To decide whether those reasons were sufficient, the Board would have to make a judgment call about the veracity or importance of the

20 *Catholic Bishop*, 440 U.S. at 493.

21 *Id.*

22 *Id.* at 493 n.5 (describing unit certified by Board).

23 *See id.* at 493–95.

24 *Id.* at 492.

25 *Id.*

26 *Id.*

27 *Id.*

28 Catholic Bishop of Chicago v. N.L.R.B, 559 F.2d 1112 (7th Cir. 1977).

29 *Id.* at 1120.

30 *Id.*

31 *Id.* at 1125–26.

32 *Id.* at 1123–24 (observing that mandatory bargaining would have forced the bishop to surrender authority over subjects that ecclesiastical law assigned to him in his sole discretion).

33 *Id.*

34 *Id.* at 1124 (observing that it is "unrealistic" to say that an employer who has to comply with a bargaining order is "not substantially inhibited in the manner in which it conducts its operations").

35 *Id.*

36 *Id.*

37 *See Id.* at 1125–28 (describing problems attendant with investigating unfair labor practices in church-run schools).

38 *Id.* at 1127–28.

39 *See id.* at 1124 (noting that investigations would inherently lead the Board to question the legitimacy of purported religious motives).

40 *See id.*

41 *Id.*

school's beliefs.[42] And that was a course barred to the government by the First Amendment.[43]

The court saw no way through this constitutional thicket.[44] There was no way to command the school to bargain while still respecting its autonomy. There was no way to evaluate unfair labor practices without digging into the school's beliefs. And so there was no way for the Board to properly supervise bargaining in religious schools.[45]

The Supreme Court affirmed that decision, but on different grounds.[46] Like the Seventh Circuit, it saw serious constitutional problems with extending the Board's jurisdiction to religious schools. The schools were religious institutions: they existed only because the church wanted to offer a religious alternative to secular education.[47] Their main purpose was to help the church pass its faith on to the next generation. Religious authority, then, "necessarily pervade[d]" their operations.[48]

The Board would deeply entangle itself in those operations by enforcing mandatory bargaining. Bargaining would touch on all manner of school policies. To resolve disputes over those policies, the Board would often have to ask questions about religious doctrine.[49] And though it might try to answer those questions in a way respectful to the schools' beliefs, merely asking the questions would draw it onto shaky constitutional ground.[50]

The Court saw no clean way around this problem. There was "no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow."[51] The Board's presence in religious schools, no matter how limited or tailored, would repeatedly cause constitutional conflicts.[52]

But rather than address those constitutional questions directly, as the Seventh Circuit had, the Court avoided them through statutory interpretation. It observed that although the NLRA applied to "employers" generally, nothing in the text directly addressed religious schools.[53] Nor had Congress addressed those schools at any point in the legislative process.[54] In other words, there was no evidence that Congress wanted the Board to wade into such a constitutionally fraught workplace.[55] And absent strong evidence on that point, the Court refused to assume that the Board's authority reached so far. So it read an exception into the Act and denied the Board jurisdiction over religious schools.[56]

A. The Board Tinkers with the Regulation of Religion

On its face, *Catholic Bishop*'s conclusion was absolute: the Board had no jurisdiction over religious schools. And while its holding was statutory, its analysis was constitutional. Whenever the Board exercised jurisdiction over religious schools, it risked violating the First Amendment. It therefore had no business regulating those schools. There was no gray area.

But not everyone read the decision that way. The Board, for one, thought *Catholic Bishop* left open a gap—a gap the Board would spend the next fifty years trying to pry open.

At first, the Board tried to limit *Catholic Bishop* to primary and secondary schools. It distinguished those schools from colleges and universities, where the students were less impressionable and the faculty more independent.[57] Indeed, the teachers there enjoyed "academic freedom," further insulating them from the school's institutional (i.e., religious) views.[58] So, the reasoning went, the teachers were less entwined in the institution's religious mission, and their relationship with the institution was more grounded in mundane workplace realities. That meant the Board could assert jurisdiction over them without bumping up against the First Amendment.[59]

But that approach ran aground in the courts. In *Universidad Central de Bayamon v. NLRB*,[60] the First Circuit rejected the Board's distinction between high schools and universities.[61] In an opinion by then-Judge Stephen Breyer, the court reasoned that even in a university, religion could still permeate an educational environment. Religion could still inform the university's instruction, course offerings, and academic decisions. And in such an environment, the Board would still have to draw knotty lines between religious and secular matters. These lines would present themselves whenever the Board certified a bargaining unit, enforced bargaining obligations, or investigated unfair labor practices. Nothing about the nature of higher education suggested that the lines would disappear. They had nothing to do with how advanced the students were, or whether the teachers enjoyed academic freedom. But they had everything to do with

42 *Id.*

43 *Id.* at 1125 (noting that when investigating unfair labor practices, the Board's inquiry "would necessarily include the validity as a part of church doctrine of the reason given for the discharge").

44 *See id.* at 1130.

45 *See id.* (seeing no possibility of compromise without "someone's constitutional rights being violated").

46 *Catholic Bishop*, 440 U.S. 490.

47 *See Catholic Bishop*, 559 F.2d at 1118 (observing that Roman Catholics established an alternative school system for religious reasons and continued to maintain them as integral parts of the church's mission).

48 *See Catholic Bishop*, 440 U.S. at 550.

49 *Id.* at 503.

50 *See id.* ("Inevitably the Board's inquiry will implicate sensitive issues that open the door to conflicts between clergy–administrators and the Board, or conflicts with negotiators for unions.").

51 *Id.* at 504.

52 *Id.*

53 *Id.* at 504–05.

54 *Id.*

55 *See id.* at 505–506.

56 *Id.* at 507.

57 *See* Barber-Scotia Coll., 245 N.L.R.B. 406, 406 (1979).

58 *See id.*

59 *See id.*

60 793 F.2d 383 (1st Cir. 1985).

61 *Id.*

the school's religious mission—a mission that could pervade a university just as much as a high school.[62]

Undeterred, the Board changed tack.[63] While the courts continued to block it from asserting jurisdiction over religious schools, it still had to decide whether a school was religious in the first place. This, it thought, gave it another opening. So it started asking whether the school in question had a "substantial religious character."[64] If so, the Board would decline jurisdiction. But if not, it would regulate at will.[65]

That approach fared no better in court. In *Great Falls University v. NLRB*,[66] the D.C. Circuit held that even this new approach veered too far into forbidden territory. The court took it as a given that the government has no competence in religious affairs: no public official can evaluate a person's or institution's beliefs, let alone decide whether those beliefs are "substantial."[67] Yet the Board's new test called for just that kind of distinction. To apply its new standard, it would have to comb through a school's practices and draw a conclusion about the school's fundamental character. That kind of evaluation was exactly what *Catholic Bishop* meant to avoid.[68]

To cut off any more maneuvering, the court announced a bright-line test. A school would be beyond the Board's jurisdiction if it (1) held itself out as providing a religious educational environment; (2) was organized as a nonprofit; and (3) was affiliated with a religious institution.[69] Those three criteria comprised the entire inquiry. If all three were present, the Board could ask no more questions.[70]

Yet ask the Board did. Several years later, the Board shifted its focus again, this time from the schools to the employees. In *Pacific Lutheran University*,[71] it held that to avoid regulation, a school would have to show that the individual employees played a role in the school's religious mission. If they didn't, the Board would assert jurisdiction regardless of the school's overall character. That is, rather than focus on the institution's mission, the Board would evaluate the employees' duties.[72]

The D.C. Circuit swiftly rejected that approach as well. In *Duquesne University v. NLRB*,[73] the court reiterated that *Catholic Bishop* and *Great Falls* left no loopholes. *Catholic Bishop* meant what it said: the Board had no business in religious schools.[74] And the *Great Falls* test was absolute: if a school satisfied its three criteria, the Board lacked jurisdiction.[75] The Board could not evade that result by shifting its focus. It was no less invasive to ask about the religiosity of individual jobs than it was to ask about the religiosity of whole institutions.[76] In either case, the Board would have to wade into questions about religious belief and doctrine—questions it had no competence to answer.[77]

Finally, after more than five decades of resistance, the Board accepted defeat. In a 2020 decision, *Bethany College*,[78] it recognized that *Catholic Bishop* stripped it of all jurisdiction over religious schools. Going forward, it would follow the bright-line test from *Great Falls*.[79] It would no longer try to police the relationship between religious schools and their teachers.[80] Instead, it would leave the schools to manage their own internal affairs.[81]

B. States Step into the Breach

As Aristotle famously (and perhaps apocryphally) said, nature abhors a vacuum. That is no truer in nature than it is in law. For even as the Board was struggling to find a foothold in religious schools, states recognized an opening, and they rushed in to fill it.

In most workplaces, states have no authority to regulate collective bargaining. The NLRA is a comprehensive regulatory system, and so it preempts state efforts to regulate the same subjects.[82] A state cannot, for example, provide additional remedies for federal unfair labor practices.[83] Nor can it require bargaining over subjects federal law leaves to the interplay of free-market forces (for example, strikes).[84] In fact, some courts have held that states cannot even encourage collective bargaining, as any

62 *See id.*

63 Great Falls Univ., 331 N.L.R.B. 1663 (2000).

64 *Id.* at 1663.

65 *See id.*

66 278 F.3d 1335 (D.C. Cir. 2002).

67 *Id.* at 1343.

68 *See id.* (explaining that "[j]udging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims'" (quoting *Smith*, 494 U.S. at 887–88)).

69 *Id.*

70 *Id.*

71 361 N.L.R.B. 1404, 1404 (2014).

72 *See id.*

73 No. 18-1063 (D.C. Cir. Jan. 28, 2020).

74 *See id.* at 7.

75 *See id.* at 22–23.

76 *See id.* at 22.

77 *See id* (observing that the Board's approach would inevitably require it to ask which job duties were religious and which were not—exactly what the First Amendment and decades of caselaw said it could not do).

78 369 N.L.R.B. No. 98, slip op. at 1 (June 10, 2020).

79 *Id.*

80 *Id.* at 5.

81 *See id.* at 4–5 (overruling *Pacific Lutheran* as inconsistent with *Catholic Bishop* and rejecting any further balancing tests). *But see* Ross Slaughter, *The NLRB's Unjustified Expansion of* Catholic Bishop *Is a Threat to All Employees at Religious Institutions*, On Labor (May 24, 2021), https://onlabor.org/the-nlrbs-unjustified-expansion-of-catholic-bishop-is-a-threat-to-all-employees-at-religious-institutions/ (arguing that the courts and the Board have overread *Catholic Bishop* and thus undermined the collective-bargaining rights of non-ministerial employees in religious institutions).

82 *See, e.g.*, Bldg. & Trades Council v. Garmon, 359 U.S. 236, 245 (1958); Machinists Lodge 76 v. Wis. Emp. Relations Comm'n, 427 U.S. 132, 150–51 (1976).

83 *See* Teamsters Local 20 v. Morton, 377 U.S. 252, 260 (1964).

84 *Machinists*, 427 U.S. at 150–51.

effort to rebalance the incentives set by Congress would interfere with the federal scheme.[85] This principle is quite broad, and it leaves states with little if anything to say about labor relations in most workplaces.[86]

The principle does, however, admit a few exceptions. For one, states are free to regulate workplaces over which the Board has declined jurisdiction—or over which it lacked jurisdiction in the first place.[87] So for example, states can create collective-bargaining systems for their own employees.[88] They can also create systems for agricultural workplaces or businesses too small to qualify for federal jurisdiction.[89] In these cases, federal law either does not reach the workplace or the Board has decided, as a matter of policy, to leave the workplace unregulated. That regulatory gap leaves a space for states to act.[90]

Some states saw just such a gap in the wake of *Catholic Bishop*. They reasoned that the Court denied the Board jurisdiction not because of any constitutional problem, but because Congress had provided no statutory authority.[91] In other words, they argued, the only problem was that Congress had not been clearer about its intent to regulate religious schools. And in that sense, religious schools were really no different than agricultural or public workplaces. The schools may have been outside the Board's remit, but they were fair game for states.

1. New York

The first state to act was New York. When the state originally adopted its labor-relations law in the 1930s, it exempted charitable, educational, and religious employers.[92] But in the late 1960s, it amended the law to cover those institutions.[93] That amendment gave the state's agencies a statutory hook for regulating the schools—exactly the hook the Board lacked in *Catholic Bishop*. That is, whereas federal law withheld authority implicitly, state law supplied it explicitly.[94]

Unions wasted no time in taking advantage of New York's more explicit coverage—an effort that eventually brought the issue to the U.S. Court of Appeals for the Second Circuit. In *Catholic High School Ass'n of Archdiocese v. Culvert*,[95] the court considered whether the state could apply its law to a group of Catholic high schools. The schools had a history of voluntarily bargaining with a union representing their lay teachers. Over the years, they had signed several collective-bargaining agreements with the union. But in 1980, they adopted a new substitution policy without bargaining about it first. Some of the teachers went on strike in protest. The schools suspended those teachers, prompting the union to file unfair-labor-practice charges for the first time.[96] In response, the schools argued that despite the state statute, New York had no jurisdiction over their internal affairs. Exercising jurisdiction, they said, would run afoul of *Catholic Bishop* and the First Amendment.[97]

The Second Circuit disagreed. It saw *Catholic Bishop* as addressing only a statutory question.[98] It thought the Court had declined to answer the constitutional question—whether mandatory collective bargaining in religious schools violated the First Amendment.[99] And on that question, the Second Circuit saw no conflict between the First Amendment and state labor law. Neither mandatory bargaining nor unfair-labor-practice investigations infringed on religious exercise.[100] Bargaining, for one, caused no excessive entanglement or interference with religious affairs. The state dictated no particular outcome in bargaining; it had no say in the terms the parties reached. Instead, it merely brought them to the table and left them to their negotiations.[101] And as for unfair labor practices, the court viewed them as inherently secular.[102] A state could forbid anti-union practices without interfering with religious exercise. True, there would be cases presenting conflicting motivations:

85 *See* Ass'n of Car Wash Owners v. City of New York., No. 15 C.V. 8157 (S.D.N.Y. May 26, 2017), *rev'd on other grounds*, 911 F.3d 74 (2d Cir. 2018).

86 *See, e.g.*, S. Jersey Catholic School Teachers v. St. Teresa, 150 N.J. 575, 584 (N.J. 1997) (observing that states are preempted from acting on subjects regulated by the NLRA).

87 *See id.* (stating that when the NLRB lacks jurisdiction, states must decide whether to assert jurisdiction for themselves).

88 *See, e.g.*, Holman v. City of Flint, Bd. of Educ., 388 F. Supp. 792, 798–99 (E.D. Mich. 1975).

89 *See, e.g.*, Willmar Poultry Co. v. Jones, 430 F. Supp. 573, 577 (D. Minn. 1977).

90 *See, e.g.*, United Farm Workers of Am. v. Ariz. Agric. Emp't Relations Bd., 669 F.2d 1249, 1257 (9th Cir. 1982) ("[W]here, as here, Congress has chosen not to create a national labor policy in a particular field, the states remain free to legislate as they see fit, and may apply their own views of proper public policy to the collective bargaining process insofar as it is subject to their jurisdiction."); Greene v. Dayton, No. 14-3195, 2014 BL 373724, at *2 (D. Minn. Aug. 25, 2014) (holding that the state could regulate homecare providers because they fell outside the NLRA's coverage); Rachel Homer, *An Explainer: What's Happening with Domestic Workers' Rights?*, On Labor (Nov. 6, 2013), https://onlabor.org/an-explainer-whats-happening-with-domestic-workers-rights/ (surveying state efforts to regulate domestic workers, who are not covered by the NLRA).

91 *See, e.g.*, *St. Teresa*, 150 N.J. at 584 (emphasizing that *Catholic Bishop* was "decided strictly on statutory interpretation grounds"); Nyserb v. Christ King Sch., 90 N.Y.2d 244, 251 (N.Y. 1997) (calling the Supreme Court's decision an affirmance of the Seventh Circuit's opinion "on other grounds"); Hill-Murray Federation v. Hill-Murray H.S., 487 N.W.2d 857, 862 (Minn. 1992).

92 Catholic High School Ass'n of Archdiocese v. Culvert, 753 F.2d 1161, 1163 (2d Cir. 1985).

93 *Id.*

94 *See id.* (discussing evolution of New York State Labor Relations Act).

95 *Id.* at 1165.

96 *Id.* at 1163–64.

97 *Id.* at 1164.

98 *Id.* at 1165 n.2 (discussing and dismissing *Catholic Bishop*) ("In this case the State Board has validly asserted jurisdiction because Congress did not indicate that the NLRB had jurisdiction.").

99 *Id.*

100 *See id.* at 1166–69.

101 *Id.* at 1167.

102 *Id.*

the union would say the school acted out of anti-union animus, and the school would say it acted out of religious conviction. But the state could resolve that kind of conflict by applying a mixed-motives analysis. That is, the state could decide whether the alleged unlawful motivation would have led the school to act even without the religious one. And if the school would have done the same thing, the state could grant relief.[103]

The same reasoning prevailed in New York's state courts. A decade later, in *Nyserb v. Christ King School*,[104] the New York Court of Appeals took up the constitutional question and reached the same answer. The court relied not only on the Second Circuit's opinion in *Culvert*, but also the Supreme Court's intervening opinion in *Employment Division v. Smith*.[105] Decided in 1990, *Smith* had given constitutional approval to neutral, generally applicable laws, even those laws burdening religious practices.[106] Drawing on that principle, the Court of Appeals found that New York's labor law passed constitutional muster. The law applied neutrally and generally across all employers. It did not target religious practice.[107] It aimed instead at promoting collective bargaining across the state's economy.[108] And so whatever incidental burdens it placed on religious exercise were of no constitutional significance.[109]

That view prevailed over the following decades. Though the state shifted regulatory responsibility among various agencies,[110] it held firmly to its view that collective bargaining could be mandated in religious schools.[111]

2. New Jersey

The same year *Nyserb* came down, the New Jersey Supreme Court reached a similar result. In *South Jersey Catholic School Teachers v. St. Teresa*, it held that religious-school teachers had a right to bargain collectively under the state constitution.[112] It also held that the federal constitution presented no bar or competing mandate.[113]

St. Teresa involved a group of elementary schools run by the Diocese of Camden. When teachers at these schools formed a union, the Diocese refused to bargain, and the teachers sued for recognition. The teachers pointed to a provision of the state constitution guaranteeing the right to collective bargaining.[114] They argued that the provision applied to all "private employment," including employment in religious schools.[115] In response, the Diocese argued that forcing it to bargain under the state constitution would violate its rights under the federal one. That is, according to the Diocese, *Catholic Bishop* barred the state from asserting jurisdiction.[116]

Although a trial court sided with the schools, the New Jersey Supreme Court reversed.[117] Like its sister court in New York, the New Jersey court saw *Catholic Bishop* as no barrier. *Catholic Bishop*, the court reasoned, dealt only with statutory interpretation.[118] The U.S. Supreme Court had been able to avoid the constitutional question because Congress had failed to clearly signal its intent.[119] That type of constitutional avoidance, however, was unavailable in New Jersey, where the state's constitution explicitly guaranteed the right to bargain in all "private employment."[120] So the court had no choice but to answer the First Amendment question itself.[121]

Relying largely on *Smith*, the court found no free exercise problem.[122] The state constitutional guarantee applied to religious and non-religious employers alike. It in no way targeted religion.[123] And its goals were obviously secular: it aimed to promote collective bargaining in all employment, and thus to strengthen all workers' positions vis-à-vis their employers. It was, in other words, neutral and generally applicable.[124] It therefore passed the *Smith* test and raised no concerns under the Free Exercise Clause.[125]

Even so, the court recognized that the scheme, if pursued too far, could raise constitutional concerns. For example, the state probably could not force a school to negotiate over overtly religious topics, such as a teacher's moral qualifications.[126] That

103 *Id.* at 1168 (explaining that to avoid conflicts with religious tenets, the state could order reinstatement only if the teacher "would not have been fired otherwise for asserted religious reasons").

104 90 N.Y.2d 244.

105 494 U.S. 872.

106 *See id.* at 887–88.

107 *Id.*

108 *Id.*

109 *See id.*

110 *See Researching Issues Under New York's Private Sector Law*, N.Y. Pub. Emp. Relations Bd. (July 11, 2018), https://perb.ny.gov/researching-issues-under-new-yorks-private-sector-law/ (discussing shift from State Labor Relations Board to State Employment Relations Board, then to Public Employee Relations Board).

111 *See, e.g.*, Emp. Bd. v. Christian Bros., 238 A.D.2d 28, 30–32 (N.Y. App. Div. 1998) (relying on *Culvert* and *Nyserb* to deny Christian school's defense based on *Catholic Bishop*).

112 150 N.J. at 580.

113 *Id.*

114 *See* N.J. Const. art. I § 19 ("Persons in private employment shall have the right to organize and bargain collectively.").

115 *St. Teresa*, 150 N.J. at 582.

116 *See id.*

117 *Id.* at 582–83.

118 *Id.* at 584.

119 *See id.* ("Defendants' reliance on *Catholic Bishop* is misplaced. That case was decided strictly on statutory interpretation grounds.").

120 N.J. Const. art. I § 19.

121 *St. Teresa*, 150 N.J. at 585.

122 *See id.* at 597–98.

123 *Id.* at 584 (observing that state constitutional provision was intended to "protect workers who are not covered by the NLRA").

124 *Id.* at 597–98.

125 *See id.* ("Because the state constitutional provision is neutral and of general application, the fact that it incidentally burdens the free exercise of religion does not violate the Free Exercise Clause." (citing *Smith*, 494 U.S. at 878–79)).

126 *See id.* at 589 (discussing items excluded from Diocese's prior contract with high schools).

kind of mandate would drag the state directly into religious disputes. So the court drew a line between religious and secular subjects. The latter could be the subject of mandatory bargaining, while the former could not.[127]

Separating secular from religious subjects was, of course, no easy task. But the court still concluded that it could be done. As evidence, it pointed to a collective-bargaining agreement the Diocese had voluntarily negotiated for some of its high schools.[128] That agreement dealt only with financial terms, such as salaries and benefits.[129] It explicitly reserved the Diocese's authority over potentially religious subjects, such as educational policies, discipline, assignments, accountability, class ratios, and other canonical or religious matters.[130] The court reasoned that if the Diocese could negotiate such an agreement with its high-school teachers, it could surely negotiate a similar one with its elementary teachers.[131] It therefore ordered the Diocese to bargain over the same subjects with the union.[132]

3. Minnesota

This mode of reasoning prevailed outside the Northeast as well. In *Hill-Murray Federation v. Hill-Murray High School*,[133] the Minnesota Supreme Court likewise held that the state could constitutionally mandate bargaining between a religious school and its teachers. And like its northeastern counterparts, it relied heavily on *Smith*.

Hill-Murray involved a high school run by a nonprofit corporation associated with the St. Paul Priory. About eighty-five percent of the school's students were Catholic.[134] Along with secular instruction, the school offered religion courses and monthly mass services.[135] Many of its teachers, however, were of different faiths.[136] Unless they worked in the religion department, they could practice any faith they chose. They could also use an internal grievance procedure, which the school had voluntarily adopted. (Teachers in the religion department, by contrast, could be fired at the Archbishop's discretion.)[137]

Seeking to represent the teachers, a union petitioned the Minnesota Bureau of Mediation Services. The school resisted the petition, making the now-familiar argument that *Catholic Bishop* barred the state from asserting jurisdiction.[138] The Bureau disagreed and certified an election unit of teachers outside the religion department.[139] A court of appeals refused to enforce the Bureau's judgment, but the Minnesota Supreme Court reversed.[140]

Like the New York and New Jersey courts before it, the Minnesota court saw the question largely as a free exercise issue. Relying on *Smith*, it characterized Minnesota's labor-relations law as a neutral law of general applicability.[141] The law on its face applied to all employers, religious and non-religious. It targeted no religious practice. And were the court to let the school opt out, it would, in *Smith*'s words, make the school a "law unto itself."[142] That result was unacceptable to the court, and so it enforced mandatory bargaining.[143]

II. An Unstable Dichotomy: State Jurisdiction over Religious Schools

And so, a half century of litigation has brought us to the unstable status quo. Time and time again, religious schools have beaten back the Board's efforts to insert itself into their internal affairs. The schools have consistently argued—and consistently convinced federal courts—that the Board's presence in their hallways cannot be squared with the First Amendment. Yet even as they protected their autonomy on one flank, they saw it overrun on another. No sooner had federal officials retreated than state officials appeared in their place.[144]

That result was surely not what the Supreme Court envisioned when it handed down *Catholic Bishop*. It is true that the Court framed its holding in terms of federal statutory interpretation. The Court's holding said nothing explicit about state law or, for that matter, the Constitution.[145] But its rationale implied more than that. Its mode of reasoning—and indeed, its counterintuitive interpretation of the statute—showed that it was doing more than parsing language. Language alone could not have produced an exemption for religious schools. Nowhere did the NLRA exempt those schools; it didn't even mention them. Instead, it applied to "employers" and "employees."[146] And when a statute uses broad terms like those, ordinary principles

127 *See id.* at 592.

128 *Id.* at 589–92.

129 *See id.*

130 *Id.*

131 *See id.*

132 *Id.*

133 487 N.W.2d 857.

134 *Id.* at 860.

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.* at 861.

139 *See id.* at 861 n.1 (describing certified unit).

140 *Id.* at 863.

141 *See id.* ("In accordance with *Smith*, we hold that the right to free exercise of religion does not include the right to be free from neutral regulatory laws which regulate only secular activities within a church affiliated institution.").

142 *Id.*

143 *See id.*

144 *See, e.g.*, S. Jersey Catholic v. Diocese, 347 N.J. Super. 301, 309–10 (N.J. Super. Ch. Div. 2002) (finding that New Jersey courts had jurisdiction over labor disputes in religious schools because "the Supreme Court of this State has consistently held that our courts have the authority to resolve disputes under this article" (citing *St. Teresa*)).

145 *See Catholic Bishop*, 440 U.S. at 507.

146 *See* 29 U.S.C. § 152 (defining *employer* and *employee* without referring to church-run schools).

of statutory interpretation warn against reading in exceptions where none appear.[147]

Yet find an exception the Court did. It reasoned that because Congress hadn't expressly mentioned religious schools, it must have meant to exclude them.[148] In other words, it reversed the normal presumption against implied exceptions. Such an approach turns statutory interpretation on its head, and in most other contexts would have been laughable—another *Holy Trinity*[149] destined for the historical dustbin. But instead, *Catholic Bishop* has survived, and it has survived because there were other considerations at play. As the Court spelled out plainly in its opinion, it took pains to read the statute as it did because the more natural reading—one giving the Board jurisdiction over religious schools—would have risked violating the First Amendment. In other words, the Court engaged in "constitutional avoidance."[150] To treat its decision as merely a statutory one is thus to ignore the major thrust of its reasoning—to deprive it of its central force, its rational glue.

Yet that is just what courts have done in cases involving state jurisdiction over labor relations in religious schools. They have minimized *Catholic Bishop* by giving it only its literal force, treating it as if it had nothing to say about the Constitution. That is the wrong approach, one that smacks of willful ignorance, or even malicious compliance.

But put that point aside. Even if these courts were right—even if *Catholic Bishop* had said nothing about the Constitution—the constitutional question would still remain. And it is by now beyond serious debate that the First Amendment applies equally to the federal government and the states.[151] The states are no freer to invade religious autonomy than the Board is.[152] So if states want to regulate the schools, courts must, at a minimum, confront the constitutional question themselves.[153] And their answer should be the same one that produced *Catholic Bishop*: there is no way, consistent with the First Amendment, to mandate collective bargaining in religious schools.

As the Seventh Circuit recognized, the state's involvement in mandatory bargaining threatens the First Amendment in two ways: through mandating bargaining itself, and through investigating alleged unfair labor practices.[154] In the former case, the state interferes by requiring the school to share authority over the terms and conditions of teachers' employment with a third party, even when those terms and conditions potentially raise religious questions. And in the latter, the state interferes by probing the school's motives for a particular action, even when the school justifies its action on religious grounds. By reading *Catholic Bishop* narrowly, courts considering state regulations have ignored both of these problems, but they haven't resolved the constitutional questions.

A. Policing Collective Bargaining

To understand why bargaining interferes with religious autonomy, we first have to understand what bargaining entails. Like the NLRA, most state labor-relations laws require employers to bargain over three topics: wages, hours, and working conditions.[155] The first two topics include a relatively limited universe of subjects. They're about when employees show up to work and how much employees get paid. The third topic, however, is more expansive. It includes, of course, things central to the employment relationship, such as workloads, promotions, and discipline.[156] But it also includes more attenuated items, such as parking spots and prices in the office cafeteria.[157] Nearly any decision affecting an employee's work life is fair game.[158]

That can lead to especially expansive bargaining in a school, where nearly all managerial decisions affect a teacher's work.[159] For example, consider the choice of which courses to offer. If a school decides to offer a wide range of courses, there will be more classes,

147 *See Bostock*, No. 17-1618 ("Nor is there any such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception.").

148 *Catholic Bishop*, 440 U.S. at 507.

149 *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 458–59 (1892) (reciting the now debunked rule that even when a thing falls within the letter of a statute, it may fall outside the intent of its drafters, and so should not be included); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534, 1551 (2007) (Scalia, J., dissenting) (criticizing *Holy Trinity*); George Conway, *Why Scalia Should Have Loved the Supreme Court's Title VII Decision*, Washington Post (June 16, 2020), https://www.washingtonpost.com/opinions/2020/06/16/why-scalia-would-have-loved-supreme-courts-title-vii-decision/ (writing that the Court's decision in *Bostock* "effectively inters" *Holy Trinity*).

150 *Id. See also Great Falls*, 278 F.3d at 1341 (characterizing *Catholic Bishop* as a constitutional-avoidance decision); Mich. Edu. Ass'n v. Christian Bros. Inst., 267 Mich. App. 660, 663 (Mich. Ct. App. 2005) (observing that although the Court in *Catholic Bishop* based its holding on the NLRA, "the reasoning underlying its holding is universal").

151 *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (applying First Amendment to state action). One notable exception is Justice Clarence Thomas, who has suggested that the Establishment Clause was wrongly incorporated against the states. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) (Thomas, J., concurring).

152 *See Nyserb*, 150 N.J. at 586 (recognizing that the federal First Amendment limits state action).

153 *See id.*

154 *See Catholic Bishop*, 559 F.2d at 1118.

155 *See, e.g.*, N.Y. Labor Law § 705(1) (specifying that a certified union represents employees with respect to "rates of pay, wages, hours of employment, or other conditions of employment"); Minn. Stat. § 179.16 (stating that a certified union represents employees "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment").

156 *See* The Developing Labor Law § 16.IV.C.1 (7th ed. 2017) (surveying caselaw).

157 *See id.* (listing such items as workloads, parking, dress codes, and use of employee bulletin boards).

158 *See, e.g.*, Pub. Serv. Co. of N.M., 364 N.L.R.B. No. 86 (2016) (holding that clean-shaven policy was a mandatory subject of bargaining); United Parcel Serv., 336 N.L.R.B. 1134, 1135 (2001) (holding that location of employee parking spaces had a "substantial impact upon the terms and conditions of employment").

159 *See Duquesne*, No. 18-1063, slip op. at 8 ("Furthermore, exercising jurisdiction would entangle the Board in the 'terms and conditions of employment,' which would involve the Board in 'nearly everything that goes on' in religious schools." (quoting *Catholic Bishop*, 440 U.S. at 502–03)).

and so more teaching work. The school can address the additional workload in a few ways: it can hire more permanent staff, hire more adjuncts, or assign more work to its current teachers. Any of these choices will affect the teachers' experience at work, and so will require bargaining.[160]

But in a religious school, the same choice may also take on a religious character. Assume the school decides to offer a new divinity course. Most people would say that the decision to offer such a course is, on some level, religious. Yet as we've just seen, the decision also affects the teachers' working conditions. So in any other workplace, the decision would be a mandatory bargaining subject.[161] But in the religious workplace, is this a decision about working conditions, or is it about the school's religious mission?

The answer, of course, is that it's both—and therein lies the problem. To avoid a conflict with the First Amendment, the state has to avoid inserting itself into religious decisions. And to do that, it has to draw clear lines between subjects affecting religion and subjects affecting working conditions.[162] But in practice, it can't draw that distinction, because the distinction is illusory. Just as nearly everything a school does affects teachers' working conditions, nearly everything a religious school does involves religion.[163] The subjects blend together in ways that make them impossible to disentangle.

Consider a few more examples. Suppose a school decides to offer a course in humanist moral theory. Whereas the choice about the divinity course looked religious on its face, this one looks "secular." The humanist course will involve teachings from outside the church's doctrines—maybe even antithetical to those doctrines.[164] So a government official might initially react by considering it an appropriate subject of bargaining. But that initial reaction would minimize the potential religious significance of teaching even apparently non-religious ideas. Maybe, in fact, the school wants to teach humanist theory because it sees the theory as compatible with its own beliefs. Or maybe it wants to illustrate a contrast between its own views and those of the secular world. Or maybe one of its central tenets is tolerance of other worldviews. Any of these goals could be characterized as religious. And because the goals are potentially religious, so is the decision to offer the course. You cannot put the course neatly into a "secular" box even when its subject is facially secular.[165]

You can find the same issue with many common workplace decisions. Dress codes, weekly schedules, codes of conduct—all of these can take on a religious character in some settings. A dress code may carry religious significance when it requires the wearing (or not wearing) of a hijab. A schedule may change its character when it forbids work on the Sabbath. A code of conduct may mix with doctrine when it requires good moral behavior. There is no way to sort these subjects neatly into secular and religious buckets. They are not working conditions or religious matters; they are both.[166]

You might think these examples are outliers, cherry-picked to prove a point. For the moment, let's assume that's right. Let's say that there are actually three categories of potential bargaining subjects: The first includes subjects that are clearly secular, the second those that are clearly religious, and the third those that are a mix of the two. The state cannot order bargaining over the second category because doing so would insert it directly into religious decisionmaking.[167] And the third category will at minimum present the same knotty line-drawing problems we just explored.[168] But couldn't the state simply put those two aside? Without wading into the difficult line-drawing questions,

160 *See* Pac. Beach Hotel, 356 N.L.R.B. 1397, 1398 (2011) (finding that increased workloads were a mandatory subject of bargaining). *See also* W. Ottawa Educ. Ass'n v. W. Ottawa Pub. Sch. Bd. of Educ., 126 Mich. App. 306, 326 (Ct. App. 1983) (holding that while school's initial decision to discontinue dance course was within its managerial discretion, it still had a duty to bargain with union over the effects of the decision on unit employees).

161 *Cf.* Webster Ctr. Sch. Dist. v. Pub. Emp. Relations Bd., 75 N.Y.2d 619, 627–28 (1990) (holding that school's decision to outsource portions of its summer school curriculum was excluded as a mandatory subject only because legislature clearly carved out an exception; otherwise, the decision would have been subject to bargaining).

162 *See Nyserb*, 90 N.Y.2d at 253–54 (holding that the First Amendment allowed the state to regulate "the secular aspects of a religious school's labor relations operations"); *St. Teresa*, 150 N.J. at 580 (holding that the state could compel religious schools to bargain about "wages, certain benefit plans, and any other secular terms and conditions of employment"); *Hill-Murray*, 487 N.W.2d at 863 (holding that state law compelled religious schools to bargain about "hours, wages, and working conditions," which it characterized as "purely secular aspects of a church school's operations").

163 *See Catholic Bishop*, 440 U.S. at 502–03 (observing that terms and conditions of employment for teachers involve almost everything a school does); *Duquesne*, No. 18-1063, slip op. at 18 (observing that mandatory bargaining would draw Board into disputes over terms and conditions in religious school, which would inevitably draw it into disputes about religion); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1408–09 (1981) (explaining that one way of exercising religion is forming a church; and so, everything church does is an extension of that exercise).

164 *See Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 387–88 (1st Cir. 1985) (panel decision) (describing university's course offerings, along with other practices, and concluding that religion did not "pervade" university's operations).

165 *See id.* at 402 (en banc opinion) (concluding that despite secular course offerings, university had a religious character within the meaning of *Catholic Bishop*, and that character made entanglement in religious affairs especially likely even when dealing with ostensibly secular subjects).

166 *Cf.* ACLU v. Ziyad, Civ. No. 09-138, slip op. at 23 (D. Minn. July 21, 2009) (explaining that whether a dress code involves religious entanglement "requires a factual inquiry into the particulars and reasons for the dress code"); Cooper v. Oak Rubber Co., 15 F.3d 1375, 1379 (6th Cir. 1994) (finding that district court erred by concluding that Seventh Day Adventists' complaint over schedule was not based on a sincerely held religious belief).

167 *See St. Teresa*, 150 N.J. at 592–93 (recognizing that state could not compel school to "negotiate terms that would affect religious matters").

168 *See Bayamon*, 793 F.2d at 402 (observing difficulty in untangling religious from secular subjects in a religious institution). *Cf. also* Presiding Bishop v. Amos, 483 U.S. 327, 336 (1987) (noting, in the Title VII context, that the line between religious and secular subjects is "hardly a bright one").

couldn't it limit its own authority and order bargaining only over items in the clearly secular category?[169]

While that approach may be tempting, the answer is still no. The problems pile up as soon as you start the analysis. To even create the three categories, a government official has to comb through the school's practices and label them accordingly.[170] And to do that, the official has to make some initial judgment about their substance.[171] Even a "clearly" religious subject requires her to recognize it as religious, and even a "clearly" secular one requires the opposite judgment. The problem isn't the ease or accuracy with which the official can make the distinction; it's that she is making the distinction in the first place.[172] She is telling the school which of its practices are religious and which are not. Even if she is fairhanded, careful, and even correct, she is still evaluating the substance of the school's beliefs.[173]

The official might try to avoid that problem by deferring to the school. For example, she might order bargaining only on subjects the school itself labels secular. Of course, that might not work, as most institutions don't make lists of all the secular things they do. So maybe more realistically, the official might require the school to object to bargaining when it sees a subject as religious. And whenever the school objects, the official might take the school at its word and set the subject aside. That approach would require her to make no judgment for herself; the school, not the official, would sort subjects into secular and religious buckets.

But even that solution would be hollow. If the official always defers, she effectively leaves the school in control. The school can decide which subjects are fit for bargaining and which are not. And at that point, we could reasonably ask why the official is involved at all. Schools can already bargain over the things they want to; the whole point of government intervention is to make them bargain over the things they don't want to discuss.[174]

You might think that the official could solve the problem by deferring only when the school makes a *reasonable* objection. But of course, to decide what's reasonable, the official still has to make some decision about the merits. And that kind of decision brings us back to the original problem. Again, government officials have no competence in religious affairs; they cannot evaluate the merits of a religious belief, reasonable or unreasonable.[175] Deference avoids that kind of evaluation only when it is universal. It works only when the official defers every time—in which case it is worthless.

Some courts have looked for a third way around the problem. In *St. Teresa*, the New Jersey Supreme Court used the Diocese of Camden's prior agreements as a kind of crib sheet. The court ordered the Diocese to bargain with its elementary-school teachers, but only about subjects contained in a prior agreement with its high-school teachers.[176] The court reasoned that if the Diocese could bargain about those subjects for its high schools, then surely it could do the same for its elementary schools.[177]

Admittedly, the *St. Teresa* approach has a superficial appeal. After all, why can't a state require a school to bargain about terms it already agreed to bargain over? The school can hardly complain that those terms are categorically off-limits. It can't say that its religious beliefs prevent it from discussing the terms with its employees or a union. It is being asked to do only what it has already done. And that, it seems, is about as modest a burden as the school could hope for.

But in fact, as a general policy, the *St. Teresa* approach is inadequate in almost every way. For one, not every religious school will have a prior agreement to crib from. And even if every school did, *St. Teresa* would still approach the problem from the wrong direction. The court assumed that mandatory bargaining is a problem only when it interferes with some specific religious practice or belief.[178] But that's wrong. In many cases, bargaining and belief are completely consistent. The Catholic Church, for one, has vocally supported collective bargaining.[179] No, mandatory bargaining is a problem only because it's mandatory.[180] The problem comes not from some specific term in a collective-bargaining agreement, but from the government-backed interference the term implies. The command to bargain interferes with a religious school's autonomy to control its own internal affairs.[181] And it is that autonomy, not some specific religious practice, that the First Amendment protects in this context.

And let's be clear: constitutional protection for this kind of autonomy is not a new concept. More than half a century

169 *See St. Teresa*, 150 N.J. at 592–93 (ordering bargaining over secular subjects, but not religious ones).

170 *See Great Falls*, 278 F.3d at 1341 (stating that government agencies cannot troll through institutional practices and decide which are religious and which are not).

171 *See id.*

172 *See id.* at 1343 (observing that judging the centrality of religious beliefs is akin to evaluating the merits of competing religious claims—an evaluation the government has no authority to make).

173 *See* Laycock, *supra* note 163, at 1400 (observing that government enforcement of bargaining obligations not only interferes with freedom of conscience, but it also deprives a church of autonomy over its internal management).

174 *Cf. Hill-Murray*, 487 N.W.2d at 863 (expressing fear that creating an exemption for church-run schools would make the schools "a law unto [themselves]").

175 *See Catholic Bishop*, 440 U.S. at 502 ("It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.").

176 150 N.J. at 580.

177 *See id.* (ordering bargaining over terms "similar to those that are currently negotiable under an existing agreement with high school lay teachers employed by the Diocese of Camden").

178 *See id.* at 593 ("By limiting the scope of collective bargaining to secular issues such as wages and benefit plans, neutral criteria are used to [e]nsure that religion is neither advances nor inhibited.").

179 *See* Laycock, *supra* note 163, at 1398 (noting that while the Catholic Church long supported workers' right to bargain collectively, it at the same time resisted the NLRB's jurisdiction).

180 *See id.*

181 *See id.* (observing that contrasting positions in Catholic Church stance toward workers' rights and forced bargaining cannot be dismissed as mere hypocrisy; the NLRA gives the church no choice over whether to bargain,

ago, the Supreme Court recognized that the government has no business telling religious institutions how to manage their internal affairs. In *Kedroff v. St. Nicolas Cathedral of the Russian Orthodox Church*, the Court held that New York could not insert itself into a dispute between the Orthodox Church in Moscow and a North American religious corporation.[182] The dispute concerned control of the St. Nicholas Cathedral. Because the matter related to internal church hierarchy, any attempt by the state to weigh in interfered with the church's right of self-determination. The First Amendment, the Court said, "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[183]

This sphere of independence comes from the very nature of a church. Churches embody the religious beliefs of their members.[184] So every time the government interferes in a church's internal organization, it to some extent interferes with religious practice.[185] That is true regardless of the nature of the interference. Interference occurs when the government tells the church whom to hire, whom to promote, or how to allocate its resources.[186] The problem isn't that the government is telling the church to act inconsistently with some specific belief; it's that the government is telling the church how to organize itself at all.

To think about it in another way, imagine if the government ordered a religious school *not* to bargain with its teachers. The government would still be interfering with internal school affairs. And that kind of interference would be no less unconstitutional than the opposite command.[187] It is the existence, not the substance, of the command that offends the First Amendment.

It follows, then, that *St. Teresa* was wrong to conflate mandatory bargaining with the voluntary kind. Without government involvement, a school can bargain about any subject it wants, even overtly religious subjects. It can bargain about the curriculums in divinity courses, qualifications for ministers, or even the admission of nonbelievers. When discussed voluntarily, none of these subjects causes a First Amendment problem. The First Amendment puts no limits on a church's decisions about its own affairs.[188] The subjects become constitutionally problematic only when the government gets involved.[189] And for that reason, voluntary bargaining is an unreliable guide for mandatory bargaining. The government cannot simply order a religious school to bargain about any subject it has bargained about on its own initiative.[190] The same bargaining subject might be perfectly fine when voluntary, but constitutionally suspect when mandatory.[191]

The *St. Teresa* approach, then, offers us no way around the constitutional problem. Any government order to bargain interferes with a school's autonomy. And that is true whether the order comes from the federal government or a state.

B. Investigating and Remedying Unfair Labor Practices

No less problematic is the state's involvement in unfair-labor-practice investigations. Like the federal government, most states run their investigations through an administrative agency.[192] If the agency finds evidence of an unfair labor practice, it brings the case before a hearing officer or a judge.[193] This judge is responsible for weighing evidence and evaluating credibility. She reviews documents, hears testimony, and resolves disputes between differing narratives. These narratives often conflict when they describe why the employer took some action. The employer will offer a business motive, the agency an unlawful one. It's up to the judge to decide which is true.[194]

To do that, the judge sometimes has to decide whether the employer's motives are pretextual—whether it made its decision

and once a union is certified, the law strips the church of the right to make unilateral decisions over internal affairs).

182 344 U.S. 94, 116 (1952).

183 *Id.*

184 *See* Laycock, *supra* note 163, at 1389 ("Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the clause.").

185 *See id.* at 1391 ("When the state interferes with the autonomy of a church, and particularly when it interferes with the allocation of authority and influence within a church, it interferes with the very process of forming the religion as it will exist in the future.").

186 *See id.* at 1408 (arguing that the Court's caselaw shows that the right to free exercise includes the right to run a religious institution and manage its internal affairs).

187 *See id.* at 1392 (explaining that the risk of undue interference can be mitigated only by a strong rule of internal autonomy); *id.* at 1391 ("When the state interferes with the autonomy of a church, and particularly when it interferes with the allocation of authority and influence within a church, it interferes with the very process of forming the religion as it will exist in the future."). *See also* Our Lady of Guadalupe Sch. v. Morrissey-Berru, No. 19-267, slip op. at 12 (July 8, 2020) (observing that church autonomy over internal affairs has strong support in the Court's caselaw).

188 *See* Laycock, *supra* note 163, at 1394 (observing that union rules have the same limiting effect on churches as government regulations: "both interfere with church control of church institutions").

189 *See Culvert*, 753 F.2d at 1165 ("If we allow the camel to stick its nose into the constitutionally protected tent of religion, what will follow may not always be controlled.").

190 *See Great Falls*, 278 F.3d at 1345 ("That a secular university might share some goals and practices with a Catholic or other religious institution cannot render the latter any less religious.").

191 *See id.* at 1344 (observing that *Catholic Bishop* made plain that decisions about religious teachings and doctrine belong to the schools, not government officials).

192 *See, e.g.*, N.Y. Labor Law § 706 (describing powers of New York Public Employment Relations Board to prevent unfair labor practices); Cal. Govt. Code § 3514.5 (empowering Public Employment Relations Board to investigate unfair labor practices). *But see* Minn. Stat. § 179.02 (describing power and duties of Bureau of Mediation Services, which has no power to investigate ULPs).

193 *See* N.Y. Labor Law § 706(2) (providing for a hearing before a board agent).

194 *See PERC and Its Jurisdiction*, N.J. Pub. Emp. Relations Comm., https://www.perc.state.nj.us/PERCFAQ.nsf/905c89adfe2e5bc085256324006d4a57/99a48e9c24ee9feb852570ab00722b5b#NT000008FE (last visited May 8, 2021) (describing hearing process).

for a reason different from the one it offers.[195] In a normal case, that kind of judgment call causes no constitutional problems. The judge can simply conclude that the employer is lying.[196] But the same judgment presents real problems in cases involving religious schools. Suppose the agency alleges that the school fired an employee for union activity. In response, the school says it fired the employee for violating certain religious tenets. To side with the agency, the judge has to conclude that the school's justification is pretextual. And to do that, the judge has to decide either that the school's reason wasn't sufficient to justify the firing or that the school doesn't believe its own reasons. Either way, she has to make some determination about the substance of the school's asserted religious beliefs.[197]

This is rocky constitutional territory. Again, government officials have no competence in religious affairs. The government cannot tell someone what she believes, much less whether her beliefs justify some specific action. And calling her asserted belief "pretext" comes quite close to that.[198]

Recognizing the problem, some courts have looked to "mixed-motives" analysis. That analysis asks whether, even without the asserted religious element, the school would have taken the challenged action anyway. If the school would have acted differently without the religious element, the official leaves things where they lie. But if the school would have done the same thing regardless of the religious element, then the unlawful motive was the true cause, and the official can order the school to reverse itself. So in our example, the judge can take the school at its word; she can accept that the school was motivated, at least in part, by religion. But she can then hypothetically remove that motive and reevaluate the situation. If, without the religious motive, the school would have fired the teacher, the official can put the teacher back to work. She doesn't have to call the school's religious beliefs into question.[199]

It's easy to see why courts are attracted to this kind of solution. Ostensibly, it lets the government have its cake and eat it too. The government can avoid questioning religious beliefs while also remedying unlawful discrimination. The school gets to keep its religious autonomy, and the employee gets her job back.

But of course, nothing is quite that easy in real workplaces. Let's assume now that the school suspends a biology teacher for a semester. The school says it suspended her because she taught a theory of evolution inconsistent with the school's religious beliefs. The agency, by contrast, alleges that the school suspended the teacher because she attended a union meeting. Under a mixed-motives approach, a judge can accept both motives as true.[200] The school may have been upset by the teacher's course materials, but also by her union activities. The judge would then apply mixed-motives analysis to decide whether the school would have suspended the teacher even if she hadn't attended the meeting.[201] That is, the judge still has to decide whether the discussion of evolution was important enough to justify the suspension on its own. That means the judge still has to weigh the school's religious motivations; she still has to make some judgment about the strength of the school's beliefs.[202] Mixed-motives analysis can't get us around this problem.[203]

In fact, the example we just considered offers an unusually clean scenario. In most real scenarios, the motivations won't be so easy to segregate. For example, suppose a Catholic school decides not to renew the contracts of several teachers. It does that, it says, because the teachers engaged in "un-Christian" behavior: they went out on strike. How is the judge to apply a mixed-motives analysis here? The alleged religious and unlawful motives are not discrete; they are the same. The strike was protected, but also, according to the school, "un-Christian." So to reverse the school's action and put the teachers back to work, the judge has to conclude either that the school is being disingenuous or that labor law overrides the religious concern. In other words, the judge has to balance the school's religious beliefs against government policy.[204]

It's tempting to dismiss this scenario as unlikely, even fanciful. But we know it happens in real schools. In fact, it was exactly the scenario presented in *Nyserb*.[205] The *Nyserb* court dealt with it by endorsing a mixed-motives analysis.[206] But as we now see, that solution was too facile. It failed to recognize, much less resolve, the conflict between religious beliefs and union activity. Mixed-motives analysis couldn't resolve that conflict because the

195 *See Catholic Bishop*, 559 F.2d at 1131 (describing NLRB process).

196 *See Wright Line*, 251 N.L.R.B. 1083, 1089 (1980) (describing burden-shifting process applied by NLRB administrative law judges); John Higgins et al., How to Take a Case Before the NLRB 16-7 (9th ed. 2016) (describing operation of pretext analysis in NLRB hearing process).

197 *See Catholic Bishop*, 559 F.2d at 1125 ("The Board in processing an unfair labor practice charge would necessarily have to concern itself with whether the real cause for discharge was that stated or whether this was merely a pretextual reason given to cover a discharge actually directed at union activity. This scope of examination would necessarily include the validity as a part of church doctrine of the reason given for the discharge.").

198 *See id.* (rejecting Board's assertion of jurisdiction in part because unfair-labor-practice investigations would inevitably draw it into religious disputes like this one).

199 *See Culvert*, 753 F.2d at 1168 (reasoning that it is possible to evaluate school's motives without questioning its faith or asserted beliefs).

200 *See id.* (describing "dual motives" analysis).

201 *See id.* (stating that the Board could reinstate the teacher "only if he or she would not have been fired otherwise for asserted religious reasons").

202 *See Catholic Bishop*, 559 F.2d at 1125 (reasoning that mixed-motives analysis still forces the government to decide whether the asserted reason was pretextual).

203 *See id.* ("This scope of examination would necessarily include the validity as a part of church doctrine of the reason given for the discharge.").

204 *Cf. Culvert*, 753 F.2d at 1168 (conceding that the First Amendment bars the government from inquiring into whether an asserted religious motive is pretextual).

205 *See Nyserb*, 90 N.Y.2d at 252–53.

206 *See id.* at 253 ("Support exists in the record that the conclusory characterization of the religious motive for the discharge enjoys no record support or even effort by the School to present evidence that Gaglione's reinstatement implicates or engenders a religious entanglement.").

school's motives were never really mixed. There was only one motive, both religious and prohibited.[207]

Now, we could imagine a rule resolving the conflict by prioritizing legal compliance over religious exercise. Indeed, such a rule prevails in most of American life. Under *Smith*, neutral and generally applicable laws often override religious practices.[208] And the same rule could play out in the halls of religious institutions, including religious schools. General laws could govern the internal affairs of those institutions just as they govern the affairs of so many others. Such a rule might even fit better with neutrality-centered views of the First Amendment, which tend to prioritize equal treatment over accommodation.[209]

But for better or worse, that has never been the rule when it comes to a religious institution's internal affairs. The Supreme Court has long recognized that at least in their internal governance, religious institutions enjoy a sphere of autonomy unlike anything enjoyed by the public at large.[210] State courts have consistently missed this distinction.[211] Yes, *Smith* allows some types of interference with religion. But not all interference is the same. And when it comes to interference with internal institutional autonomy, *Smith* has almost nothing to say.

C. Three Types of Interference: The Irrelevancy of Smith

Decided in 1990, *Smith* revolutionized free exercise jurisprudence. For decades, the Court had analyzed laws burdening the free exercise of religion under a compelling-interest standard. That is, whenever a state burdened religious exercise, it had to provide a sufficiently compelling reason for doing so.[212] But that standard had drawn withering criticism. Many, including some of the Justices, thought it offered too little guidance to lower courts and state officials.[213] There was no way for these officials to decide, objectively, whether a particular interest was sufficiently compelling. And without guidance, they were left to their own devices; they were free to decide how important the government's interests were based on their own intuitions.[214] The Court took those criticisms to heart and, in *Smith*, discarded the compelling-interest approach.[215] It instead announced that it would uphold laws burdening religious exercise as long as they were neutral and generally applicable.[216] Discriminatory laws would fail that test, but most others would pass.[217]

This revolution came just as states were considering whether to extend their labor laws to religious schools. When these laws were challenged, courts in Minnesota, New Jersey, and New York all looked to *Smith* to help them resolve the constitutional question.[218] And in each case, they upheld the laws. The laws, they reasoned, were neutral and generally applicable. They applied to religious and non-religious employers alike. They singled out no religious practice or belief. And their purpose was self-evidently secular: they promoted collective bargaining to improve the wages and working conditions of all employees. As a result, they passed muster under *Smith*, and whatever incidental interference they caused was of no constitutional significance.[219]

This analysis, however, elided a distinction between different kinds of interference. In a classic article on employment law in religious schools, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, Professor Douglas Laycock divided interference with religion into three categories.[220] The first was government interference with religious belief: the government tells the believer what he or she can or cannot think.[221] The second category was state interference with specific religious practices: the government tells the believer she cannot sacrifice animals, cannot use certain drugs, cannot dodge the draft, etc.[222] The third was

207 *See id.* (concluding that state board could order reinstatement despite asserted religious motivations).

208 *See Smith*, 494 U.S. at 887–88. *See also* Lyle Denniston, *A Bold New Plea on Religious Rights*, Constitution Daily (April 25, 2019), https://constitutioncenter.org/blog/a-bold-new-plea-on-religious-rights (discussing post-*Smith* litigation attempting to develop an approach more accommodating to religious practice); Kathryn Evans, *Supreme Court Considers Religious Exemptions to Nondiscrimination Laws*, Nat'l L. Rev. (Nov. 17, 2020), https://www.natlawreview.com/article/supreme-court-considers-religious-exemptions-to-nondiscrimination-laws (same).

209 *See* Howard Gillman & Erwin Chemerinsky, The Religion Clauses: The Case for Separating Church and State 49–51, 134 (2020) (distinguishing between accommodationist and separationist views of the First Amendment and arguing that the former is inconsistent with a pluralist, democratic society).

210 *See Kedroff*, 344 U.S. at 116 (recognizing "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine").

211 *See, e.g.*, *Nyserb*, 90 N.Y.2d at 248–49 (relying on *Smith* and analyzing interference with internal affairs for interference with specific religious practices); *Hill-Murray*, 487 N.W.2d at 862 (same).

212 *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (asking whether a "compelling interest" justified incidental burdens on religious exercise).

213 *See Smith*, 494 U.S. at 883–84 (recounting failings and gradual erosion of *Sherbert* standard).

214 *See id.* at 886–87 (rejecting the notion that judges can decide which religious tenets are "central" to a person's faith and which are not).

215 *See id.* at 494 U.S. at 887–89 (considering and rejecting even more limited forms of the compelling-interest test).

216 *Id.* at 891.

217 *See id.* at 894 (explaining that the Court's standard would not permit a state to target a particular religious practice); *see also* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1731 (2018) (explaining that even under *Smith*, government cannot target religious practices out of "animosity").

218 *Nyserb*, 90 N.Y.2d at 248–49; *Hill-Murray*, 487 N.W.2d at 862; *St. Teresa*, 150 N.J. at 595.

219 *See St. Teresa*, 150 N.J. at 597 (upholding application of state constitutional provision to church-run school because the provision was "a generally applicable civil law" and was "neutral in that it is not intended to regulate religious conduct or belief"); *Nyserb*, 90 N.Y.2d at 249 (upholding application of state labor-relations law because the law was a "facially neutral, universally applicable and secular regulatory regime"); *Hill-Murray*, 487 N.W.2d at 863 (upholding application of state labor-relations law because it was "a valid law of general applicability" and did not "intend to regulate religious conduct or beliefs").

220 *Supra* note 163, at 1393.

221 *Id.*

222 *Id.*

state interference in the operation of religious institutions: the government tells believers how to administer the entities through which they practice their faith.[223]

The first type of interference is rare in this country. We seldom see examples of the government proscribing beliefs or dictating matters of faith.[224] The second, however, occurs almost daily. The government tells people when and where they can gather, what substances they can consume, whom they can marry. It was this type of interference that the Court dealt with in *Smith*. There, the Court held that the state could deny unemployment benefits to believers who lost their jobs for smoking peyote, even though peyote was part of their religious faith.[225] State law thus clashed with a specific religious practice.[226]

Catholic Bishop, however, involved the third kind of interference.[227] The schools never argued that collective bargaining itself violated any particular religious practice or tenet. Indeed, the Catholic Church enthusiastically supported collective bargaining.[228] Instead, the schools objected to the state's interference in their internal affairs. By commanding them to bargain over conditions of employment, the state sapped their authority over their internal governance. In other words, it wasn't bargaining that violated the schools' rights; it was the government's command to bargain.[229]

Smith, then, has little to say about whether a state can dictate the terms of a religious school's relationship with its employees. *Smith* dealt with a different kind of interference—state interference with individuals' religious practice. It never suggested that a state could insert itself into a religious institution's internal administration, even if the state did so in a neutral and generally applicable way. *Smith* tells us, in short, almost nothing about the debate over mandatory collective bargaining in religious schools.

This conclusion will, no doubt, raise some eyebrows. After all, if *Smith* doesn't allow states to regulate religious schools, does anything? Surely the school must comport itself according to normal commercial and regulatory laws. It must, for example, pay its vendors on time, comply with local zoning laws, and observe general building codes.[230] We cannot let a school flout those laws simply because it associates with a religious institution. So some will ask: Can a state do anything to rein in a religious school, or is the school "a law unto itself"?[231]

But so stated, the question presents a false choice. Not even churches claim that they can ignore all laws simply by virtue of their religious affiliation. Society can—and does—recognize a church's general duty to comply with the law while still respecting its sphere of internal autonomy.[232] The real question, then, is where autonomy ends and general obligation begins.

To draw the line, we have to distinguish between a church's behavior toward those outside its community and its behavior toward those within it. When the church complies with contracts, zoning laws, and building codes, it is acting externally: it is operating in the market just like any other person, business, or other entity.[233] But when it acts internally, its governance is its own, and the members of its community voluntarily submit to its authority.[234] That is no less true of employees than it is of congregants. Like congregants, employees in a religious school voluntarily join the community and accept the church's leadership.[235] They are no longer pure outsiders dealing with the school at arm's length, as a member of the public might.[236] They have taken up a role—a vital one—in the school's religious mission.[237]

This last point is, of course, not uncontroversial. There are no doubt some who think teachers are more like vendors than congregants, more like arm's-length contracting parties than members of the religious community. But that view overlooks the teachers' role in carrying out a school's religious mission.[238] Religious schools exist only when a community decides to offer an alternative to secular education.[239] Religious schools, then, owe their existence to a community's desire to project its religious message, and in particular, to hand that message down to the next

223 *Id.*

224 *See id.*

225 *Smith*, 494 U.S. at 874.

226 *See id.*

227 Laycock, *supra* note 163, at 1401 (explaining that the problem recognized in *Catholic Bishop* was an autonomy problem, not an interference-with-specific-practice problem).

228 *Id.* at 1398.

229 *See Catholic Bishop*, 440 U.S. at 503 (observing that government mandated collective bargaining would necessarily infringe on management prerogatives and lead to clashes between the church and the unions over "sensitive" issues that could have religious implications).

230 *See* Laycock, *supra* note 163, at 1406–08 (observing that few dispute that churches must comply with general laws governing their relationship with third parties, such as building codes).

231 *See Smith*, 494 U.S. at 879 (quoting Reynolds v. United States, 98 U.S. 145 (1879)).

232 *See Our Lady of Guadalupe*, No. 19-267, slip op. at 12 (recognizing that respect for church autonomy does not mean churches are immune from all secular laws; it only "protect[s] their autonomy with respect to internal management decisions that are essential to the institution's central mission").

233 *Cf. Catholic Bishop*, 559 F.2d at 1124–25 (observing that bargaining orders are different from fire codes or compulsory attendance laws; the former inevitably draw the government into disputes over religious doctrine, while the latter do not).

234 *See* Laycock, *supra* note 163, at 1408.

235 *See id.* at 1409 (distinguishing between external and internal relationships for purposes of church's religious exercise) ("When an employee agrees to do the work of the church, he must be held to submit to church authority in much the same way as a member.").

236 *Id.*

237 *See id.*

238 *See Our Lady of Guadalupe*, No. 19-267, slip op. at 23 ("The concept of a teacher is loaded with religious significance.").

239 *See Catholic Bishop*, 559 F.2d at 1118 (observing that Catholic Church established schools as alternatives to secular public school system).

generation.[240] The community's primary agents in that mission are its teachers. Teachers stand at the front lines, speaking for the whole group. They may not always embrace the community's teachings, but they do serve as its voice.[241]

That special role has been recognized for decades. For example, in *Lemon v. Kurtzman*, the Supreme Court held that a state could not subsidize teacher salaries at religious schools even when the teachers taught only secular subjects.[242] The Court reasoned that even lay teachers would inevitably be affected by the school's religious mission and character.[243] The teachers were products of their environment, and the state could not legitimately expect them to expel religion from their classrooms.[244] That is, they were religious agents even when teaching subjects other than religion.

Similarly, in a pair of recent cases, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*[245] and *Our Lady of Guadalupe School v. Morrissey-Berru*,[246] the Court held that the First Amendment protects religious institutions from interference with their relationship with "ministerial" employees—i.e., employees who play important religious roles. Both cases involved attempts to apply antidiscrimination laws to teachers in religious schools. In rejecting those attempts, the Court reemphasized that religious schools enjoy a sphere of autonomy over their internal affairs, including their relationships with their teachers.[247] Laws regulating those relationships sapped the schools of their internal authority and entangled the state in school administration: "When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."[248]

Teachers, then, are more than just ordinary employees. They are part of the school's internal religious community. In fact, they are often the school's most important agents in its religious mission. Their relationship with the school is a matter of internal governance, over which the school enjoys constitutionally protected autonomy.[249]

That being the case, when a state regulates the teachers' relationship with a school, it necessarily interferes with the school's internal authority.[250] And that is true even when the regulation is neutral and generally applicable, and even when these laws interfere with no specific religious practice. Again, *Hosanna-Tabor* and *Our Lady of Guadalupe* offer prime examples. There, the schools never argued that their religious practices required them to discriminate on the basis of some protected characteristic. No one claimed that antidiscrimination laws failed the *Smith* test. Instead, the only question was whether the state could apply neutral, generally applicable employment laws to the schools' internal affairs. The answer was no.[251] That was the answer not because the schools had a First Amendment right to discriminate, but because they had a First Amendment freedom to manage their own internal relationships.[252]

The same, then, must be true for mandatory-bargaining laws. Those laws interfere with a school's autonomy at least as much as antidiscrimination laws, probably more. Antidiscrimination laws have only a moderate effect on management's decisionmaking: they limit the bases on which management can make certain employment decisions, but still leave those decisions in management's hands. Bargaining laws, by contrast, limit management's authority across an array of subjects. They require bargaining over every term and condition of employment.[253] And again, when it comes to teachers, those terms and conditions encompass nearly everything the school does.[254] Class sizes, course offerings, curriculums—they all affect teachers' work environments, and so are proper subjects for bargaining.[255] Mandatory bargaining thus represents a far greater loss of autonomy for religious schools.[256]

If *Smith* meant to limit that longstanding sphere of autonomy, you might have expected the Court to at least mention it. But it never did. Nor has the Court suggested at any point since that *Smith* gave the state an entryway into church administration. To the contrary, the Court has affirmed and reaffirmed the

240 *See* Laycock, *supra* note 163, at 1411 (describing multiple roles played by religious schools, including as agents of transmitting religious beliefs to next generation).

241 *Cf. Catholic Bishop*, 559 F.2d at 1127 (observing that failure by a lay teacher to carry out the bishop-employer's policy would "directly interfere with the exercise of religion").

242 403 U.S. 602, 618–19, 625 (1971).

243 *Id.* at 619.

244 *See id.*

245 565 U.S. 171, 181–90 (2012).

246 No. 19-267.

247 *See id.* at 23 (observing that the "concept of a teacher is loaded with religious significance").

248 *Id.* at 26–27.

249 *See* Laycock, *supra* note 163, at 1401.

250 *See Our Lady of Guadalupe*, No. 19-267, slip op. at 10.

251 *See id.*; *Hosanna Tabor*, 565 U.S. at 189.

252 *See Our Lady of Guadalupe*, No. 19-267, slip op. at 10 ("State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion.").

253 *See* Laycock, *supra* note 163, at 1401 (recognizing that collective bargaining necessarily deprives management of some of its autonomy and control over internal affairs).

254 *See supra* note 163 (citing sources).

255 *See Duquesne*, No. 18-1063, slip op. at 8 ("Furthermore, exercising jurisdiction would entangle the Board in the 'terms and conditions of employment,' which would involve the Board in 'nearly everything that goes on' in religious schools." (quoting *Catholic Bishop*, 440 U.S. at 502–03)).

256 *See* Laycock, *supra* note 163, at 1409 ("Modern labor legislation may have deprived secular employers of the fiduciary duty once owed them by their rank and file employees, but to deprive churches of that duty would be to interfere with an interest protected by the free exercise clause.").

importance of church autonomy over internal affairs, including employment relationships. On that subject, *Smith* has nothing to teach us.

III. Conclusion: All Roads Lead to Consistency

As we've now seen at length, a dichotomy persists in the law governing religious schools. While the courts have recognized that the First Amendment denies the Board jurisdiction over church-run schools, they have failed to apply that same rule to state agencies. Worse, they have done so without making any serious effort to explain the difference. Instead, they have swept *Catholic Bishop* into a jurisdictional corner, dismissing it as a decision only about statutory interpretation. And they have justified the states' own actions with logic that fails to address *Catholic Bishop*'s core concern: protecting the autonomy of religious schools over their internal affairs, as required by the First Amendment.

There is no way to square *Catholic Bishop* with that result. Nor is there any way to justify the distinction based on the Court's later precedents. The First Amendment protects religious schools' autonomy over their relationships with their employees, and that protection extends just as much to state agencies as it does to the Board. There is no constitutionally coherent way to deny the Board jurisdiction over the schools while allowing it to the states.

To paraphrase Abraham Lincoln, the law divided cannot stand. It must become all one thing, or all the other. Ideally, states would recognize the illogic of the existing divide and withdraw on their own accord. But more likely, the courts will have to make them. Courts will have to recognize the dichotomy and order states to stand down. With such an obvious imbalance, we might expect that decision to come sooner rather than later. We are now entering our fifth decade since *Catholic Bishop*, and the Supreme Court appears more solicitous of religious autonomy than ever. If ever there were a time to give *Catholic Bishop* its full force, it is now.

Banning America's Rifle: An Assault on the Second Amendment?

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Note from the Editor:

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Other Views:

• Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011) (*Heller II*), *available at* https://casetext.com/case/heller-v-district-of-columbia-10-7036-dc-cir-10-4-2011.

• New York State Rifle and Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242 (2d Cir. 2015), *available at* https://casetext.com/case/ny-state-rifle-amp-pistol-assn-inc-v-cuomo.

• Josh Sugarmann, Assault Weapons and Accessories in America (Violence Policy Center 1988), *available at* http://www.vpc.org/studies/awaconc.htm.

• Jonathan E. Lowy, *Comments on Assault Weapons, the Right to Arms, and the Right to Live*, 43 Harv. J.L. & Pub. Pol'y 375 (2014), *available at* https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2020/03/Lowy-FINAL.pdf.

The AR-15 rifle has aptly been called "America's Rifle." It is the most popular rifle in the United States, owned and used by millions of law-abiding citizens. Does prohibiting it infringe on the right of the people to keep and bear arms as guaranteed by the Second Amendment?

This article begins with an examination of the meanings of term "assault weapon," features that some lawmakers and activists have claimed define such weapons, and the rarity of their use in crime. It then analyzes how the Supreme Court's jurisprudence on the Second Amendment, which protects firearms in common use for lawful purposes, precludes bans on such firearms. After that, it examines the text, history, and tradition of the Second and Fourteenth Amendments to show that the right keeps pace with and continues to exist as technological improvements are made to firearms. It demonstrates how judicial decisions upholding laws that ban these commonly possessed firearms conflict with and undermine the right. It ends with a challenge to judges and litigants to take the Second Amendment seriously.

Some common myths must be cast aside at the outset for a serious consideration of the issue. The term "assault weapon," while usually applied to some kind of rifle, is actually a pejorative term without a definite meaning. It was invented to sow confusion in the public between semiautomatic rifles and fully automatic military weapons like the M-16 rifle.[1] So-called assault weapons are semiautomatic firearms that, just like all other semiautomatic firearms, fire one round for each pull of the trigger. The features that make an otherwise legal semiautomatic firearm an "assault weapon" under various laws do nothing to affect the firearm's functional operation and, if anything, promote safe and accurate use. One purported feature called a "conspicuously protruding pistol grip" may be found on many, diverse types of rifles, including those used in the Olympics, and it promotes accurate fire. Another frequently targeted feature, a telescoping stock, allows rifles to be better fitted to the stature of the user, much like a telescoping steering wheel, and hence promotes comfort and accuracy. Surveys frequently show that self-defense is a primary reason why individuals choose to own AR-15s and similar firearms. They are particularly attractive for women and older individuals because of their light weight and ease of use, particularly in comparison to shotguns. Rifles are used in crime more rarely than other firearms, particularly handguns, and there is no evidence that any of the features targeted by assault weapon bans has been the causal factor of any person's death in a crime.

The Supreme Court has referred to the AR-15 semiautomatic rifle in the context of discussing the "long tradition of widespread lawful gun ownership" in America.[2] In *District of Columbia v.*

1 *See* Josh Sugarmann, Assault Weapons and Accessories in America (Violence Policy Center 1988), *available at* http://www.vpc.org/studies/awaconc.htm.

2 Staples v. United States, 511 U.S. 600, 610-11 (1994).

Heller, the Court held that the Second Amendment protects arms that are typically possessed or in common use by law-abiding citizens for lawful purposes like self-defense.[3] The right to bear arms was held to be a fundamental right that applied to the states through the Fourteenth Amendment in *McDonald v. City of Chicago*.[4] The Court held in a stun gun case that the Second Amendment extends to "arms . . . that were not in existence at the time of the founding."[5] These decisions bear heavily on whether so-called assault weapons may be banned.

After analysis of the above decisions, this article delves into the Second and Fourteenth Amendments, with a focus on text, history, and tradition. Adopted at the dawn of the age of repeating firearms, the Second Amendment was understood to protect a robust right to have "arms." In the early republic, firearms of all kinds were considered the birthright of the citizen. Not being considered citizens, African Americans could be prohibited from possession of arms. But the Fourteenth Amendment extended the right to arms to all Americans, and such arms included repeating firearms with extended magazines.

Since the beginning of the 20th century, semiautomatic firearms with detachable magazines have been commonly possessed. Despite Jim Crow laws, semiautomatic rifles proved useful in protecting the lives and civil rights of blacks. There is no historical tradition in the United States of banning ordinary firearms or standard-capacity magazines. The first restrictions on the AR-15 and magazines of a certain capacity were only enacted in 1989 and 1990, respectively.

Notwithstanding the above, five circuits have considered "assault weapon" and magazine bans and upheld them in each case. Each case will be analyzed in depth. First to rule was the D.C. Circuit, which rejected common use as the test and relied on legislative testimony to uphold a ban; then-Judge Brett Kavanaugh wrote a spirited dissent.[6] The Second Circuit next upheld Connecticut's and New York's bans without even analyzing the features that supposedly rendered the banned firearms unprotected by the Second Amendment.[7]

While these decisions conceded that the banned firearms and magazines are in common use, the Seventh Circuit (over a dissent)—upholding a local Illinois ban—questioned the viability of that test from *Heller*.[8] In an en banc decision with dissents, the Fourth Circuit pushed the envelope further, validating Maryland's ban, in deciding that semiautomatic firearms may be banned because they are like machine guns, which they are not.[9] Finally, the First Circuit upheld Massachusetts' ban based on "combat features" that it never identified.[10]

The U.S. District Court for the Northern Mariana Islands saw through the haze and found that the pistol grip, adjustable stock, and flash suppressor make a rifle more accurate and safer to use for the law-abiding citizen. It therefore found that a ban violated the Second Amendment.[11]

Bans have been enacted in only a handful of states—only six ban certain long guns and handguns, one more bans just certain handguns, and eight ban certain magazines—and that some have been upheld is hardly reason to infer that the federal judiciary in general agrees that the bans are constitutional. Judges from the few states with an anti-gun political culture may reflect that culture in their decisions.

More telling is that forty-four states have *not* defined "assault weapons" as certain long guns and handguns and banned them; this could reflect that most lawmakers consider such bans to be unconstitutional and unproductive. Of course, the courts have had no occasion to uphold or invalidate bans which do not exist in these states. It's no accident that eight of the thirteen federal circuits have never considered, post-*Heller*, an assault weapon ban under the Second Amendment. Like the dog that didn't bark in the Sherlock Holmes mystery,[12] the silence is deafening.

This article analyzes the apparent disconnect between the decisions of the Supreme Court and those of the five circuits that have upheld bans. The issue is informed by the text, history, and tradition of the Second and Fourteenth Amendments, which includes the development, use, and acceptance by the American public the past century and a half of repeating and semiautomatic firearms with standard-capacity magazines. Decisions upholding bans on the arms that the people commonly keep and bear are out of touch with that background, depart from the clear test provided by the Supreme Court, and substitute value-laden judicial balancing tests for the plain text of the Second Amendment.

I. "Assault Weapon" Is a Political Term, Its Purported Features Are Innocuous, and It Is Rarely Used In Crime

A. What Is an "Assault Weapon"?

Literally, an assault weapon is a weapon used in an assault.[13] The term "assault rifle" is a military term used to describe a selective-fire rifle such as the AK-47 that fires both fully automatically and semiautomatically.[14] The M-16 selective-fire

3 District of Columbia v. Heller, 554 U.S. 570, 624-25, 627 (2008).

4 McDonald v. City of Chicago, 561 U.S. 742, 764 (2010).

5 Caetano v. Massachusetts, 136 S. Ct. 1027, 1028 (2016) (per curiam).

6 Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011) (*Heller II*); *id*. at 1269 (Kavanaugh, J., dissenting). When a Second Amendment challenge to New York City's restrictions on transport of pistols was held to be moot, Justice Kavanaugh cited this dissent along with *Heller* and *McDonald*, for a correct understanding of the Second Amendment. New York State Rifle & Pistol Association, Inc. v. City of New York, 140 S. Ct. 1525, 1527 (2020) (Kavanaugh, J., concurring).

7 New York State Rifle and Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242 (2d Cir. 2015).

8 Friedman v. City of Highland Park, Ill., 784 F.3d 406, 407 (7th Cir. 2015).

9 Kolbe v. Hogan, 849 F.3d 114, 125 (4th Cir. 2017) (en banc).

10 Worman v. Healey, 922 F.3d 26, 36 (1st Cir. 2019).

11 Murphy v. Guerrero, No. 1:14-CV-00026, 2016 WL 5508998, *18-20 (D. N. Mariana Islands Sept. 28, 2016).

12 Arthur Conan Doyle, *Silver Blaze*, in The Complete Sherlock Holmes 383 (1938).

13 *See* People v. Alexander, 189 A.D.2d 189, 193, 595 N.Y.S.2d 279 (N.Y. App. Div. 1993) ("a tire iron that was believed to be the assault weapon").

14 "Assault rifles are short, compact, selective fire weapons that fire a cartridge intermediate in power between submachinegun and rifle cartridges. Assault rifles . . . are capable of delivering effective full automatic fire . . . ." Harold E. Johnson, Small Arms Identification &

service rifle came to be America's "standard assault rifle."[15] Federal law defines the M-16 as a "machinegun," i.e., a "weapon which shoots . . . automatically more than one shot, without manual reloading, by a single function of the trigger."[16]

By contrast, a semiautomatic firearm can only fire a single shot with each pull of the trigger. These types of firearms are extraordinarily common nationwide; they have been part of the landscape in America for over 100 years.[17] AR-15s have been in commercial production since *Leave it to Beaver* was on television.[18] But the production of civilian rifles that fire only in semiautomatic mode and that have cosmetic features that look like those of military rifles gave gun prohibitionists the idea of calling them assault weapons to promote banning them. As a lobbyist for the Violence Policy Center wrote, "The weapons' menacing looks, coupled with the public's confusion over fully automatic machine guns versus semiautomatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase the chance of public support for restrictions on these weapons."[19]

In a case not related to firearms, Justice Clarence Thomas observed:

> Prior to 1989, the term 'assault weapon' did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists to expand the category of 'assault rifles' so as to allow an attack on as many additional firearms as possible on the basis of undefined 'evil' appearance.[20]

The term "assault weapon" thus became a classic case of "an Alice-in-Wonderland world where words have no meaning."[21]

Since "assault weapon" has come to be a political term with no fixed meaning, it can mean anything the speaker wants it to mean. One legislature's assault weapon warranting a prohibition and felony penalties is another legislature's sporting rifle not subject to special restrictions. Even legislatures seeking to ban assault weapons define them in different and contradictory ways.

If a law calls a firearm an assault weapon and bans it, then how should a court decide whether the law violates the Second Amendment? The label shouldn't count for much, as "no pronouncement of a Legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act . . . ."[22] Nor does the label foreclose a factual inquiry, as "a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty, or property had a rational basis."[23] And as *Heller* adds, "Obviously, the same [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right . . . ."[24]

America's first rifle ban—California's Roberti-Roos Assault Weapons Control Act of 1989—was upheld on the basis that the Second Amendment did not apply to the states through the Fourteenth Amendment,[25] and because the Second Amendment does not protect individual rights.[26] America's first magazine ban—New Jersey's 1990 prohibition on detachable magazines holding over 15 rounds—was upheld without any reference to the Second Amendment.[27] Bans were extended to a handful of other states and cities.[28]

In 1994, Congress passed a law defining and restricting "semiautomatic assault weapons"—itself an oxymoron because true assault weapons are fully automatic. The law began with a list of named firearms, such as "Colt AR-15," and "copies or duplicates" thereof.[29] It then set forth generic definitions that began with reference to a type of firearm and then described certain features that could combine to render it illegal. Most prominently, a rifle (which has a shoulder stock and shoots a projectile through a rifled barrel),[30] that is semiautomatic (which fires once with a single pull of the trigger and loads another cartridge),[31] and that uses a detachable magazine (an ammunition feeding device that detaches from the rifle) was *not* an "assault weapon" per se. It became one only if two other features were present, such as a "bayonet mount" and a "pistol grip that

Operation Guide – Eurasian Communist Countries 105 (Defense Intelligence Agency 1980). *Sturmgewehr*, the German equivalent of the term assault rifle, was first used in Nazi Germany. Peter R. Senich, The German Assault Rifle 1935-1945 79 (1987).

15 Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 804 (1988).

16 26 U.S.C. § 5845(b).

17 Mark W. Smith, *"Assault Weapon" Bans: Unconstitutional Laws for A Made-Up Category of Firearms*, 43 Harv. J.L. & Pub. Pol'y 357, 359 (2020).

18 Mark W. Smith, First They Came for the Gun Owners 1087 (2019).

19 Sugarmann, *supra* note 1.

20 Stenberg v. Carhart, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting) (citation omitted).

21 Welsh v. United States, 398 U.S. 333, 354 (1970) (Harlan, J., concurring).

22 United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

23 *Id.*

24 *Heller,* 554 U.S. at 629 n.27.

25 Fresno Rifle & Pistol Club, Inc. v. Van De Kamp, 965 F.2d 723 (9th Cir. 1992).

26 Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2003), *reh'g denied*, 328 F.3d 567 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 803 (2003).

27 Coalition of New Jersey Sportsmen, Inc. v. Whitman, 44 F. Supp. 2d 666 (1999), *aff'd.*, 263 F.3d 157 (3rd Cir.), *cert. denied*, 534 U.S. 1039 (2001).

28 *See, e.g.*, Springfield Armory, Inc. v. City of Columbus, 29 F.3d 250 (6th Cir. 1994) (holding ban unconstitutionally vague).

29 Chapter XI, Subchapter A of the Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322, 108 Stat. 1796 (1994), codified at 18 U.S.C. §§ 921(a)(30)(A), 922(v) (expired 2004).

30 "The term 'rifle' means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire only a single projectile through a rifled bore for each single pull of the trigger." 18 U.S.C. § 921(a)(7).

31 "The term 'semiautomatic rifle' means any repeating rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge." 18 U.S.C. § 921(a)(28).

protrudes conspicuously beneath the action of the weapon."[32] The federal ban did not restrict possession of such firearms that were lawfully possessed on its effective date. Magazines holding more than ten rounds were similarly restricted but grandfathered.[33] After the law expired ten years later, Congress declined to reenact it.

New York defines "assault weapon" to include a rifle, which is fired from the shoulder, with the feature of "a pistol grip that protrudes conspicuously beneath the action of the weapon."[34] So in New York, a rifle with a pistol grip is banned if it has a shoulder stock. But in Cook County, Illinois, a rifle with a pistol grip is banned if it *doesn't* have a shoulder stock; the Chicago-area county defines "assault weapon" as a rifle featuring "only a pistol grip without a stock attached."[35] Maryland's ban is silent on those features; one can have a rifle with a pistol grip and stock, or a rifle with a pistol grip and no stock, and it's not necessarily an "assault weapon."[36]

A Florida initiative petition sought a state constitutional amendment that would throw the features out the window and define "assault weapon" as "any semiautomatic rifle or shotgun capable of holding more than ten (10) rounds of ammunition at once, either in a fixed or detachable magazine, or any other ammunition-feeding device."[37] In a case brought before the Florida Supreme Court, the attorney general alleged that the language was misleading, as it would ban virtually all semiautomatic long guns, even small .22 caliber rifles with traditional wood stocks such as the Ruger 10/22.[38] That's because almost all semiautomatic long guns are "capable" of holding more than ten rounds, even if one does not possess a magazine that does so.[39] The Sixth Circuit held a similar provision to be unconstitutionally vague, as it did not require that the person possess such magazine or have knowledge that one exists.[40]

Washington exhibits the frivolousness of the term "assault weapon" with its definition: "'Semiautomatic assault rifle' means any rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge."[41] That's simply the definition of a semiautomatic rifle *of any kind*. Washington restricts sales to persons under 21 but does not ban them.

Given that the jurisdictions that ban assault weapons cannot agree on the features that make them unworthy of Second Amendment protection, it's important to keep in mind that the vast majority of states have no such prohibitions. Bans are limited to California, Connecticut, Hawaii (certain pistols only), Illinois (certain localities only), Maryland, Massachusetts, New Jersey, and New York. No other states ban firearms in common use based on contradictory assault weapon features.

In the handful of states with bans, what was an ordinary, lawful firearm one day can become an assault weapon overnight, by the wave of a legislative magic wand. In 2000, New York passed a law nearly identical to the federal law, defining assault weapon based on a combination of two generic features.[42] But on January 15, 2013, the day after the bill was introduced, the Secure Ammunition and Firearms ("SAFE") Act was signed into law, declaring countless ordinary firearms to be assault weapons based on *a single* generic characteristic.[43] Having been so relabeled, they purportedly lost their Second Amendment protection and were banned, other than those registered by a deadline. Yet nothing changed other than how the term was used.

B. The Conspicuously Protruding Pistol Grip is an Innocuous Feature

All handguns have a pistol grip, and *Heller* held that handguns may not be banned. However, some laws define assault weapons as rifles that include the feature of a "conspicuously protruding pistol grip." Whether on a handgun or a rifle, a pistol grip is simply a handle by which one holds the firearm. That feature raises the question of why Second Amendment protection is accorded to a pistol with a pistol grip and a rifle with a pistol grip that protrudes *inconspicuously*, but suddenly evaporates when it comes to a rifle with a pistol grip that protrudes *conspicuously*. Aside from the inherent vagueness of the term "conspicuously," it is unclear how a constitutionally protected object loses protection because something about it is conspicuous.

In the gun industry, a "pistol grip stock" is defined as "[a] stock or buttstock having a downward extension behind the trigger guard somewhat resembling the grip of a pistol." A "straight stock" is "[a] stock with no pistol grip . . . . Also known as: English stock, straight grip stock."[44] Straight stocks predominated until the 20th century, when rifles with pistol grip stocks became common. Traditionally, the pistol grip is part of the complete stock, which is usually wooden, while the pistol grip on rifles like the AR-15 is usually a separate part from the shoulder stock. The

32 18 U.S.C. § 921(a)(30)(B) (expired 2004).

33 18 U.S.C. §§ 921(a)(31), 922(w) (expired 2004).

34 N.Y. Penal Law § 265.00(22)(a)(ii). *See also id.* (11) ("rifle" means a weapon made "to be fired from the shoulder").

35 § 54-211(1)(A), Cook County, Ill., Ordinance No. 06–O–50 (2006).

36 *See* Md. Code, Criminal Law, §§ 4-301(h)(1) ("copycat weapon"), 4-301(d) (assault weapon" includes "a copycat weapon").

37 BAWN, https://bawnfl.org/banassaultweaponsnowpetition.pdf.

38 Advisory Opinion to the Attorney General Re: Prohibits Possession of Defined Assault Weapons, SC19-1266, 2019 WL 5790251, *8 (Fla. 2019).

39 *Id. See also* Beyer v. Rosenblum, 363 Or. 157, 170, 421 P.3d 360 (Or. 2018) (holding that initiative petition was misleading because "different voters reasonably could draw different meanings from the term 'assault weapons'").

40 Peoples Rights Organization, Inc. v. City of Columbus, 152 F.3d 522, 535-36 (6th Cir. 1998). While the Florida Supreme Court did not resolve the vagueness issue regarding magazines, it held the petition to be misleading because it represented that a registered "assault weapon" would be grandfathered, when in fact only the first registrant would be grandfathered. *Advisory Opinion to the Attorney General, Re: Prohibits Possession of Defined Assault Weapons,* 296 So.3d 376, 381 (Fla. 2020).

41 Wash. Rev. Code § 9.41.010(26) (2020).

42 N.Y. Penal Law § 265.00, L. 2000, c. 189.

43 *Id.* L. 2013, c. 1.

44 Glossary of the Sporting Arms and Ammunition Manufacturers' Institute, *available at* https://saami.org/saami-glossary/?search=.

term "conspicuously protruding" as applied to a pistol grip stock is a recent invention of the anti-gun movement.

If sometimes a cigar is just a cigar, as Freud is reputed to have said, sometimes a pistol grip is just a pistol grip. Like a barrel or sights, there is nothing specifically military or civilian about it. That is exemplified by the fact that, from the beginning, civilian AR-15s had some of the same parts as the military M-16. But they differed radically in that the M-16 was designed for fully automatic fire.

The semiautomatic Colt AR-15 was first marketed to the public the same year the first deliveries of the automatic M-16 were made to the armed forces. In 1963, Colt submitted to the predecessor agency of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) two firearms: an "AR-15 Sports Version Rifle" and an "AR-15 automatic rifle" (later renamed the M-16). The agency found that modifications to the automatic version that made it into the sports version "have changed the weapon in basic design to the extent that it is not a 'firearm' in the machine gun category" as defined in the National Firearms Act.[45] The Sports Version was then introduced to the public as the AR-15 Sporter in 1964, the same year the first M-16s were delivered to the Air Force.[46]

Perhaps the most distinctive outward feature of an AR-15 is the protruding pistol grip. As discussed below, the purpose of the pistol grip is to have a comfortable grasp with the same hand that pulls the trigger while holding the stock to the shoulder and allowing the other hand to hold the forend under the barrel. But an urban myth asserts dramatically that the real purpose of the pistol grip is to enable the shooter to spray fire from the hip—that is, to kill a lot of people.[47]

The myth of spray firing from the hip was created by Hollywood for second-rate action movies. That myth becomes reality in the minds of people who are ignorant about the actual workings of firearms. No person familiar with firearms would fire a rifle from the hip. No record exists of a mass shooter firing from the hip. This myth has become so entrenched that some courts rely on it when they uphold laws banning semiautomatic rifles because of their protruding pistol grips.[48]

Yet identical pistol grips are found on single-shot and bolt-action rifles,[49] and even on air guns used in Olympic competition.[50] Single-shot rifles have no magazine, hold only one cartridge at a time, and must be laboriously reloaded. Bolt-action rifles may have a magazine but require manual reloading for each shot. It is inconceivable that the purpose of the pistol grips on such rifles is to facilitate spray firing from the hip.

The M-16 military service rifle and its variations have a protruding pistol grip, so military sources are relevant and helpful. The Army manual *Rifle Marksmanship, M16-/M4-Series Weapons* (2008) illustrates firing from the kneeling, standing, and prone positions and instructs the reader to "Place the firing hand on the pistol grip, with the weapon's buttstock between the SAPI plate and the bicep to stabilize the weapon and absorb recoil."[51] (A SAPI [Small Arms Protective Insert] plate is a type of body armor that extends to the area beside the shoulder.) It further instructs, "Grip the weapon firmly, and pull it into the shoulder securely."[52] The manual adds that "unaimed fire must never be tolerated," and it instructs the soldier "to properly aim the weapon" by "Keep[ing] the cheek on the stock for every shot, align[ing] the firing eye with the rear aperture, and focus[ing] on the front sight post."[53] That means aimed firing from the shoulder and not the hip. If "a target cannot be engaged fast enough using the sights in a normal manner," the soldier is told to shoulder the rifle and fire a quick aimed shot or, if that's not possible, to "Keep the weapon at your side" and "Quickly fire a single shot or burst."[54] A single shot is obviously not spray fire.

A study of military training manuals published from 1923 through 2012 demonstrates the almost exclusive focus on firing from the shoulder.[55] Some earlier manuals mentioned as a minor technique firing from an underarm position (not the hip), but this had nothing to do with the presence or absence of a perpendicular

45 Director, Alcohol & Tobacco Tax Division, Internal Revenue Service, to Colt's Patent Firearms Manufacturing Co., Dec. 10, 1963. Copy in possession of author.

46 R. Stevens & E. Ezell, The Black Rifle 149-50 (1987); Jeff W. Zimba, *The Evolution of the Black Rifle*, http://smallarmsreview.com/display.article.cfm?idarticles=116.

47 Urban myths actually prevail about virtually all of the so-called assault weapon features. For an in-depth analysis, see E. Gregory Wallace, *"Assault Weapon" Myths*, 43 S. Ill. U. L.J. 193 (2018).

48 *Heller II*, 670 F.3d at 1261-62.

49 "Action, bolt. A firearm, typically a rifle, that is manually loaded, cocked and unloaded by pulling a bolt mechanism up and back to eject a spent cartridge and load another." NSSF, The Writer's Guide To Firearms & Ammunition 6 (2017), *available at* http://www3.nssf.org/share/PDF/WritersGuide2017.pdf.

50 For example, see a single-shot air rifle with a protruding pistol grip at https://www.feinwerkbau.de/en/Sporting-Weapons/Air-Rifles/Model-800-Evolution.

51 Rifle Marksmanship, M16-/M4-Series Weapons at 7-2 to 7-5 (Dep't of Army, 2008), *available at* https://www.globalsecurity.org/military/library/policy/army/fm/3-22-9/fm3-22-9_c1_2011.pdf.

52 *Id.* at 7-5.

53 *Id.* at 7-9.

54 *Id.* at 7-20 to 7-21. The manual further notes, "Automatic or burst fire is inherently less accurate than semiautomatic fire," and that "When applying automatic or burst fire, Soldiers deliver the maximum number of rounds (one to three rounds per second) into a designated target area . . . ." *Id.* at 7-12. That is exactly why semiautomatics are appropriate for individual self-defense—with accurate, aimed fire, an aggressor may be pinpointed, but full automatic fire may endanger innocent bystanders. Accurate fire is a virtue, not a vice, for lawful self-defense by civilians. The ability to spray fire in full automatic, pitting armies against armies, is the true military feature that distinguishes a machine gun from a civilian gun of any kind. The Army manual instructs: "Clearing buildings, final assaults, FPF [final protective fire], and ambushes may require limited use of automatic or burst fire." *Id.* at 7-13. Furthermore, "Suppressive fire . . . is employed to kill the enemy or to prevent him from observing the battlefield, effectively using his weapons, or moving." *Id.* at 7-16. Finally, "automatic weapon fire may be necessary to maximize violence of action or gain fire superiority when gaining a foothold in a room, building, or trench." *Id.* at 7-47.

55 Dennis Chapman, Features & Lawful Common Uses of Semi-Automatic Rifles 35-55 (2019), *available at* https://ssrn.com/abstract=3436512.

pistol grip.[56] A 1966 manual "identified the underarm firing position as an automatic firing position only, making no reference to it whatsoever in the section devoted to semi-automatic firing"; and a 1971 study concluded that "[f]iring from the underarm position was grossly inferior to from the shoulder position in both speed and accuracy . . . ."[57]

There is a type of firearm that would be spray fired from the hip: certain submachine guns firing in full automatic in close quarters.[58] But it would *not* have a pistol grip, which would require one to torque and strain the wrist and forearm. Moreover, a submachine gun fires pistol cartridges, which makes it far more controllable than a rifle firing more powerful rifle cartridges.

A rifle with a protruding pistol grip, when held comfortably at the hip, points down to the ground. By contrast, a rifle without such a grip—such as a traditional hunting rifle or shotgun—may be held comfortably at the hip with the barrel pointing forward. One can conduct the simple exercise of holding an imaginary rifle with the rear hand even with the hip as if holding a flashlight (like holding a stock with no pistol grip) and then twisting the hand upward to a vertical position (like holding a pistol grip). The no-pistol-grip hold is comfortable, while the pistol-grip hold causes an uncomfortable strain. Just doing this simple exercise exposes the "spray fire from the hip" argument as a myth.

Protruding pistol grips—whether on semiautomatic or single-shot rifles—facilitate firing from the shoulder. Neither soldiers nor civilians are trained to fire from the hip. No record exists of a mass murderer firing a rifle from the hip. Yet states ban rifles for having the feature of a protruding pistol grip, and the only justification that has been offered for such bans is that the grips facilitate spray firing from the hip. And courts uphold the bans for the false reason that mass murderers prefer it in order to spray fire from the hip.

What kind of grip should transform an ordinary, legal rifle into a banned assault weapon? The expired federal ban defined "assault weapon" in part as "a semiautomatic rifle that has an ability to accept a detachable magazine and has at least 2" features, one of which was "a pistol grip that protrudes conspicuously beneath the action of the weapon."[59] How conspicuous it must be—and how much of a protrusion in inches and at what angle—was left unsaid. California defines those terms in its regulations: "'Pistol grip that protrudes conspicuously beneath the action of the weapon' means a grip that allows for a pistol style grasp in which the web of the trigger hand (between the thumb and index finger) can be placed beneath or below the top of the exposed portion of the trigger while firing."[60] Rifles with a flat fin behind the grip that forces the thumb in an upward, "hitchhiking" position comply with that definition, but they cannot be held as firmly as rifles with the banned grip.[61]

It seems incredible that a rifle would lose Second Amendment protection because the web of the trigger hand may be placed "beneath or below" a certain position, but not if placed above that position. Or indeed, that a rifle with an inconspicuously protruding pistol grip is protected, but not one with a conspicuously protruding pistol grip. What kind of grip should transform an ordinary, legal rifle into a banned assault weapon? There is no non-frivolous answer to this question. If the Second Amendment protects anything, it protects a gun regardless of the position of the trigger hand or the degree of conspicuousness of its grip.

C. So-Called Assault Weapons Are Rarely Used in Assaults, and Magazine Capacity Likely Makes Little Difference

There were very few prosecutions under the federal assault weapon ban in the ten years of its existence beginning in 1994, reflecting that they were rarely used in crime in the first place. That may have been why Congress chose not to reenact the law when it expired in 2004.

The rarity of criminal misuse of the banned firearms was confirmed in a report to the National Institute of Justice by Christopher S. Koper entitled *An Updated Assessment of the Federal Assault Weapons Ban*, which noted, "AWs [assault weapons] were used in only a small fraction of gun crimes prior to the ban: about 2% according to most studies and no more than 8%. Most of the AWs used in crime are assault pistols rather than assault rifles."[62] The study saw a reduction in gun crime involving assault weapons in selected cities following enactment of the federal law.[63] This could not be attributed to the law; since all preexisting "assault weapons" were grandfathered, the quantity in civilian hands did not decrease. Koper candidly concluded:

> Should it be renewed, the ban's effects on gun violence are likely to be small at best and perhaps too small for reliable measurement. AWs were rarely used in gun crimes even before the ban. LCMs [large capacity magazines] are involved in a more substantial share of gun crimes, but it is not clear how often the outcomes of gun attacks depend

56 *Id.* at 37.

57 *Id.* at 44, 48, 50.

58 The Sten Gun, one of World War II's most ubiquitous submachine guns, had a shoulder stock and no pistol grip. *Sten Gun*, https://en.wikipedia.org/wiki/Sten. A 1942 article asked "did you attempt to lift the Sten to your shoulder? If so, you're dead!" The article continued, "To be used in close quarters, it's got to be fired the sudden and instinctive way it was intended—from the waist." It conceded that it could be more accurately fired from the shoulder at longer distances, but it said that was a job for a rifle. "In Sten gun training for Rangers emphasis is laid on firing from the waist. . . . The important point always to remember is that the Sten is NOT a rifle. It is of the machine-pistol class and the natural way to fire it is from the waist or hip." *The Sten Revives Old Art of Hip-Shooting*, The Range, Sept. 1942, reprinted in 2 John A. Minnery, Firearm Silencers 81-82 (1981).

59 18 U.S.C. § 921(a)(3)(B)(ii) (expired 2004).

60 11 C.C.R. § 5471(z).

61 *See Survivor Systems Option Zero AR-15 Stock*, https://www.vcdefense.com/option-zero-stock-ca-featureless-stock/.

62 Christopher S. Koper et al., An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003, at 2 (Report to the National Institute of Justice, U.S. Dep't. of Justice 2004), https://www.ojp.gov/pdffiles1/nij/grants/204431.pdf.

63 *Id.*

on the ability of offenders to fire more than ten shots (the current magazine capacity limit) without reloading.[64]

Neither the federal law nor its expiration had any effect on the homicide rate, which had been falling since almost two years before the enactment of the law and which has remained low since the law expired in 2004. The Bureau of Justice Statistics reported in 2013 that "Firearm-related homicides declined 39%, from 18,253 in 1993 to 11,101 in 2011."[65] Moreover, according to the same study, while the banned assault weapons were mostly rifles, rifles are used in disproportionately fewer crimes: "About 70% to 80% of firearm homicides and 90% of nonfatal firearm victimizations were committed with a handgun from 1993 to 2011."[66] Criminals are less likely to use rifles than any other firearm.[67] Indeed, from the expiration of the ban through 2018, the percentage of rifles of all kinds used in murders has steadily continued to drop: "The percentage of firearm murders with rifles was 4.8% prior to the ban starting in September 1994, 4.9% from 1995 to 2004 when the ban was in effect, and just 3.6% after that . . . ."[68] Moreover, the federal law did not define a semiautomatic rifle with a detachable magazine as an assault weapon unless it had two particular features, such as a pistol grip and a bayonet mount.[69] Manufacturers complied by removing one feature, such as the bayonet mount, and Americans continued to buy essentially the same rifles. Of course, crime did not fall because bayonet mounts were removed from the newly-made rifles that were otherwise identical to those that had been banned.

The federal ban was never reenacted. A law that banned certain firearms only if made after a certain date and that lasted only ten years of almost two and a half centuries of the history of the American Republic can hardly be considered a longstanding tradition or cited as supportive of the constitutional validity of similar or more draconian legislation.

It is unknown whether magazine capacity makes a difference in shooting attacks, as Professor Koper noted.[70] Professor Gary Kleck studied 23 shootings in 1994-2013 in which over six victims were shot and "large capacity magazines" (LCMs) were used. Only one incident was found in which the perpetrator "may" have been stopped during a magazine change. The study concluded:

> In all of these 23 incidents, the shooter possessed either multiple guns or multiple magazines, meaning that the shooter, even if denied LCMs, could have continued firing without significant interruption by either switching loaded guns or changing smaller loaded magazines with only a 2- to 4-seconds delay for each magazine change. Finally, the data indicate that mass shooters maintain such slow rates of fire that the time needed to reload would not increase the time between shots and thus the time available for prospective victims to escape.[71]

Two notorious mass shootings in Florida illustrate the point. In the Orlando Pulse Nightclub incident, the terrorist used LCMs, but he had plenty of time to change magazines as the police took three hours to storm the facility and end his attack.[72] In the Parkland school shooting, which involved a failure of law enforcement at every level, the shooter used only ten round magazines.[73] The Public Safety Commission on Parkland, which spent months interviewing witnesses, reviewing evidence, and studying the Parkland shooting (and produced a 100+ page report of its findings) recommended that teachers should be allowed to volunteer to be armed, and the Florida legislature agreed.[74]

Perpetrators of mass shootings plan their attacks, acquiring ample weapons and choosing soft targets. Victims are caught off guard. If they are able to grab a firearm to defend themselves, it's likely to have only one magazine available, and ten rounds may not be enough. It is unrealistic to assume that frightened and confused victims, many of whom will have limited experience firing a gun, and who may be holding a phone to call 911, would be able to secure a second loaded magazine and replace an empty magazine with it.[75]

II. Bans on America's Rifle Are Precluded By Supreme Court Precedent

A. Staples *Characterized the AR-15 as Part of a "Long Tradition of Widespread Lawful Gun Ownership"*

A few months before Congress passed the 1994 assault weapon ban, the Supreme Court decided in *Staples v. United States* that, to convict a person of possession of an unregistered machine gun, the government must prove that he knew that it would fire automatically. The defendant thought he had an ordinary semiautomatic AR-15 rifle, but ATF technicians were able to make the rifle fire more than one shot with a single pull

64 *Id.* at 3.

65 Bureau of Justice Statistics, Firearm Violence, 1993-2011, at 1 (2013), http://www.bjs.gov/content/pub/pdf/fv9311.pdf.

66 *Id.*

67 "During the offense that brought them to prison, 13% of state inmates and 16% of federal inmates carried a handgun. In addition, about 1% had a rifle and another 2% had a shotgun." *Id.* at 13 (statistic for 2004).

68 Crime Prevention Research Center, *How Has the Share Of Murders With Rifles Changed Over Time?* (Nov. 4, 2019), https://crimeresearch.org/2019/11/with-all-the-concern-about-assault-weapons-how-has-the-share-of-murders-with-rifles-changed-over-time/.

69 18 U.S.C. § 921(a)(30)(B).

70 *See* Koper, *supra* note 62, and accompanying text.

71 Gary Kleck, *Large-Capacity Magazines and the Casualty Counts in Mass Shootings*, 17 Justice Res. & Pol'y 28 (2016), *available at* https://journals.sagepub.com/doi/abs/10.1177/1525107116674926.

72 Nigel Duara, *Police face questions about delayed response to Orlando shooting*, L.A. Times, June 12, 2016, https://www.latimes.com/nation/la-na-orlando-nightclub-police-20160612-snap-story.html.

73 Mairead McArdle, *Parkland Shooter Did Not Use High-Capacity Magazines*, Nat'l Rev., Mar. 1, 2018, https://www.nationalreview.com/2018/03/report-parkland-shooter-did-not-use-high-capacity-magazines/.

74 Marjory Stoneman Douglas High School Public Safety Commission: Report Submitted to the Governor 87 (2019), http://www.fdle.state.fl.us/MSDHS/MSD-Report-2-Public-Version.pdf.

75 On the magazine issue, see *Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020) (holding California ban on possession of magazine that hold over ten rounds violative of the Second Amendment), *reh'g en banc granted*, 988 F.3d 1209 (9th Cir. 2021); David B. Kopel, *The History of Firearms Magazines and Magazine Prohibitions*, 88 Albany L. Rev. 849 (2015).

of the trigger.[76] While the case involved basic mens rea issues, the Court made several comments that illuminated how common AR-15s are in American society.

The Court described the rifle as follows: "The AR-15 is the civilian version of the military's M-16 rifle, and is, unless modified, a semiautomatic weapon. The M-16, in contrast, is a selective fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic or automatic fire."[77] "Automatic" fire means that "once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted," and that is the definition of a "machinegun"; a "semiautomatic," by contrast, "fires only one shot with each pull of the trigger . . . ."[78]

Acknowledging "a long tradition of widespread lawful gun ownership by private individuals in this country," *Staples* noted, "Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation. . . . [D]espite their potential for harm, guns generally can be owned in perfect innocence."[79] Indeed, "[a]utomobiles . . . might also be termed 'dangerous' devices . . . ."[80] The Court contrasted ordinary firearms, such as the AR-15 rifle involved in that case, with "machineguns, sawed-off shotguns, and artillery pieces," adding that "guns falling outside those [latter] categories traditionally have been widely accepted as lawful possessions . . . ."[81]

Since no evidence existed that Mr. Staples knew the rifle would fire more than one shot with a single function of the trigger—which could have been the result of malfunction—the Court remanded the case,[82] and the court of appeals ordered his acquittal.[83] No Second Amendment issue was raised in the case.

B. Heller *Adopted the Test of "In Common Use for Lawful Purposes"*

In the 2001 case of *United States v. Emerson*, the Fifth Circuit decided that "the people" in the Second Amendment means actual people, not an elusive collective, and thus that individuals have a right to keep and bear arms.[84] The court found that a Beretta 9mm semiautomatic pistol is protected by the Second Amendment,[85] while upholding the federal prohibition on possession of a firearm by a person subject to a domestic restraining order.[86] The Beretta M9 pistol, used by the U.S. military, has a 15-shot magazine.[87]

In 2007, the D.C. Circuit invalidated the District of Columbia's handgun ban in *Parker v. D.C.*, which the Supreme Court would affirm in *Heller*.[88] To determine what arms are protected by the Second Amendment, the court asked what arms are in common use for lawful purposes. Applying that test, it found that "most handguns (those in common use) fit that description then and now."[89] *Parker* rejected the suggestion "that only colonial-era firearms (e.g., single-shot pistols) are covered by the Second Amendment," and instead held that the amendment "protects the possession of the modern-day equivalents of the colonial pistol."[90] In fact, the court discussed three basic types of modern equivalents of colonial-era firearms: "The modern handgun—and for that matter the rifle and long-barreled shotgun—is undoubtedly quite improved over its colonial-era predecessor, but it is, after all, a lineal descendant of that founding-era weapon . . . ."[91] Applying a categorical test, *Parker* rejected the argument that protected arms could be selectively banned:

> The District contends that since it only bans one type of firearm, "residents still have access to hundreds more," and thus its prohibition does not implicate the Second Amendment because it does not threaten total disarmament. We think that argument frivolous. It could be similarly contended that all firearms may be banned so long as sabers were permitted. Once it is determined—as we have done—that handguns are "Arms" referred to in the Second Amendment, it is not open to the District to ban them.[92]

The District pressed forward to the Supreme Court, which granted its petition for a writ of certiorari. In briefing in what was now captioned *District of Columbia v. Heller*, the District argued that its handgun ban "do[es] not disarm the District's citizens, who may still possess operational rifles and shotguns."[93] It further argued that "the Council acted based on plainly reasonable grounds. It adopted a focused statute that continues to allow private home possession of shotguns and rifles, which some gun rights' proponents contend are actually the weapons of choice for home defense."[94] In short, rifles and shotguns are good, handguns are bad. As will be seen, in later litigation, the District would argue the opposite: that rifles may be banned because citizens may possess handguns.

76 *Staples*, 511 U.S. 600, *rev'g* 971 F.2d 608, 609, 615 (10th Cir. 1992).

77 *Id.* at 603.

78 *Id.* at 602 n.1.

79 *Id.* at 610-11.

80 *Id.* at 614.

81 *Id.* at 612. "The Nation's legislators chose to place under a registration requirement only a very limited class of firearms, those they considered especially dangerous." *Id.* at 622 (Ginsburg, J., concurring) (noting also "the purpose of the *mens rea* requirement—to shield people against punishment for apparently innocent activity").

82 *Id.* at 620. In upholding his conviction, the lower court held that evidence that the rifle fired more than one shot by a single function of the trigger as a result of a malfunction, and defendant being unaware of such capability, did not matter. *Staples*, 971 F.2d at 613-16.

83 United States v. Staples, 30 F.3d 108 (10th Cir. 1994).

84 270 F.3d 203 (5th Cir. 2001).

85 *Id.* at 216, 227 n.22, 273.

86 *Id.* at 264-65.

87 *M9*, Beretta, http://www.beretta.com/en-us/m9/.

88 Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007).

89 *Id.* at 397.

90 *Id.* at 398.

91 *Id.*

92 *Id.* at 400.

93 Brief for Petitioners, *District of Columbia v. Heller*, 2008 WL 102223, *11 (U.S. Jan. 4, 2008).

94 *Id.* at *53.

In a 5-4 opinion, the Supreme Court decided that the Second Amendment protects individual rights and that a ban on handguns infringes on the right.[95] The Court's analysis generally applies to long guns as well as handguns, both of which are "arms": "The term ['Arms'] was applied, then [in the 18th century] as now, to weapons that were not specifically designed for military use and were not employed in a military capacity."[96] Further, the technology of protected arms is not frozen in time: "Just as the First Amendment protects modern forms of communications, . . . and the Fourth Amendment applies to modern forms of search, . . . 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."[97]

Heller looked back to the Court's 1939 opinion in *United States v. Miller*, which held that judicial notice could not be taken that a short-barreled shotgun "is any part of the ordinary military equipment or that its use could contribute to the common defense," precluding it from deciding "that the Second Amendment guarantees the right to keep and bear such an instrument."[98] *Heller* explained:

> We think that *Miller*'s "ordinary military equipment" language must be read in tandem with what comes after: "[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." . . . The traditional militia was formed from a pool of men bringing arms "in common use at the time" for lawful purposes like self-defense. . . . We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.[99]

Thus, "the sorts of weapons protected were those 'in common use at the time.' . . . We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous *and* unusual weapons.'"[100] Use of the conjunctive "and" in that last phrase is critical. Recall that *Staples* contrasted items like AR-15 rifles and automobiles that may be dangerous but are commonplace, with items like M-16 machine guns that are not "widely accepted as lawful possessions."[101] Similarly, *Heller* makes clear that arms in common use are not "unusual" and may not be prohibited.

Heller did draw the line at fully automatic machine guns such as the M-16 and heavy ordnance:

> It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks.[102]

In contrast to "M-16 rifles and the like," semiautomatic rifles that fire only once per trigger pull are hardly "most useful in military service," which is why they are not issued as standard service weapons to any military force in the world. But *Heller* does not suggest that *any* "military" feature disqualifies a firearm from Second Amendment protection—the original militia would "bring the sorts of lawful weapons that they possessed at home to militia duty."[103] *Heller* held that a weapon that is possessed by law-abiding citizens or in common use for lawful purposes is protected, without regard to the features it may have in common with military weapons.

Heller referred to certain longstanding restrictions as presumptively valid, but none involve a prohibition on possession of a type of firearm by law-abiding persons.[104] It took a categorical approach and, without any consideration of the committee report which sought to justify the handgun ban or various empirical studies, held:

> The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," . . . would fail constitutional muster.[105]

The *Heller* test for determining what the Second Amendment protects is what arms are chosen by the populace for self-defense and other lawful purposes, not what arms the government allows its subjects to have. Responding to the District's argument that

95 *Heller,* 554 U.S. 570.

96 *Id.* at 581.

97 *Id.* at 582.

98 307 U.S. 174, 178 (1939) (quoted in *Heller*, 554 U.S. at 622). *Miller* reinstated an indictment for an unregistered short-barreled shotgun under the National Firearms Act that had been dismissed by the district court on the basis that the Act violated the Second Amendment.

99 *Heller,* 554 U.S. at 624-25 (quoting *Miller*, 307 U.S. at 179).

100 *Id.* at 627 (emphasis added). *Heller* cites, *inter alia*, 4 Blackstone 148-149 (1769) ("The offense of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land."); O'Neill v. State, 16 Ala. 65, 67 (1849) ("if persons arm themselves with deadly or unusual weapons for the purpose of an affray, and in such manner as to strike terror to the people, they may be guilty of this offence, without coming to actual blows"). The offense thus involved "going armed" with such weapons to terrify others, not on possessing them in the home.

101 *Staples*, 511 U.S. at 610-14.

102 *Id.* at 627.

103 *Id.*

104 *Heller,* 554 U.S. at 626-27.

105 *Id.* at 628-29 (citation omitted).

rifles and shotguns are good while handguns are bad, the Court stated:

> It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. It is enough to note . . . that the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.[106]

Many Americans prefer long guns for self-defense for other reasons. A rifle or shotgun may also be easy to store. It would be even harder for an attacker to redirect it or wrestle it away than a handgun. Depending on caliber, a rifle may have less recoil and may be aimed more accurately than a handgun. Depending on its weight, may be held with one hand while the other dials 911. The Violence Policy Center argued in an amicus brief supporting the District that "shotguns and rifles are much more effective in stopping" a criminal; "handguns—compared with larger shotguns and rifles that are designed to be held with two hands—require a greater degree of dexterity."[107]

Heller rejected rational basis analysis[108] as well as Justice Stephen Breyer's proposed "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'"[109] Relying on such intermediate scrutiny cases as *Turner Broadcasting*, Breyer would have applied a standard under which "the Court normally defers to a legislature's empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity."[110] Applying that test, Justice Breyer relied on the committee report which proposed the handgun ban in 1976 and which was filled with data on the misuse of the type of firearm it sought to justify banning.[111] He also cited empirical studies about the alleged role of handguns in crime, injuries, and death.[112] Contrary empirical studies questioning the effectiveness of the handgun ban and focusing on lawful uses of handguns, in his view, would not suffice to overcome the legislative judgment.[113] Breyer concluded: "There is no cause here to depart from the standard set forth in *Turner*, for the District's decision represents the kind of empirically based judgment that legislatures, not courts, are best suited to make."[114]

Heller rejected Justice Breyer's reliance on the committee report and empirical studies:

> After an exhaustive discussion of the arguments for and against gun control, Justice Breyer arrives at his interest-balanced answer: because handgun violence is a problem, because the law is limited to an urban area, and because there were somewhat similar restrictions in the founding period (a false proposition that we have already discussed), the interest-balancing inquiry results in the constitutionality of the handgun ban. QED.
>
> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.[115]

Indeed, like the First, the Second Amendment "is the very *product* of an interest-balancing by the people," and "it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[116] Moreover, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home."[117]

In sum, *Heller* held categorically that handguns—which by definition have pistol grips—are commonly possessed by law-abiding persons for lawful purposes and may not be prohibited. While the subject was handguns, the same approach would be equally applicable to long guns, regardless of whether they have features like pistol grips. As will be seen, some lower courts have rejected that approach in considering bans on long guns pejoratively called assault weapons.

C. McDonald *Held the Right to Arms to be "Fundamental to Our Scheme of Ordered Liberty"*

In *McDonald*, the Supreme Court held that "the right to keep and bear arms is fundamental to *our* scheme of ordered liberty" and is "deeply rooted in this Nation's history and tradition . . . ."[118] It called the right "fundamental" multiple times.[119] *McDonald* rejected the view "that the Second Amendment

106 *Id.* at 629.

107 Brief of Violence Policy Center, 2008 WL 136348, *30 (U.S. Jan. 8, 2008).

108 *Heller,* 554 U.S. at 629 n.27.

109 *Id.* at 634.

110 *Id.* at 690 (Breyer, J., dissenting) (citing Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 195-96 (1997) (*Turner II*)).

111 *Id.* at 693.

112 *Id.* at 696-99.

113 *Id.* at 699-703.

114 *Id.* at 705.

115 *Id.* at 634.

116 *Id.* at 635.

117 *Id.* at 636.

118 *McDonald*, 561 U.S. at 764 (emphasis added).

119 *Id.* at 764-68, 770-78. "Assault weapon" bans were upheld by pre-*Heller* courts that believed that the Second Amendment did not even protect an individual right, much less a fundamental right. *See* Richmond Boro Gun Club v. City of New York, 97 F.3d 681, 684 (2d Cir. 1996)

should be singled out for special—and specially unfavorable—treatment."[120] It refused "to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees . . . ."[121]

As established in other precedents, a right is "fundamental" if it is "explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny."[122] "[C]lassifications affecting fundamental rights . . . are given the most exacting scrutiny."[123] "Under the strict-scrutiny test," the government has the burden to prove that a restriction "is (1) narrowly tailored, to serve (2) a compelling state interest."[124] While reliance on text, history, and tradition may be the preferable approach to protecting these fundamental rights, the alternative is to apply strict scrutiny, consistent with precedents on other constitutional rights.

Since the right to keep and bear arms is a fundamental right, one would think that strict scrutiny would apply to an outright ban on a large class of firearms. But before *Heller* and *McDonald*, some state courts upheld assault weapon bans based on a "reasonableness" test akin to rational basis, which *Heller* rejected.[125] Post-*Heller* federal courts have upheld such bans under what they call intermediate scrutiny. But even if it were applicable, true intermediate scrutiny has teeth. Moreover, "it is [the Court's] task in the end to decide whether [the legislature] has violated the Constitution," and thus "whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law . . . ."[126] Assertions in a committee report cannot override a constitutional right.[127]

Heller did not consider legislative findings relevant. *McDonald*, which refused "to allow state and local governments to enact any gun control law that they deem to be reasonable,"[128] barely mentioned Chicago's legislative finding about handgun deaths and accorded it no discussion.[129] Instead, *McDonald* noted that "the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials."[130] Such officials were not entitled to deference.

Dissenting in *McDonald*, Justice Breyer argued that legislatures, not courts, should resolve empirical questions such as: "What sort of guns are necessary for self-defense? Handguns? Rifles? Semiautomatic weapons? When is a gun semi-automatic?"[131] But *Heller* had rejected his interest-balancing test, and the Court thus found it "incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise."[132]

But even if a lesser standard were applied, such as that applied to adult bookstores under the First Amendment, a legislature cannot "get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance."[133] If plaintiffs "cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings," then "the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance."[134]

The changing views of a government agency about whether the firearms at issue are "sporting" fails to buttress banning them under intermediate scrutiny. In 1989, ATF decided that it no longer considered certain firearms to be "particularly suitable for or readily adaptable to sporting purposes" as required for importation by federal law.[135] ATF had considered such firearms to meet the sporting criteria ever since it was created in the

(New York City "assault weapon" ban "does not relate to a fundamental constitutional right."); Olympic Arms v. Buckles, 301 F.3d 384, 389 (6th Cir. 2002) ("Second Amendment does not create an individual right to bear arms."). *See also* United States v. Toner, 728 F.2d 115, 128 (2d Cir. 1984) ("the right to possess a gun is clearly not a fundamental right"; ruling on N.Y. handgun restrictions).

120 *McDonald*, 561 U.S. at 778.

121 *Id*. at 780. No constitutional right is "less 'fundamental' than" others, and "we know of no principled basis on which to create a hierarchy of constitutional values . . . ." Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 484 (1982).

122 San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 17, 33 (1973).

123 Clark v. Jeter, 486 U.S. 456, 461 (1988).

124 Republican Party of Minnesota v. White, 536 U.S. 765, 774-75 (2002).

125 Some pre-*Heller* state court decisions upheld gun and magazine bans under state arms guarantees. But these decisions do not meet the standard of review required for the Second Amendment by *Heller*, not to mention that they conflict with prior decisions in those same states. *Compare* Benjamin v. Bailey, 234 Conn. 455, 465-66 (1995) (adopting "reasonable regulation" test and holding that if "some types of weapons" are available, "the state may proscribe the possession of other weapons"), *with* Rabbitt v. Leonard, 413 A.2d 489, 491 (Conn. 1979) ("[A] Connecticut citizen, under the language of the Connecticut constitution, has a fundamental right to bear arms."); *compare* Robertson v. Denver, 874 P.2d 325, 328 (Colo. 1994) ("[T]his case does not require us to determine whether that right is fundamental."), *with* City of Lakewood v. Pillow, 501 P.2d 744, 745 (Colo. 1972) (holding a gun ban void because a governmental "purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved"); *compare* Arnold v. City of Cleveland, 616 N.E.2d 163, 172 (Ohio 1993) ("reasonableness test" applies to the "fundamental right" to have arms), *with* Harrold v. Collier, 107 Ohio St.3d 44 (2005) (strict scrutiny applies to fundamental rights).

126 Sable Commcns. of Cal., Inc. v. FCC, 492 U.S. 115, 129 (1989).

127 *Turner Broadcasting System v. FCC* applied intermediate scrutiny to a content-neutral regulation and held that the regulation must not burden more speech than necessary. *Turner II*, 520 U.S. at 189. Its predecessor case reiterated the holding of *Sable Communications*. Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 666 (1997).

128 *McDonald*, 561 U.S. at 783.

129 *Id*. at 750-51.

130 *Id.* at 790.

131 *Id*. at 923 (Breyer, J., dissenting).

132 *Id*. at 790-91.

133 Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438-39 (2002).

134 *Id*.

135 18 U.S.C. § 925(d)(3).

Gun Control Act of 1968.[136] Yet the Second Amendment is not confined to firearms that a government agency deems sporting, but extends to firearms "of the kind in common use," and to "popular weapon[s] chosen by Americans for self-defense."[137] Labeling a firearm as "sporting" is meaningless insofar as that the same firearm may be used for recreational shooting and for self-defense. Just as at the time of the Founding muskets were used for both militia and hunting purposes, today rifles such as the AR-15 are in wide use for both self-protection and target competitions.

Nor do government agencies define the limits of constitutional rights. A politically charged report by ATF in 1994, relied on by some courts, asserted that so-called assault weapons are designed for "shooting at human beings" and are "mass produced mayhem."[138] Such rhetoric blatantly ignores that the firearms at issue are predominantly owned by millions of law-abiding citizens who bought them after passing background checks, who use them for hunting and target shooting, and who would never use them to shoot at a human being other than in lawful self-defense.

D. Caetano *Reiterated that the Second Amendment Protects "Arms That Were Not in Existence at the Time of the Founding"*

A unanimous per curiam opinion, *Caetano v. Massachusetts*, reversed and remanded a decision of the Massachusetts Supreme Judicial Court that upheld a ban on stun guns.[139] The Massachusetts court erred in holding stun guns not to be protected because they were not in common use when the Second Amendment was adopted, contrary to *Heller*'s holding that the Amendment "extends . . . to . . . arms . . . that were not in existence at the time of the founding."[140] It erred in concluding that stun guns were "unusual" because they are a modern invention, for the same reason. And it erred in asserting "that only those weapons useful in warfare are protected," a test that *Heller* explicitly rejected.[141]

Significantly, the 8-0 decision included four of the Justices in the *Heller* majority (Antonin Scalia had died), two of the *Heller* dissenters (Ruth Bader Ginsburg and Breyer), and newly appointed Justices Sonia Sotomayor and Elena Kagan. The Court unanimously recognized that the state court had contradicted *Heller*, without any suggestion that *Heller* was limited to handguns.

Justice Samuel Alito, joined by Justice Thomas, concurred. Jaime Caetano got the stun gun for protection due to threats by her abusive former boyfriend who ignored restraining orders against him.[142] Justice Alito explained the evolving technology of protected arms:

> While stun guns were not in existence at the end of the 18th century, the same is true for the weapons most commonly used today for self-defense, namely, revolvers and semiautomatic pistols. Revolvers were virtually unknown until well into the 19th century, and semiautomatic pistols were not invented until near the end of that century.[143]

To be banned, a weapon must be "*both* dangerous *and* unusual," and thus "the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes."[144] While *Heller* rejected a test that an arm must be suitable for militia use, it is notable that stun guns are used by the police and the military.[145] Nor would that exclude them from protection.

It did not matter for the common-use test, Justice Alito continued, that there are more firearms than stun guns; that handguns are the most popular weapon for self-defense would not justify a ban on other weapons. *Hundreds of thousands* of stun guns had been sold to civilians, who could lawfully possess them in 45 states.[146] It is noteworthy that *millions* of AR-15 rifles have been sold to civilians, who may lawfully possess them in about the same number of states. If stun guns meet the common-use test for Second Amendment protection, AR-15s certainly do too.

III. The Second and Fourteenth Amendments: Text, History, and Tradition

A. Adopted at the Dawn of the Age of Repeating Firearms, the Second Amendment was Understood to Protect a Robust Right to Have "Arms"

The Second Amendment provides: "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." Each part of the Amendment inexorably points to protection for semiautomatic firearms and standard magazines.[147]

Such firearms and magazines are "arms" by any definition. "The right of the people" refers to a liberty of the populace at large, in the same manner that "the right of the people" to assemble is protected by the First Amendment and to be free from unreasonable searches and seizures is protected by the

136 ATF's 1989 change in policy was challenged, but no final decision on the merits was rendered. Gun South, Inc. v. Brady, 877 F.2d 858, 866 (11th Cir. 1989) (review limited to 90-day suspension of permits), *rev'g* 711 F. Supp. 1054 (N.D. Ala. 1989). The district court found that the reinterpretation was sparked by politics rather than by ATF's experts, who testified that the rifles at issue continued to be sporting. 711 F. Supp. at 1056-60. "*All* of the evidence in this case demonstrates that the Steyr AUG is designed and marketed to be predominantly a sporting weapon." *Id*. at 1063.

137 *Heller*, 554 U.S. at 624, 629.

138 ATF, Assault Weapons Profile 19 (1994), quoted in *NYSRPA*, 990 F. Supp. 2d 349, 369 (W.D.N.Y. 2013). *See also Heller II*, 670 F.3d at 1262.

139 *Caetano*, 136 S. Ct. at 1028 (per curiam).

140 *Id.* at 1027.

141 *Id*. at 1028.

142 *Id*. at 1029 (Alito, J., concurring).

143 *Id*. at 1030-31.

144 *Id*.

145 *Id*. at 1032.

146 *Id*. at 1033.

147 "Standard magazines" refers to magazines that are typically sold for various firearms and which commonly hold over ten rounds. For instance, the Glock 17 pistol is typically sold with a 17-round magazine, while the AR-15 rifle is often sold with a 20-round magazine. *See Duncan*, 970 F.3d at 1048. Magazines in multiple capacities are commonly available for the same firearm.

Fourth Amendment. Exercise of the right "shall not be infringed," precluding a prohibition on the right.

The term "bear arms" suggests that the right includes such hand-held arms as a person could "bear," such as rifles, shotguns, and pistols, but not artillery or other heavy ordnance which one could not carry. While one could "keep" such heavy ordnance,[148] the reference to "the right" suggests a preexisting right, and at the time of the Framing, such a right had historically included hand-carried arms used by law-abiding persons for lawful purposes such as self-defense, sport, hunting, and militia use.

In addition to this substantive guarantee to protect "arms" as broadly defined, the prefatory clause declaring the necessity of a militia to a free state's security means that arms useful to a militia would have presumptive protection. Banning rifles because they "are more accurate and easier to control"[149] conflicts with the imperative of "a well regulated militia" capable of providing for "the security of a free state."

State constitutional guarantees of the right to keep and bear arms began to be adopted in 1776, continued to be adopted as new states were admitted to the United States, and have continued to be revised and strengthened through current times.[150] This process was ongoing with every step of development of firearms technology, from single shots through repeaters using tubular magazines, and then semiautomatics with detachable magazines. The constant rejuvenation of arms guarantees alongside improvements in arms technology demonstrates that modern arms maintain constitutional protection.

All state constitutions with arms guarantees protect the right to have and bear "arms," without language that would freeze the technology of such arms in a time period. Pennsylvania's 1790 guarantee, that the citizens' right "to bear arms in defence of themselves and the State shall not be questioned,"[151] is not limited to flintlocks. For over two centuries, states continued to adopt or amend arms guarantees without language that would freeze the technology. Missouri's 2014 guarantee, the most recent, protects the citizen's right "to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property" from being "questioned."[152] Modern arms are obviously included.

The need to guarantee the right to bear arms stemmed in part from the confiscation of arms by the Crown. Days after Lexington and Concord, when General Thomas Gage ordered Bostonians to surrender their arms, they turned in "1778 firearms, 634 pistols, 973 bayonets, and 38 blunderbusses."[153] In reaction to such disarming, the first four state declarations of rights recognized the right of the people to bear arms for defense of themselves and for the common defense.[154]

While most firearms at the Founding had to be reloaded after each shot, repeating firearms—guns that fire multiple rounds without reloading—had been developed two centuries before that.[155] The first reference in America to a repeating firearm was by Samuel Niles, who wrote in 1722 that certain Indians

> were also entertained with the sight of a curious gun, made by Mr. [John] Pim of Boston,—a curious piece of workmanship,—which though loaded but once, yet was discharged eleven times following, with bullets, in the space of two minutes each of which went through a double door at fifty yards' distance.[156]

In Boston, 9 and 11 shot repeaters were available during 1722-1756.[157] In 1777, Joseph Belton test fired an 8-shot musket before members of the Continental Congress, which authorized him to make 100 such firearms.[158] He later demonstrated a 16-shot repeater that was recommended for approval by the Congress.[159]

The Founding generation was thus aware of improvements in firearms technology that allowed repeated shots to be fired without reloading. Such firearms were well within the right to bear arms for defense of self and state declared in the first state constitutions and later in the Second Amendment. Founders like Benjamin Franklin and Thomas Jefferson were typical of the new nation in an age of technological innovation, and the nation would soon adopt a constitution that would protect patents and copyright "[t]o promote the Progress of Science and useful Arts . . . ."[160]

148 In the early Republic, "[c]annon are constantly manufactured . . . for sale to associations of citizens, and to individual purchasers, for use at home, or for exportation." Tench Coxe, *Statement of the Arts & Manufacturers of the United States of America* (1814), in 2 American State Papers (Finance) 687 (1832). Cannon were not federally regulated until 1968, and they may legally be possessed if registered with the federal government. *See* Gun Control Act of 1968, P.L. 90-618, Title II, 82 Stat. 1213, 1227 (1968). *See also* 26 U.S.C. § 5841 (firearm registry); §§ 5845(a)(8) (firearm defined to include destructive device) & (f) (destructive defined to include weapon with barrel bore over one-half inch).

149 "[T]hat the rifles are more accurate and easier to control is precisely why California has chosen to ban them." Rupp v. Becerra, 401 F. Supp. 3d 978, 993 (C.D. Ca. 2019) (upholding "assault weapon" ban), *appeal pending*, No. 19-56004 (9th Cir.).

150 *See* Eugene Volokh, *State Constitutional Right to Keep and Bear Arms Provisions*, http://www2.law.ucla.edu/volokh/beararms/statecon.htm (listing the arms guarantees in all states and the years, from 1776 through the present, when they were adopted or amended).

151 Pa. Const., art. IX, § 21 (1790).

152 Mo. Const., art. I, § 23 (2014).

153 Richard Frothingham, History of the Siege of Boston 95 (1903).

154 Pa. Dec. of Rights, art. XIII (1776); Vt. Const., art. I, § 15 (1777); N.C. Dec. of Rights, art. XVII (1776); Mass. Dec. of Rights, XVII (1780).

155 *See* A Sixteenth Century 16-Shooter, https://www.ammoland.com/2017/11/a-sixteenth-century-16-shooter/#axzz6xWtWI7WS.

156 Harold L. Peterson, Arms and Armor in Colonial America 1526-1783 215 (2000).

157 C. Sawyer, Firearms in American History 217 (1910); Flint-lock magazine gun, http://collections.vam.ac.uk/item/O77720/flint-lock-magazine-cookson-john/.

158 Robert Held, The Belton Systems, 1758 & 1784-86: America's First Repeating Firearms 17 (1986).

159 *Id.* at 37.

160 U.S. Const., art. I, § 8.

The Constitution was proposed in 1787 without a declaration of rights. The Federalists initially argued that no bill of rights was needed because, in the words of Noah Webster, "[t]he supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed . . . ."[161] In *The Federalist* No. 46, James Madison heralded "the advantage of being armed, which the Americans possess over the people of almost every other nation," including the European kingdoms, where "the governments are afraid to trust the people with arms."[162] This understanding and promise that the people would be armed and able to protect their freedom from an oppressive government was seen as the cornerstone of the Constitution. Today's "governments [that] are afraid to trust the people with arms" such as AR-15s, to use Madison's words, are in the tradition of the monarchies that the Founders rejected.

The Anti-Federalists demanded written guarantees of rights. The Pennsylvania Dissent of Minority declared: "That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game . . . ."[163] Samuel Adams proposed in the Massachusetts ratification convention a declaration that the "peaceable citizens" would never be disarmed.[164] The New Hampshire convention resolved against disarming anyone unless they were involved in "actual rebellion."[165]

Both sides of the ratification debate thus presupposed the existence of a robust right to bear arms. The issue was whether this and other rights should be written into the Constitution. Compromise was reached and Madison introduced what became the Bill of Rights to the House of Representatives in 1789. Ten days later, Tench Coxe explained what became the arms guarantee: "As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed . . . in their right to keep and bear their private arms."[166] Madison praised Coxe's article.[167]

The federal Militia Act of 1792 particularized the meaning of a "well regulated militia" and of the "arms" the people had a right to keep and bear. In debate, Rep. Roger Sherman "conceived it to be the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack upon his liberty or property, by whomsoever made."[168] The Act required enrollment of "every free able-bodied white male citizen"[169] aged 18 to 44 years old. Each was required to "provide himself" with a musket or firelock, bayonet, and a box of "not less than twenty-four cartridges," or alternatively with a rifle, twenty balls, and a quarter pound of powder.[170] "Musket" and "firelock" referred in common language to "a species of fire-arms used in war . . . ."[171] The above ammunition quantities were minimums—no maximum was set.

In sum, the arms protected under the Second Amendment, including for militia use, embraced at a minimum firearms, multiple rounds of ammunition, and bayonets. That again speaks to the broad nature of the arms protected by the Second Amendment.

B. The Early Republic: Arms for Citizens, But Not for African Americans

Commentator St. George Tucker wrote in 1803 that "wherever the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction."[172] That would include prohibiting the right, using current judicial jargon, under so-called intermediate scrutiny.

The same year that Tucker wrote that, Meriwether Lewis acquired a rapid-firing air rifle with a magazine capacity of twenty-two balls.[173] It was invented in 1778 for use by the Austrian military.[174] Its use in the Lewis and Clark expedition was recorded in their diaries.[175]

Antebellum judicial decisions reflected the broad scope of protected arms. The Supreme Court of Georgia in *Nunn v. State* (1846) explained, "The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree . . . ."[176] The U.S. Supreme Court in *Heller* explained that this "perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause . . . ."[177]

From colonial times, slaves could not "keep or carry a gun," one of the many legal disabilities they suffered.[178] Moreover, free blacks were prohibited from possessing arms, especially defensive

161 Noah Webster, An Examination of the Leading Principles of the Federal Constitution 43 (1787).

162 15 Documentary History of the Ratification of the Constitution 492-93 (1984).

163 *Id.*, vol. 2, at 623-24 (1976).

164 *Id.*, vol. 6, at 1453 (2000).

165 *Id.*, vol. 18, at 188 (1995).

166 *Remarks on the First Part of the Amendments to the Federal Constitution*, Federal Gazette, June 18, 1789, at 2, col. 1.

167 12 Papers of James Madison 257 (C. Hobson ed. 1979).

168 14 Documentary History of the First Federal Congress 92-93 (1996).

169 During Reconstruction, the term "white" was deleted. 14 Stat. 422, 423 (1867).

170 § 1, 1 Stat. 271 (1792).

171 Noah Webster, An American Dictionary of the English Language (1828).

172 1 St. George Tucker, Blackstone's Commentaries, App., 300 (1803) (emphasis added).

173 *The Girandoni Air Rifle*, Defense Media Network, May 14, 2013, https://www.defensemedianetwork.com/stories/the-girandoni-air-rifle/.

174 *Id.*

175 *Id.*

176 1 Ga. 243, 251 (1846).

177 *Heller*, 554 U.S. at 612.

178 St. George Tucker, A Dissertation on Slavery 65 (1796).

or militia-type arms, without a license. Such laws reflected that African Americans were not recognized to be among "the people" with the rights of citizens.

Virginia law provided that "[n]o negro or mulatto slave whatsoever shall keep or carry any gun . . . ."[179] Further, "[n]o free negro or mulatto, shall be suffered to keep or carry any fire-lock of any kind, any military weapon, or any powder or lead," without a license.[180] Such limits "upon their right to bear arms," Virginia's high court explained, were among the "numerous restrictions imposed on this class of people [free blacks] in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States."[181] But that inconsistency stood because blacks were not considered citizens.

In North Carolina, it was unlawful "if any free negro, mulatto, or free person of color, shall wear or carry about his or her person, or keep in his or her house, any shot gun, musket, rifle, pistol, sword, dagger or bowie-knife," without a license.[182] This was upheld because "free people of color cannot be considered as citizens . . . ."[183] Similarly, Georgia's high court ruled that "Free persons of color have never been recognized here as citizens; they are not entitled to bear arms . . . ."[184] And a Delaware court held that the police power justified "the prohibition of free negroes to own or have in possession fire arms or warlike instruments."[185]

But it was the U.S. Supreme Court in the Dred Scott case that notoriously argued against recognition of African Americans as citizens because it "would give to persons of the negro race . . . the full liberty of speech . . ., and to keep and carry arms wherever they went."[186] Clearly, having no right to bear arms was an incident of slavery and of refusal to recognize African Americans as citizens.

C. The Fourteenth Amendment Was Understood to Guarantee the Right to Bear Arms, Which Included Repeating Firearms with Extended Magazines

The Fourteenth Amendment was understood to protect the right to keep and bear arms. But African Americans were deprived of this right even after the abolition of slavery through the black codes. Among the commonly-possessed arms in this epoch were repeating rifles with magazines holding more than ten rounds.

The invention of fixed cartridges paved the way for mass production of repeating, lever-action rifles with magazines of various capacities. Designed in 1856, the Volcanic rifle had a magazine that held, depending on barrel length, 20, 25, or 30 cartridges.[187] This developed into the Henry Repeating Rifle in 1860, which evolved into the Winchester Model 1866. The rifle version of the Winchester held 17 rounds, and the carbine version held 12.[188] The Spencer carbine could fire a magazine of seven cartridges in 30 seconds, and it could be reloaded quickly with extra magazine tubes. While over 94,000 Spencers were bought by the U.S. military, 120,000 were bought by civilians.[189] Discharged Union soldiers were allowed to buy their arms. Prices were $6 for a musket, $10 for a Spencer carbine, and $8 for other carbines and revolvers.[190]

Simultaneous with such developments in firearms technology was the extension of the right to keep and bear arms to African Americans. As *Heller* stated, "In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves."[191] Frederick Douglass famously said, "The best work I can do, therefore, for the freed-people, is to promote the passing of just and equal laws towards them. They must have the cartridge box, the jury box, and the ballot box, to protect them."[192]

But the slave codes were reenacted as the black codes. South Carolina provided that no person of color would, without permission, "be allowed to keep a fire arm," except "the owner of a farm, may keep a shot gun or rifle, such as is ordinarily used in hunting, but not a pistol, musket, or other fire arm or weapon appropriate for purposes of war."[193] An African American convention resolved that the enactment "to deprive us of arms be forbidden, as a plain violation of the Constitution . . . ."[194]

During debate in Congress on the Freedmen's Bureau bill, Rep. Josiah Grinnell noted that "a white man in Kentucky may keep a gun; if a black man buys a gun he forfeits it and pays a fine of five dollars, if presuming to keep in his possession a musket which he has carried through the war."[195] Rep. Samuel McKee added that 27,000 black soldiers who were "allowed to retain their arms" returned to Kentucky, and "[a]s freedmen they must have the civil rights of freemen."[196] Rep. Thomas Eliot quoted a report from the Freedmen's Bureau: "The civil law prohibits the

179 Va. 1819, c. 111, §§ 7 & 8.

180 *Id.*

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

182 State v. Newsom, 27 N.C. 250, 254 (1844) (Act of 1840, ch. 30).

183 *Id.*

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

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

186 Scott v. Sanford, 60 U.S. (19 How.) 393, 417 (1857).

187 Robert F. Williamson, Winchester: The Gun that Won the West 9-13 (1952).

188 *Id.* at 22, 49.

189 *Spencer Carbine*, https://amhistory.si.edu/militaryhistory/collection/object.asp?ID=117.

190 General Order 101 (May 30, 1865), U.S. Congressional Serial 1497, at 167-72 (cited in *Civil War News* 15 (May 2016)).

191 *Heller*, 554 U.S. at 614, citing Stephen Halbrook, Freedmen, the Fourteenth Amendment, & the Right to Bear Arms, 1866-1876 (1998).

192 *Frederick Douglass on the American Crisis*, Newcastle Weekly Courant, May 26, 1865, at 6.

193 S.C. Stat., No. 4730, § XIII, 250 (1865).

194 2 Proceedings of the Black State Conventions, 1840-1865 302 (1980).

195 Cong. Globe, 39th Cong., 1st Sess. 651 (1866).

196 *Id.* at 654.

colored man from bearing arms; returned soldiers are, by the civil officers, dispossessed of their arms and fined for violation of the law."[197] As the Commissioner of the Freedmen's Bureau put it, "the right of the people to keep and bear arms as provided in the Constitution is *infringed* . . . ."[198]

Muskets used in military service were thus considered arms protected by the Second Amendment. While they had to be reloaded after each shot, a typical musket was a formidable weapon: "A rifle [musket] could fire a bullet with man-killing accuracy over 800 yards . . . ."[199] Standard bullets were .58 caliber weighing 510 grains,[200] which is enormous compared to today's much smaller bullets, such as the .223 caliber bullet weighing 55 grains that is used in many AR-15s.[201] But that military utility did not preclude constitutional protection. Muskets also had civilian uses. A Freedmen's Bureau official testified that blacks "are proud of owning a musket or fowling-piece. They use them often for the destruction of vermin and game."[202]

The Freedmen's Bureau Act declared that the rights to "personal liberty" and "personal security," "including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . without respect to race or color or previous condition of slavery."[203] And the arms of that epoch included repeating rifles with magazines holding as many as thirty rounds.

Introducing the Fourteenth Amendment, Senator Jacob Howard referred to "the personal rights guaranteed and secured by the first eight amendments," including "the right to keep and bear arms . . . ."[204] He averred, "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[205] In debate on the amendment, Senator Samuel Pomeroy described "the safeguards of liberty" as including "the right to bear arms for the defense of himself and family," which would allow a freedman to protect his cabin with "a well-loaded musket."[206] Again, the military utility of muskets did not preclude their use in self-defense.

Congress later sought to enforce the Fourteenth Amendment through the Civil Rights Act of 1871,[207] today's 42 U.S.C. § 1983. Rep. George McKee argued that the bill was necessary to prevent recurrence of laws such as Mississippi's 1865 ban on unlicensed possession of a firearm by a freedman. He recalled that "a soldier honorably mustered out of the United States Army was entitled to keep his musket or rifle by having the sum of eight dollars stopped from his pay" and that "[m]ost of the colored soldiers availed themselves of this privilege," but that "I have seen those muskets taken from them and confiscated under this Democratic law."[208]

The same year the Civil Rights Act passed, the Supreme Court of Tennessee explained that "the usual arms of the citizen of the country" were "the rifle of all descriptions, the shot gun, the musket, and repeater . . .; and that under the Constitution the right to keep such arms, can not be infringed or forbidden by the Legislature."[209] That included repeating rifles with magazines holding over ten rounds. Louisiana's high court said later, "When we see a man with a musket to shoulder, or carbine slung on back, or pistol belted to his side, or such like, he is bearing arms in the constitutional sense."[210]

D. Semiautomatic Firearms with Detachable Magazines Have Been Commonly Possessed for Over a Century

Rifles and pistols with detachable magazines came into wide use toward the end of the 19th century. Winchester began making semiautomatic rifles with detachable magazines beginning with the Model 1907.[211] Judge (now Justice) Kavanaugh wrote in his dissent in *Heller II*: "The first commercially available semi-automatic rifles, the Winchester Models 1903 and 1905 and the Remington Model 8, entered the market between 1903 and 1906."[212] Significantly, he added, "Many of the early semi-automatic rifles were available with pistol grips. . . . These semi-automatic rifles were designed and marketed primarily for use as hunting rifles . . . ."[213]

Over a century ago, to promote the national defense, Congress provided for the sale of "magazine rifles . . . for the use of rifle clubs . . . ."[214] Sales continue today under the Civilian Marksmanship Program (CMP) in order "to instruct citizens of the United States in marksmanship," "to promote practice and safety in the use of firearms," and "to conduct competitions in the use of firearms . . . ."[215] The CMP sells surplus M1 Garand rifles to civilians.[216] The semiautomatic M1 Garand was America's service rifle in World War II. The CMP promotes and sponsors competitions using, among others, the M1 Garand, an AR-15-type commercial rifle with a 20 or 30 round magazine, and an

197 *Id.* at 657.

198 Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236 (1866).

199 William B. Edwards, Civil War Guns 13 (1962).

200 *Id.* at 23-24.

201 *See* 5.56 NATO 55 gr GMX Superperformance, https://www.hornady.com/ammunition/rifle/5-56-nato-55-gr-gmx-superformance#!/.

202 Rpt. of Jt. Com. on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, at 246 (1866).

203 § 14, 14 Stat. 173, 176-77 (1866).

204 Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

205 *Id.* at 2766.

206 *Id.* at 1182.

207 17 Stat. 13 (1871).

208 Cong. Globe, 42nd Cong., 1st Sess. 426 (1871).

209 Andrews v. State, 50 Tenn. 165, 179 (1871). That precedent was endorsed by *Heller*, 554 U.S. at 629.

210 State v. Bias, 37 La. Ann. 259, 260 (1885).

211 Williamson, *supra* note 187, at 434.

212 *Heller II*, 670 F.3d at 1287 (Kavanaugh, J., dissenting) (citations omitted).

213 *Id.*

214 P.L. 58-149, 33 Stat. 986, 987 (1905).

215 36 U.S.C. § 40722.

216 36 U.S.C. § 40728(a); 32 C.F.R. § 621.2.

M1A-type semiautomatic rifle with a 10 or 20 round magazine.[217] As this reflects, rifles and magazines banned as assault weapons by some jurisdictions are not only typically possessed for lawful purposes, their use is promoted by the United States to encourage civilian marksmanship.

Some 19.8 million AR-15s or other modern sporting rifles were produced in the United States or imported between 1990 and 2018. About half of all rifles produced in 2018 were of those types.[218] A panel of the Ninth Circuit noted data "that from 1990 to 2015, civilians possessed about 115 million LCMs out of a total of 230 million magazines in circulation. Put another way, half of all magazines in America hold more than ten rounds."[219] Semiautomatic rifles with magazines holding 10, 15, 20, and 30 cartridges have become common for use in target shooting, competitions, hunting, self-protection, protection of livestock, law enforcement, and other lawful purposes. Semiautomatic pistols with magazines holding between 8 and 20 cartridges also have come into wide use for civilian and military purposes. Indeed, the number of lawful gun owners who use the AR-15 or similar firearms for sport shooting or self-defense far exceeds the number of people who engage in such other widespread recreational activities such as swimming and jogging.[220]

Police nationwide are issued, or purchase their own, AR-15-type rifles. The Fourth Circuit has noted that "the standard service weapons issued to law enforcement personnel come with large-capacity magazines."[221] States that ban assault weapons for civilians exempt law enforcement officers and even retired officers.[222] No one suggests that active and retired officers possess such firearms to spray fire from the hip at innocent victims. Instead, police use such rifles and magazines because they are considered well suited for self-defense, including in an urban environment. Yet when New York civilians challenged that state's ban, the state filed "affidavits of chiefs of police opining that assault weapons may not be well suited for self-defense, especially in an urban environment . . . ."[223] So it's self-defense for me, but not for thee.

In 1921, the North Carolina Supreme Court held that protected arms include "the rifle, the musket, the shotgun, and the pistol," i.e., "all 'arms' as were in common use, and borne by the people as such when this provision was adopted."[224] Florida's high court held in 1972 that protected arms are those that "are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property, such as semi-automatic shotguns, semi-automatic pistols and rifles."[225] *Heller* followed the same traditional test in recognizing "arms 'in common use at the time' for lawful purposes like self-defense" as constitutionally protected.[226]

Laws that ban commonly-possessed arms as so-called assault weapons have no longstanding historical tradition. During the Great Depression, three states restricted or required a license for semiautomatics that would fire more than 12,[227] 16,[228] or 18 shots,[229] and all of these laws were repealed. The District of Columbia had an odd ban dating to 1932 on automatics and semiautomatics that shot "more than twelve shots without reloading," which thus allowed a real machine gun as long as it fired eleven or fewer shots; the definition would be revised to conform to the federal definition in 2008.[230]

In 1989, California passed the first state ban on assault weapons, defined by a list of names of manufacturers and models such as "Colt AR-15."[231] In 1990, New Jersey became the first state to ban detachable magazines holding more than 15 rounds (later reduced to 10).[232] Since then, bans have been passed in Colorado (magazines only), Connecticut, Hawaii (certain handguns and magazines only), Maryland, Massachusetts, New Jersey, New York, and the District of Columbia. Six of these states define "assault weapon" to include mostly rifles together with some shotguns and handguns; one bans only certain handguns; and eight states ban certain magazines. The District of Columbia bans certain of all of these, but it does not count as a state.[233]

The fact that only six states ban certain long guns and handguns means there are 44 states that fully recognize Second Amendment rights.[234] Four of the restrictive states—California, Maryland, New Jersey, and New York—have no arms guarantee in their state constitutions.[235] The arms guarantees of the two

217 CMP, *Highpower Rifle Competition Rules* 33-38 (2019), https://thecmp.org/wp-content/uploads/HighpowerRifleRules.pdf?vers=072319.

218 Figures based on data from the Bureau of Alcohol, Tobacco, Firearms and Explosives. *NSSF Releases Most Recent Firearm Production Figures* (Nov. 16, 2020), https://www.nssf.org/nssf-releases-most-recent-firearm-production-figures/.

219 *Duncan*, 970 F.3d at 1142.

220 *See* Smith, *supra* note 17, at 367.

221 *Kolbe*, 849 F.3d at 147.

222 *E.g.*, Md. Code, Criminal Law, § 4-302.

223 *NYSRPA*, 804 F.3d at 256 n.63.

224 State v. Kerner, 181 N.C. 574, 107 S.E. 222, 224 (1921).

225 Rinzler v. Carson, 262 So. 2d 661, 666 (Fla. 1972).

226 *Heller*, 554 U.S. at 624.

227 1927 R.I. Acts & Resolves 256, 256–57; repealed, Ch. 278, sec. 1, § 11-47-2, 1975 R.I. Pub. Laws 738, 738–39, 742.

228 1927 Mich. Pub. Acts 888-89; repealed, Act No. 175, sec. 1, § 224, 1959 Mich. Pub. Acts 249, 250.

229 1933 Ohio Laws 189, 189; repealed, H.B. 234, § 1, 2014 Ohio Laws File 165.

230 P.L. 72-275, §§ 1, 14, 47 Stat. 650, 654 (1932); amended, 2008 D.C. Laws 17-372 (Act 17–708), § 3(a)(5).

231 Ca. Stats. 1989, ch. 19, § 3, at 64.

232 N.J. L. 1990, c. 32, § 10 (1990).

233 *See* Ca. Penal Code §§ 30510, 30515, 30600, 30605; Colo. Rev. Stat. §§ 18-12-301(2)(a), 18-12-302; Conn. Gen. Stat. §§ 53-202a(1), 53-202b, 53-202c; Haw. Rev. Stat. §§ 134-1, § 134-4(e); Md. Code, Criminal Law, §§ 4-301(c), (d), 4-301(e)(1)(i), 4-303(a), Md. Code, Public Safety Article, § 5-101(r)(2); Mass. Gen. Laws 140 §§ 121, 131M; N.J. Stat. 2C:39-1w, 2C:39-3(j), 2C:39-5(f), 2C:39-9(g), 2C:58-5, 2C:58-12; N.Y. Penal Law §§ 265.02(7), (8), 265.10(1) - (3); D.C. Code §§ 7-2502.02(a), 7-2501.01(3A)(A)(i)(IV), 7-2506.01(b).

234 Hawaii bans only certain handguns, so it fails to change the basic score.

235 Eugene Volokh, *State Constitutional Right to Keep and Bear Arms Provisions*, http://www2.law.ucla.edu/volokh/beararms/statecon.htm.

other states—Connecticut and Massachusetts—have been gutted by judicial decisions.[236] Similarly, the fact that only eight states have magazine restrictions means that 42 states see that as an infringement on the fundamental right to bear arms, or see no value in such restrictions. The bottom line is that America at large respects the right to possess the arms that a fringe group of states bans.

In *McDonald*, the Supreme Court found that the right to keep and bear arms "is fundamental to our scheme of ordered liberty" and is "deeply rooted in this Nation's history and tradition."[237] While "we have never held that a provision of the Bill of Rights applies to the States only if there is a 'popular consensus' that the right is fundamental, . . . in this case, as it turns out, there is evidence of such a consensus."[238] The Court pointed to a brief submitted by 38 states taking that view.[239] Similarly, the refusal of 44 states to ban the long guns and handguns denigrated by six states as assault weapons shows a broad consensus that there is a fundamental right to arms.

But despite this apparent popular consensus, all of the (admittedly few) judicial decisions on the question have upheld assault weapon bans. The handful of bans are all in blue states with long traditions of unusual gun restrictions and typically no state constitutional guarantee of the right to arms. It is not an accident that the Fifth Circuit rendered the first major decision holding the Second Amendment to be an individual right in a case arising in Texas, while the first major precedent holding it to be a "collective right" was rendered by the Ninth Circuit in a case upholding California's assault weapon ban.[240]

New York is another example of a state where the Second Amendment often, as Rodney Dangerfield would say, gets no respect. Its 1911 Sullivan Law required a license just to keep a handgun in the home. The Second Circuit upheld a warrantless seizure of a firearm based on its "'immediately apparent' incriminating character" because, it said, "Under New York law, it is a crime to possess a firearm."[241] The court in that case found that the prohibition did not offend the Second Amendment because "the right to possess a gun is clearly not a fundamental right."[242] Then-Judge Sonia Sotomayor joined in the opinion, although in another case she dissented from an opinion upholding overly-harsh sentencing in a gun sale case.[243] Given that history, it is no small wonder that the Second Circuit upheld New York's assault weapon ban.

Not only red states but most blue states don't pass assault weapon bans, and thus unsurprisingly there are no precedents in such states about whether such bans are unconstitutional. Only six blue states (and the District of Columbia) ban certain long guns and handguns as "assault weapons," and the precedents upholding such bans reflect the restrictive firearm traditions in those states. Those precedents should thus be seen as only a small fraction of the viewpoints of the federal judiciary (and the American people).

Finally, the handful of bans amount to an insignificant hiccup, albeit a major intrusion on Second Amendment rights, in the totality of American history. From the time of the colonial settlements of Jamestown in 1607 and Plymouth Colony in 1620, up to the enactment of California's ban in 1989, no comparable firearm bans existed in America. The one exception was the British attempt to disarm the colonists in 1775. Other than that, in over 400 years of American history, there have been only thirty-two years of assault weapon bans, and they have been confined to 6 out of 50 states. Such laws are recent, extreme outliers that are antithetical to American history and tradition.

E. Up from Jim Crow: How Repeating Rifles Protected Civil Rights

California's ban on named rifles had a single precedent in American legal history. In 1893, Florida made it "unlawful to carry or own a Winchester or other repeating rifle" without a license.[244] How that came about warrants review.

Ida B. Wells famously wrote in 1892 that a "Winchester rifle should have a place of honor in every black home, and it should be used for that protection which the law refuses to give."[245] Earlier that year, she explained, "the only case where the proposed lynching did not occur, was where the men armed themselves in Jacksonville, Fla., and Paducah, Ky, and prevented it. The only times an Afro-American who was assaulted got away has been when he had a gun and used it in self-defense."[246] In the Jacksonville incident, rumors spread of a possible lynching at the jail holding a black murder suspect. The *Florida-Times Union* reported: "Every approach to the jail was guarded by crowds of negroes armed to the very teeth."[247] A lynching was averted and the suspect was tried and convicted.[248] In the Paducah case, the jail holding a black man accused of being a peeping tom was being protected by members of the black community when some white rowdies showed up. With a race war rumored, the state militia was called up, and police seized over 200 guns from black homes. Hotheads cooled down and peace was restored.[249]

Along with Rev. Taylor Nightingale, who advised his congregants to obtain Winchester rifles, Wells urged members

236 *Benjamin*, 234 Conn. at 478 ("We therefore apply rational basis review, which the statutory ban on assault weapons satisfies."); Commonwealth v. Davis, 369 Mass. 886, 888 (1976) (arms guarantee limited to organized militia, not individuals).

237 *McDonald*, 561 U.S. at 767.

238 *Id.* at 789.

239 *Id.*

240 *Emerson*, 270 F.3d at 227; *Silveira*, 312 F.3d at 1061.

241 United States v. Sanchez-Villar, 99 Fed. Appx. 256, 258 (2d Cir. 2004) (per curiam).

242 *Id.* at 258 n.1, quoting *Toner,* 728 F.2d at 128.

243 United States v. Cavera, 550 F.3d 180, 220 (2d Cir. 2008) (en banc) (Sotomayor, J., dissenting).

244 1893 Fla. Laws 71-72.

245 Ida B. Wells, Southern Horrors: Lynch Law in All its Phases 16 (1892).

246 *Id.*

247 Nicholas Johnson, Negroes and the Gun: The Black Tradition of Arms 111-12 (2014).

248 *Id.* at 112.

249 *Id.* at 111.

of the black community to defend themselves with arms in the newspaper *Memphis Free Speech* and elsewhere. Their repeated references to the virtues of the Winchester, and the defensive use thereof by black communities, were well publicized and would have consequences.[250]

Perhaps in response to such incidents in which blacks defended themselves with effective arms, in 1893, Florida made it "unlawful to carry or own a Winchester or other repeating rifle without first taking out a license from the County Commissioner"; only with a license would a person be "at liberty to carry around with him on his person and in his manual possession" such a rifle.[251] A license required a $100 bond from sureties to be approved by the County Commissioner.[252] That would be equivalent to $2,943 today.[253] The average monthly wage for farm labor in Florida in 1890 was $19.35.[254] The law did what it was intended to do when it effectively excluded the poor and African Americans from legal gun ownership. In 1901, the law was amended to add pistols to the list of firearms requiring a license.[255]

In 1941, the Florida Supreme Court decided *Watson v. Stone*. Mose Watson had been convicted under the statute for having a pistol in the glove box of an automobile in which he was a passenger. Holding that this did not constitute "on his person and in his manual possession," the court reversed the conviction, adding for good measure that businessmen, tourists, "unprotected women and children," and "all law-abiding citizens fully appreciate the sense of security afforded by the knowledge of the existence of a pistol in the pocket of an automobile . . . ."[256] "These people," the court concluded, "should not be branded as criminals in their effort of self preservation and protection, but should be recognized and accorded the full rights of free and independent American citizens."[257]

Justice Rivers H. Buford, who had been a member of the Florida legislature when the 1901 amendment was enacted,[258] wrote a concurring opinion explaining:

> The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers . . . . The statute was never intended to be applied to the white population and in practice has never been so applied.[259]

Buford concluded that "there had never been . . . any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution . . . ."[260] But this was an epoch in which members of the black community needed to protect themselves from racial violence. Justice Buford himself in 1934 gave a stirring speech on the steps of a courthouse convincing a mob not to conduct a lynching.[261]

Years later, another Florida judge recalled Buford's opinion and added that he had reservations about whether the prohibition "singling out Winchesters, is constitutional."[262] He commented, "A Winchester rifle is a most popular hunting rifle in the United States. . . . Thousands of hunters in Florida possess and carry Winchesters or other repeating rifles around during hunting season and otherwise."[263] Yet the *Watson* case was about carrying a concealed handgun. There is no reported decision directly about carrying a Winchester, reinforcing that this part of the law was never enforced.

Meanwhile, semiautomatic rifles had long since replaced lever actions as the more technologically developed firearm. Black citizens had turned to semiautomatic rifles to protect their communities from racist violence. As noted above, the federal CMP has long sold surplus military rifles, including M1 Garands, to civilians to promote marksmanship. Members of the black community in Monroe, North Carolina, formed an NRA gun club and used such rifles to defend against Klan attacks in 1957.[264] The Deacons for Defense would often use M1 Garand rifles to protect activists. In 1966, as Martin Luther King and others gathered to support a wounded James Meredith and continue his Mississippi March against fear, Deacons armed with pistols and semiautomatic rifles patrolled the route and provided security for the marchers.[265]

During the civil rights movement of the 1960s, semiautomatic rifles helped black organizers survive racist violence. Mississippi Delta activist Hartman Turnbow halted a firebomb attack on his home with his 16-shot semiautomatic rifle.[266] The next morning, the license plate of the local sheriff was found in Turnbow's driveway.[267] One county over, activist Leola Blackman repelled

250 *Id.* at 110-11, 131-32.

251 1893 Fla. Laws 71-72.

252 *Id.*

253 Value of $1 from 1893 to 2021, https://www.officialdata.org/us/inflation/1893?amount=1.

254 George K. Holmes, Wages of Farm Labor 29 (USDA 1912), https://babel.hathitrust.org/cgi/pt?id=njp.32101050723756&view=1up&seq=745.

255 Watson v. Stone, 148 Fla. 516, 518-19 (1941).

256 *Id.* at 522-23.

257 *Id.* at 523.

258 3 History of Florida: Past and Present 156 (1923).

259 *Watson*, 148 Fla. at 524 (Buford, J., concurring).

260 *Id.*

261 Rivers Henderson Buford, https://peoplepill.com/people/rivers-h-buford/.

262 Cates v. State, 408 So.2d 797, 800 (Fla. 2d DCA 1982) (Ryder, J., concurring).

263 *Id.*

264 Robert F. Williams, Negroes with Guns 57, 97 (1962).

265 Johnson, *supra* note 247, at 265-268, 276.

266 *Id.* at 244.

267 *Id.*

Klansmen who set a cross afire in her yard, also using a 16-shot semiautomatic rifle.[268]

In short, African Americans, including civil rights icons, have a long tradition of advocacy for and use of firearms to protect themselves and their communities.[269] To be sure, while a majority in the black community may support gun control, the high rate of victimization from gun crime in that community reveals "both a desire to keep guns from criminals and a parallel desire to possess guns for self-defense."[270]

The Fourteenth Amendment did not prevent facially neutral restrictions from being enforced primarily against African Americans. Despite that, the struggle of black people for the basic rights of citizenship shows that the right to arms, including semiautomatic firearms with standard magazines, has been a vital resource for minorities facing terrorism, mobs, state failure, and majoritarian tyranny.

IV. Shooting From the Hip: How Five Circuits Got It Wrong

Post-*Heller* decisions upholding assault weapon prohibitions have been rendered by the D.C., Second, Seventh, Fourth, and First Circuits, in that order.[271] Each decision builds on the decision before it, repeating the same ideas but not questioning the factual premises. This section analyzes these decisions, with particular focus on the differing generic definitions of assault weapon, particularly those referencing the protruding pistol grip, and how each court sought to justify the prohibitions on rifles with such features. As will be seen, the decisions have been strong on the rhetorical phrases that embody the assault weapon debate and have waxed at length on the slippery standard of intermediate scrutiny, but they have made only superficial reference to the banned features. These decisions invariably eschew *Heller*'s common-use test in favor of a watered-down version of intermediate scrutiny.

While five circuits on the mainland couldn't manage a serious analysis of why the banned features are not protected by the Second Amendment, the U.S. District Court for the Northern Mariana Islands located in Saipan considered the evidence and found that features like the pistol grip, adjustable stock, and flash suppressor make the rifles more accurate and safer. The ban was invalidated under intermediate scrutiny in that jurisdiction.

A. Heller II *in the D.C. Circuit*

After Justice Scalia announced the Court's decision in *Heller* holding the District's handgun ban violative of the Second Amendment, D.C. officials criticized the decision and vowed that the District would come back fighting. *Heller* held categorically that the District's prohibition on possession of pistols violated the Second Amendment. The Court pointed to the provisions banning possession of an unregistered firearm and prohibiting the registration of handguns.[272] It did not qualify its holding by saying that certain kinds of pistols such as semiautomatics could be banned or by remanding the case for fact-finding on which handguns are protected by the Amendment and which ones are not.[273]

So the District knew it had to make handguns registerable, but that raised a separate problem. The District prohibited machine guns, which it curiously defined to include not just real machine guns that shoot automatically, but also any firearm that "shoots, is designed to shoot, or can be readily converted or restored to shoot . . . semiautomatically, more than twelve shots without manual reloading."[274] A court decision held this to apply to pistols and rifles capable of accepting magazines holding more than 12 shots, even though the owners only had magazines that held fewer.[275] The District thus complied with *Heller* by redefining machine guns to include only automatics and to exclude semiautomatics.[276] Semiautomatic pistols thereby became registerable.

At the same time, the District passed a ban on assault weapons, defined as rifles with a conspicuously-protruding pistol grip and other generic features, together with the laundry list of scores of names like the Colt AR-15.[277] A committee report alleged that "assault weapons . . . are designed with military features," but the only specific features applicable to rifles were detailed this way: "Assault weapons also have features such as pistol grips and the ability to accept a detachable magazine. Pistol grips help stabilize the weapon during rapid fire and allow the shooter to spray-fire from the hip position."[278] None of the other banned rifle features were mentioned.

268 *Id.*

269 *See* Charles E. Cobb, Jr., This Nonviolent Stuff'll Get You Killed: How Guns Made the Civil Rights Movement Possible (2014).

270 Johnson, *supra* note 247, at 304.

271 The Ninth Circuit upheld California's ban under the "collective rights" theory of the Second Amendment that *Heller* and *McDonald* rejected. *Silveira,* 312 F.3d at 1056, *cert. denied*, 540 U.S. 1046 (2003).

272 *Heller,* 554 U.S. at 574. The District uses the term "pistol," which it defines as "any firearm originally designed to be fired by use of a single hand or with a barrel less than 12 inches in length." D.C. Code § 7-2501.01(12). That definition would also include revolvers.

273 The United States as amicus had disagreed with the court of appeals' determination that "handguns are 'Arms' referred to in the Second Amendment," and that categorically "it is not open to the District to ban them." It urged that "the best course would be to remand for application of the proper standard of review in the first instance." Brief for the United States as Amicus Curiae at *28, *District of Columbia v. Heller*, 2008 WL 157201 (2008).

274 Fesjian v. Jefferson, 399 A.2d 861, 863-64 (D.C. App. 1979), citing D.C. Code 1978 Supp., § 6-1802(10).

275 *Id.* at 864-65. *See also id.* at 863 n.1-3 (reference to Browning Hi Power 9mm, semiautomatic pistol and various rifles).

276 *See* D.C. Code § 7-2501.01(10).

277 *See* D.C. Code § 7-2501.01(3A)(A). Subsection (3A)(A)(i)(IV) includes the following generic definitions:

> A semiautomatic, rifle that has the capacity to accept a detachable magazine and any one of the following: (aa) A pistol grip that protrudes conspicuously beneath the action of the weapon; (bb) A thumbhole stock; (cc) A folding or telescoping stock; (dd) A grenade launcher or flare launcher; (ee) A flash suppressor; or (ff) A forward pistol grip . . . .

278 Council of the District of Columbia, Committee on Public Safety & the Judiciary, Report on Bill 17-843, the "Firearms Control Amendment Act of 2008," Nov. 25, 2008, at 7 (hereafter "Council of D.C.").

The District also prohibited possession of any "large capacity ammunition feeding device," which includes any magazine or other device that "has a capacity of . . . more than 10 rounds of ammunition."[279] The committee report conceded that "semiautomatic pistols are a common and popular weapon," and "the Committee heard testimony that magazine capacity of up to 20 rounds is not uncommon and 'reasonable.'"[280] However, "the Committee agrees with the Chief of Police that the 2 or 3 second pause to reload can be of critical benefit to law enforcement, and that magazines holdings over 10 rounds are more about firepower than self-defense."[281] Left unsaid was that the critical 2 or 3 seconds could be fatal for a law-abiding person pausing to reload when under the stress of a violent attack. D.C. police officers are issued Glock pistols with magazines holding 15 or 17 rounds for the very purpose of self-defense.[282]

A challenge to the District's new assault weapon ban, another *Heller v. District of Columbia*, which came to be known as *Heller II*, was filed.[283] In cross motions for summary judgment, the District filed no evidence, relying on the committee report and similar sources. The plaintiffs filed extensive declarations. One was by Harold E. Johnson, who retired after twenty-one years in the U.S. Marine Corps as a Warrant Officer at the Quantico Ordnance School. An intelligence analyst for the U.S. Army Foreign Science and Technology Center for the next seventeen years, he authored small arms identification guides for the Defense Intelligence Agency and hundreds of classified reports concerning small arms and small arms technology. Some of the banned rifles, Johnson affirmed, "have cosmetic similarities with military rifles," such as "a pistol grip that protrudes beneath the action, which allows the rifle to be fired accurately from the shoulder. Such pistol grips are *not* designed to allow the shooter to spray-fire from the hip position."[284]

Mark Westrom, head of the firearm manufacturer ArmaLite, gave evidence about several AR-type rifles. He said these rifles have a pistol grip typically 3 3/4 to 4 inches in length that protrudes at a rearward angle beneath the action of the rifle. The pistol grip, in conjunction with the straight-line stock, allows the rifle to be fired accurately from the shoulder with minimal muzzle-rise.[285]

William Carter, one of the plaintiffs whose application to register a rifle with a protruding pistol grip was denied by the District, affirmed that the pistol grip allows the rifle to be accurately shot from the shoulder without excessive muzzle rise. In his Marine Corps training, Carter was instructed to fire the M-16 (which has a similar pistol grip) only from the shoulder and was never trained to fire it from the hip.[286]

Yet in its 2-1 *Heller II* decision in 2011, the D.C. Circuit affirmed the decision of the district court awarding summary judgment to the District, holding that the Second Amendment does not protect assault weapons as defined by the District.[287] It conceded that the banned rifles met the *Heller* common-use test, which should have been the end of the case:

> We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in 'common use,' as the plaintiffs contend. Approximately 1.6 million AR–15s alone have been manufactured since 1986, and in 2007 this one popular model accounted for 5.5 percent of all firearms, and 14.4 percent of all rifles, produced in the U.S. for the domestic market.[288]

The court also said the banned magazines met the common-use test:

> As for magazines, fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds, and approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000. There may well be some capacity above which magazines are not in common use but, if so, the record is devoid of evidence as to what that capacity is; in any event, that capacity surely is not ten.[289]

Despite that, the majority upheld the prohibitions under intermediate scrutiny.[290] Like Justice Breyer's *Heller* dissent, it relied on the rule of according "substantial deference to the predictive judgments" of the legislature, which it said must have "drawn reasonable inferences based on substantial evidence."[291]

On the issue of how the features of the rifles justified the ban, the majority completely ignored the plaintiffs' expert evidence. Instead, it relied particularly on Brady Center lobbyist Brian Siebel, who testified before the committee that "the military features of semi-automatic assault weapons are designed to enhance their capacity to shoot multiple human targets very rapidly" and that "[p]istol grips on assault rifles . . . help stabilize the weapon during rapid fire and allow the shooter to spray-fire

279 D.C. Code § 7-2506.01(b).

280 Council of D.C., *supra* note 278, at 9.

281 *Id.*

282 Declaration of Undisputed Material Facts in Support of Plaintiffs' Motion for Summary Judgment, Joint Appendix at 52, in *Heller II*, No. 10-7036 (hereafter "Joint Appendix"). The Model 17 magazine holds 17 rounds, and the Model 19 holds 15 rounds. *See* https://us.glock.com/products/model/g17 and https://us.glock.com/products/model/g19.

283 *Heller II,* 670 F.3d 1244. For a complete account of *Heller II*, see Stephen P. Halbrook, *Reality Check: The "Assault Weapon" Fantasy and Second Amendment Jurisprudence*, 14 Geo. J.L. & Pub. Pol'y 47 (2016). On what became *Heller III*, see Halbrook, *The Empire Strikes Back: the District of Columbia's Post-*Heller *Firearm Registration System*, 81 Tenn. L. Rev. 571 (2014).

284 Declaration of Harold E. Johnson, in Joint Appendix, *supra* note 282, at 135.

285 Affidavit of Mark Westrom, Joint Appendix, *supra* note 282, at 90.

286 Declaration of William Carter, Joint Appendix, *supra* note 282, at 64-65.

287 *Heller II,* 670 F.3d 1244.

288 *Id.* at 1261.

289 *Id.*

290 *Id.* at 1264.

291 *Id.* at 1259 (quoting *Turner II*, 520 U.S. at 195). *See Heller,* 554 U.S. at 690 (Breyer, J., dissenting) (citing same).

from the hip position."[292] The ergonomics of this design were not analyzed to determine whether they support this proposition. Since the pistol grip was virtually the only feature of a rifle mentioned that allegedly made it an assault weapon, this assertion warranted closer scrutiny than the majority gave it. Siebel's role as a lobbyist for the Brady Center reflected no credentials as a firearms expert. No evidence was presented as to why a person would want to spray fire single shots from the hip, which would be highly inaccurate, or that such occurred in any crimes. In fact, no evidence on topic was presented at all, just one sentence of bare assertion.

The majority further relied on Siebel for the proposition that semiautomatics "fire almost as rapidly as automatics."[293] Siebel testified to the D.C. Council that a "30-round magazine" of an UZI "was emptied in slightly less than two seconds on full automatic, while the same magazine was emptied in just five seconds on semi-automatic"[294] Where did that information come from? Why should it be taken as reliable? For aught it appears, this assertion was pulled out of thin air. According to the Army training manual *Rifle Marksmanship*, the "Maximum Effective Rate of Fire (rounds per min)" in semiautomatic for the M4 and M16A2 rifles is 45 rounds in sixty seconds (one minute).[295] In other words, a semiautomatic could effectively fire one round per 1 1/3 second, not 6 rounds per second as Siebel claimed.

The reference to Siebel's testimony was part of the majority's attempt to compare automatic with semi-automatic firearms. The Supreme Court suggested in *Heller* that "M-16 rifles and the like" may be banned because they are "dangerous and unusual."[296] In *Staples*, the Court had described the "AR-15" as "the civilian version of the military's M-16 rifle."[297] That made a world of difference to the Court, since civilian semi-automatics fire "only one shot with each pull of the trigger," but a military automatic fires continuously as long as the trigger is pulled.[298] Yet based on the testimony of Siebel, the D.C. Circuit panel majority sought, despite the best evidence, to minimize the difference by accepting that semi-automatics "fire almost as rapidly as automatics."[299]

Other than the pistol grip and semi-automatic action, the *Heller II* majority was silent on the other features which supposedly caused the firearms to lose Second Amendment protection. For instance, a telescoping shoulder stock allows a rifle to be adjusted to an individual's physique, particularly his or her arm length. Like a shoe, a firearm should fit the person using it. Even when retracted to the shortest length, such rifles would still have to meet the legal overall length of more than 26 inches.[300] They can thus not be any more concealable than any other legal rifle. Yet the court approved the ban based on such features without analysis.

The majority concluded that "the *evidence* demonstrates a ban on assault weapons is likely to promote the Government's interest in crime control in the densely populated urban area that is the District of Columbia."[301] But the committee report's unsupported assertions and Mr. Siebel's bare allegations can hardly be considered "evidence." "[E]vidence means the statements of witnesses or documents produced in court for inspection."[302] The claims made by Siebel would never qualify as admissible expert testimony under the Federal Rules of Evidence, which allow testimony based on "scientific, technical, or other specialized knowledge."[303] As the Supreme Court noted in *Daubert*, "The adjective 'scientific' implies a grounding in the methods and procedures of science. Similarly, the word 'knowledge' connotes more than subjective belief or unsupported speculation."[304]

Plaintiffs submitted the only evidence in the case, and that evidence repudiated the allegations made in the committee report, which were largely based on Mr. Siebel's testimony at a legislative hearing. Do the unsworn allegations made at a legislative hearing by a lobbyist who has no expert qualifications overcome the actual evidence introduced in a case by sworn witnesses, expert and lay, whose testimony was not challenged? How is it appropriate for a court to uphold a law challenged as unconstitutional based on such unsupported allegations without even mentioning the adverse evidence actually submitted in the case?

There are parallels here to the challenge to New York City firearm restrictions that the Supreme Court dismissed as moot in 2020. Justice Alito, joined by Justices Gorsuch and Thomas, dissented from the dismissal, opining on the merits that the City's restriction "burdened the very right recognized in *Heller*. History provides no support for a restriction of this type. The City's public safety arguments were weak on their face, were not substantiated in any way, and were accepted below with no serious probing."[305]

The panel majority in *Heller II* went on to uphold the District's magazine ban also based on Mr. Siebel's allegations relied on by the committee. Siebel claimed that "military-style assault weapons"—recall plaintiffs' uncontradicted evidence that the banned rifles are not used by any military force in the world—are even more dangerous if equipped with magazines that hold more than ten rounds, which "greatly increase[s] the firepower of mass shooters."[306] No data or information on the actual facts in mass shootings was mentioned. The majority added, "The Siebel testimony moreover supports the District's claim that high-capacity magazines are dangerous in self-defense

292 *Heller II,* 670 F.3d at 1261-62. The court earlier referred to Testimony of Brian J. Siebel, Brady Center to Prevent Gun Violence (Oct. 1, 2008).

293 *Id.*

294 *Id.* at 1262 (citing Siebel testimony, *supra* note 278, at 1).

295 Rifle Marksmanship, M16-/M4-Series Weapons at 2-1.

296 *Heller II*, 670 F.3d at 1263 (quoting *Heller*, 554 U.S. at 627).

297 *Id.* (quoting *Staples*, 511 U.S. at 603).

298 *Id.* (quoting *Staples*, 511 U.S. at 602 n.1).

299 *Id.* at 1263.

300 *See* 26 U.S.C. § 5845(a)(4); D.C. Code § 7-2501.01(17).

301 *Heller II*, 670 F.3d at 1263 (emphasis added).

302 United States v. Pugh, 99 U.S. 265, 270 (1878).

303 Fed. R. Evidence 702.

304 Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590 (1993).

305 *New York State Rifle & Pistol Ass'n*, 140 S. Ct. at 1544.

306 *Heller II*, 670 F.3d at 1263.

situations because 'the tendency is for defenders to keep firing until all bullets have been expended, which poses grave risks to others in the household, passersby, and bystanders.'"[307] No factual basis was set forth for that allegation. Based on these evidence-free allegations, the majority held that the District had shown "a substantial relationship" between the rifle and magazine bans and "the objectives of protecting police officers and controlling crime."[308]

Despite its discussion of semi-automatics, the majority did not hold that "possession of semi-automatic handguns is outside the protection of the Second Amendment," allowing that "a ban on certain semi-automatic pistols" could be unconstitutional, but then adding that it did "not read *Heller* as foreclosing every ban on every possible sub-class of handguns or, for that matter, a ban on a sub-class of rifles."[309] In other words, even if the Supreme Court in *Heller* held that handguns and long guns as a class may not be banned, some of them may be banned anyway.

Then-Judge Kavanaugh dissented in *Heller II*, writing, "After *Heller*, however, D.C. seemed not to heed the Supreme Court's message. Instead, D.C. appeared to push the envelope again, with its new ban on semi-automatic rifles . . . ."[310] He averred that semiautomatic rifles and handguns were not traditionally banned and "are in common use by law-abiding citizens for self-defense in the home, hunting, and other lawful uses," but that such handguns were used far more in crime than rifles. Yet *Heller* held that handguns may not be banned.[311]

Buttressing the majority's acknowledgment that semiautomatic rifles are in common use, Judge Kavanaugh noted that they accounted for 40 percent of rifles sold in 2010; two million AR-15s, America's most popular rifle, had been manufactured since 1986.[312] He cited the website of the popular gun seller Cabela's to illustrate how common such rifles are.[313] The dissent cited the declaration of the highly-credentialed firearms expert Harold E. Johnson for the proposition that "Semi-automatic rifles are commonly used for self-defense in the home, hunting, target shooting, and competitions. . . . And many hunting guns are semi-automatic."[314] The majority had denied that based on the opinions of Siebel, who lacked any credentials on the subject.

Heller evaluated restrictions "based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."[315] Judge Kavanaugh added, "Whether we apply the *Heller* history- and tradition-based approach or strict scrutiny or even intermediate scrutiny, D.C.'s ban on semi-automatic rifles fails to pass constitutional muster."[316]

The dissent took the majority to task for suggesting that "semi-automatic handguns are good enough to meet people's needs for self-defense and that they shouldn't need semi-automatic rifles," which is "like saying books can be banned because people can always read newspapers."[317] Moreover, since semi-automatic handguns are constitutionally protected under *Heller*, it is difficult to understand why semi-automatic rifles are not. Even granting Siebel's assertion about rate of fire—which meant "that semi-automatics actually fire two-and-a-half times slower than automatics"—the comparison was invalid in that "semi-automatic rifles fire at the same general rate as semi-automatic handguns," which are protected.[318] Referring to rifles as assault weapons adds nothing, in that "it is the person, not the gun, who determines whether use of the gun is offensive or defensive," and in any event handguns are used most often in violent crime.[319]

The dissent would have remanded the issue of the ban on magazines holding more than ten rounds to determine whether such magazines "have traditionally been banned and are not in common use.[320] The majority had conceded that they were in common use, and that they were no more traditionally banned than were so-called assault weapons, and indeed both were part and parcel of the same recent bans.[321] That said, a remand would have produced additional facts to support those conclusions.

Since the banned firearms were in common use, Judge Kavanaugh apparently saw no need to discuss the specific features that were banned. While the majority only echoed without question the unsupported allegations of a lobbyist about spray firing from the hip, other courts would be only too happy to repeat such allegations, buttressing their holdings with the *Heller II* precedent.[322]

B. The Second Circuit's Decision in New York State Rifle & Pistol Association

After the horrible murders at Sandy Hook Elementary School, New York and Connecticut redefined the term "assault

307 *Id.* at 1263-64.

308 *Id.* at 1264.

309 *Id.* at 1268.

310 *Id.* at 1271 (Kavanaugh, J., dissenting).

311 *Id.* at 1269-70.

312 *Id.* at 1287 (citing researcher Mark Overstreet).

313 *Id.* (citing http://www.cabelas.com).

314 *Id.* at 1287-88.

315 *Id.* at 1271.

316 *Id.* at 1285.

317 *Id.* at 1289.

318 *Id.*

319 *Id.* at 1290.

320 *Id.* at 1296 n.20.

321 *Id.* at 1261.

322 A California court held that, based on legislative statements that some "assault weapons" were used in crime, they were not typically possessed by law-abiding citizens for lawful purposes. People v. James, 174 Cal. App. 4th 662, 94 Cal. Rptr. 3d 576, 585-86 (2009). By contrast, an Illinois court opined that whether the banned firearms are "well suited for self-defense or sport" or are "dangerous and unusual weapons" is an empirical issue beyond the scope of judicial notice, adding that a legislative declaration that the banned guns were "military" weapons and were most likely to be used in crime "does not preclude inquiry by the judiciary into the facts bearing on an issue of constitutional law." Wilson v. County of Cook, 968 N.E.2d 641, 656-57 (Ill. 2012) (citing Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978)).

weapon" in preexisting statutes to include more firearms, mostly semiautomatic rifles, and banned any that were not registered or declared by a specified deadline.[323] Both states also banned magazines that would hold more than ten rounds, and New York even prohibited the loading of more than seven rounds in each magazine.[324] In *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo* ("*NYSRPA*"), the Second Circuit would follow *Heller II* and uphold both of these states' expansive bans.[325]

The court in *NYSRPA* began by stipulating that the prohibited firearms and magazines were in common use. Specifically, noting the production of nearly four million AR-15 rifles alone between 1986 and March 2013, and countless millions of the banned magazines, the court acknowledged that "the assault weapons and large-capacity magazines at issue are 'in common use' as that term was used in *Heller*."[326] Moreover, it proceeded "on the assumption that these laws ban weapons protected by the Second Amendment."[327]

Per *Heller*, the court should have ended its analysis there. But the court instead decided to apply intermediate scrutiny to evaluate the laws, albeit in a watered-down form that did not require narrow tailoring.[328] It reasoned that while the bans "impose a substantial burden on Second Amendment rights," the burden was not "severe," and further that the laws were "substantially related" to the state interests in public safety and crime prevention.[329] To support that conclusion, the court averred that the banned rifles are disproportionately misused in crime and that their features make them particularly dangerous. Were those findings accurate?

First, despite handguns allegedly "account[ing] for 71 percent to 83 percent of the firearms used in murders" and the holding of *Heller* that handguns cannot be banned,[330] *NYSRPA* asserted that the banned rifles "are disproportionately used in crime, and particularly in criminal mass shootings . . . ."[331] The court relied on the Violence Policy Center for the statistic—unsupported by data—that so-called assault weapons were used in 20% of killings of law enforcement officers between 1998 and 2001.[332] But the evidence is that the banned rifles are used in disproportionately *fewer* such crimes, as "[m]ost of the AWs [assault weapons] used in crime are assault pistols rather than assault rifles."[333]

Second, what was the basis for the court's finding that the banned rifles are extraordinarily dangerous? The court devotes exactly one paragraph, with no substantive discussion, to the features that supposedly make assault weapons so dangerous and unusual. The opinion stated that features such as the flash suppressor, protruding grip, and barrel shroud, according to plaintiffs, "improve a firearm's 'accuracy,' 'comfort,' and 'utility.' This circumlocution is, as Chief Judge Skretny observed, a milder way of saying that these features make the weapons more deadly."[334]

But Chief Judge William Skretny, who wrote the district court opinion, had relied on Justice John Paul Stevens' *dissent* in *McDonald v. Chicago* to argue that "the very features that increase a weapon's utility for self-defense also increase its dangerousness to the public at large."[335] But the constitutional rights of law-abiding people are not forfeited because of the bad behavior of criminals; "[a]utomobiles, for example, might also be termed 'dangerous' devices," but higher-performance models are not banned.[336] Since sights on a firearm make it more accurate and hence more deadly, could guns be banned for having sights? Is it preferable that an

323 N.Y. Penal Law §§ 265.00(22)(b)(i)-(v) (definitions), 400.00(16a)(a) (registration); Conn. Gen. Stat. §§ 53-202a(1)(B)-(E) (definitions), 53-202D(a)(2) (declaration).

324 N.Y. Penal Law, §§ 265.00(23)(a) (ten round limit), 265.37 (seven round load limit); Conn. Gen. Stat. § 53–202w(a)(1).

325 New York State Rifle and Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 257 (2d Cir. 2015). *See* Stephen P. Halbrook, *New York's Not So "SAFE" Act: The Second Amendment in an Alice-in-Wonderland World Where Words Have No Meaning*, 78 Albany L. Rev. 789 (2015). It is noteworthy that rifles in particular had long been long held to be protected by the Second Amendment in New York precedents. People v. Raso, 9 Misc. 2d 739, 742, 170 N.Y.S.2d 245 (Cnty. Ct. 1958) (The legislature "carefully avoided including rifles [for restrictions] because of the Federal constitutional provision."); Hutchinson v. Rosetti, 24 Misc. 949, 951, 205 N.Y.S.2d 526 (1960) (Rifle used for defense against a prejudiced mob must be returned based on "the constitutional guarantee of the right of the individual to bear arms. Amendments Art. II."); Moore v. Gallup, 267 A.D. 64, 68 (3d Dept. 1943) ("the arms to which the Second Amendment refers include weapons of warfare to be used by the militia, such as swords, guns, rifles and muskets"), *aff'd*, 59 N.E.2d 439 (1944).

326 *NYSRPA*, 804 F.3d at 255.

327 *Id.* at 257.

328 *Id.* at 261 & n.109. *See Turner II*, 520 U.S. at 215-16 (narrow tailoring required for intermediate scrutiny).

329 *Id.* at 260-61.

330 *NYSRPA*, 804 F.3d at 256.

331 *Id.* at 262.

332 *Id.* at 262 & n.15. Given the differing and constantly changing definitions of "assault weapon," it is unclear how any statistic would be reliable.

333 Koper, *supra* note 62, at 2. It is also noteworthy that more rifles were in circulation than pistols. In 2004, when Koper reported, 1,325,138 rifles were manufactured, while only 728,511 pistols were manufactured. ATF, *Annual Firearms Manufacturing & Export Report* (2004), https://www.atf.gov/resource-center/docs/2004-firearms-manufacturers-export-reportpdf/download.

334 *NYSRPA*, 804 F.3d at 262.

335 *NYSRPA*, 990 F. Supp. 2d at 368 (citing *McDonald*, 561 U.S. at 891 (Stevens, J., dissenting)). Justice Stevens used that argument in support of his beliefs that "the Court badly misconstrued the Second Amendment" in *Heller* and that it was a mistake to hold "that a city may not ban handguns." *Id.* at 890 & n.33.

336 *Staples*, 511 U.S. at 614. The majority in *McDonald* held that the right to keep and bear arms should be incorporated into the Fourteenth Amendment, rejecting the policy argument "that the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety." *McDonald*, 561 U.S. at 782. *See* Illinois Ass'n of Firearms Retailers v. City of Chicago, 961 F. Supp. 2d 928, 942 (N.D. Ill. 2014) ("whatever burdens the City hopes to impose on criminal users also falls squarely on law-abiding residents who want to exercise their Second Amendment right."). "Arms" by their very definition can be lethal, and yet the right to have them is what the Second Amendment guarantees.

inaccurate firearm be used in self-defense, exposing an innocent bystander to being shot?

Consider the specific features condemned by the district court. "A muzzle compensator reduces recoil and muzzle movement caused by rapid fire,"[337] the court said, suggesting that the feature only benefits mass shooters. But a muzzle compensator has these same benefits in slow fire. Recoil can be painful, and muzzle movement interferes with accuracy. A telescoping stock, as plaintiffs noted, "allows the user to adjust the length of the stock," which "like finding the right size shoe, simply allows the shooter to rest the weapon on his or her shoulder properly and comfortably."[338] The district court found that the feature could aid "concealability and portability,"[339] without any reference to the overall length of the rifle, which could be quite long. As for the pistol grip "increas[ing] comfort and stability,"[340] it also supposedly allows "'spray firing' from the hip."[341] Through repetition, and without regard to evidence, myths about firearm features become part of our constitutional law. *Heller II* asserted them, the district court in the New York challenge repeated them, and the district court in the Connecticut challenge repeated them again.[342] The Connecticut court thought it sufficient to uphold the ban on rifles with specified features by quoting *Heller II*'s reference to "pistol grips" as purportedly "contribut[ing] to the unique function of any assault weapon to deliver extraordinary firepower."[343] No need to explain further and no need to mention the other banned rifle features.

Actually, Connecticut has its own unique, bizarrely-worded feature that transforms a rifle into an assault weapon: "[a]ny grip of the weapon, including a pistol grip, a thumbhole stock, or any other stock, the use of which would allow an individual to grip the weapon, resulting in any finger on the trigger hand in addition to the trigger finger being directly below any portion of the action of the weapon when firing."[344] Why a rifle should lose Second Amendment protection based on finger position was not discussed. Because of the term "when firing," plaintiffs argued that the "provision is vague because it applies or does not apply to every rifle and shotgun depending on how it is being held, but fails to give notice of any assumption that it is being held in a specific manner."[345] The district court held that the definition refers to "the normal horizontal firing position" and "is only plausibly vague when applied to a specific use of the weapon."[346] It conceded that "the vertical firing position may be 'normal' for certain activities, such as duck hunting," adding, "Ideally, the legislation would have included a more descriptive statement than 'when firing.'"[347] With that wave of the wand, the court essentially crossed that term out of the definition to save it from vagueness.

In upholding the New York and Connecticut district court decisions, the Second Circuit in *NYSRPA* didn't bother making even superficial reference to the specific features and what justified banning them. Instead it rendered a lengthy opinion upholding the bans without any substantive discussion of the features that allegedly make them dangerous and unusual.

The Second Circuit upheld the magazine bans under intermediate scrutiny with one paragraph of discussion to the effect that such magazines are disproportionately used in crime.[348] It did not mention the overwhelming lawful use of standard magazines. That magazines holding over ten rounds are well-suited and preferred for self-defense is demonstrated by the fact that they are issued to law enforcement[349] and bought by law-abiding citizens, who also use them for target shooting, competitions, and other sporting activities. Both police and citizens need larger-capacity magazines because they are necessarily at a disadvantage during a planned attack by a criminal. They may run out of ammunition and may not be able to change magazines, if another one is even available.

To be sure, *NYSRPA* did find two provisions violative of the Second Amendment. First, it invalidated Connecticut's ban on the Remington Tactical 7615 pump-action rifle because the state had presented evidence only on semiautomatic firearms, although the court left the door open for evidence on pump-actions to be generated.[350] Second, while upholding the ban on magazines holding more than ten rounds, it invalidated New York's ban on loading such magazines with more than seven rounds, for failure "to present evidence that the mere existence of this load limit will convince any would-be malefactors to load magazines capable of holding ten rounds with only the permissible seven."[351] Yet

337 *NYSRPA*, 990 F. Supp. 2d at 370.

338 *Id.* at 368.

339 *Id.* at 370.

340 *Id.* at 368.

341 *Id.* at 370 (citing *Heller II*, 670 F.3d at 1262-63 (relying on unsworn testimony of Brady lobbyist Brian Siebel)). The record was silent on why the SAFE Act bans semiautomatic shotguns with thumbhole stocks and a second handgrip or a protruding grip that can be held by the non-trigger hand. An ATF report on which New York relied found the latter feature sporting because it "permits accuracy and maneuverability even for activities such as bird hunting or skeet shooting." ATF, Study on the Importability of Certain Shotguns 3 (2012), Exhibit 19 in *NYSRPA*, 990 F. Supp. 2d 349.

342 Shew v. Malloy, 994 F. Supp.2d 234 (D. Conn. 2014).

343 *Id.* at 249 (quoting *Heller II*, 670 F.3d at 1264, and citing testimony of Brian J. Siebel).

344 *Id.* at 254 (quoting Conn. Gen. Stat. § 53–202a (1)(E)(II)).

345 *Id.* at 254. The court explained:

> The plaintiffs argue that "[w]aterfowl shotguns are typically fired vertically when ducks are flying over a blind. When pointed upward for firing, all four fingers are directly below the action of the shotgun." The plaintiffs argue, "[b]y contrast, a rifle with some types of pistol grips or thumbhole stocks (depending on the configuration), when held at an angle downward to fire at a deer in a valley, may be tilted sufficiently that the non-trigger fingers are not directly below the action."

Id. at 254 n.69

346 *Id.* at 255.

347 *Id.* at 255 n.71.

348 *NYSRPA*, 804 F.3d at 263-64.

349 New York's SAFE Act recognizes this by exempting law enforcement from its prohibitions. New York Penal Law § 265.20(a)(1)(b), (c).

350 *NYSRPA*, 804 F.3d at 257 n.73.

351 *Id.* at 264.

the limit on magazines holding more than ten rounds cannot be expected to get much respect by these same malefactors.

Now that the D.C. and Second Circuits had upheld bans, the Seventh Circuit was next in line to join the leapfrog game.

C. The Seventh Circuit Decides Friedman

Cook County, Illinois, and a number of other Chicago-area localities define "assault weapon" to include some of the aforementioned features and names, but one feature is the opposite of or has no counterpart in other laws and ordinances. A semiautomatic rifle that has the capacity to accept a LCM is said to be an assault weapon if it has "only a pistol grip without a stock attached."[352] By contrast, most jurisdictions outside of Illinois ban a rifle with a pistol grip only if it *has* a stock attached,[353] and still another does not even include a pistol grip as a prohibited feature.[354]

Highland Park, Illinois, copies the Cook County language regarding that and other features to define assault weapon in part as:

> (1) A semiautomatic rifle that has the capacity to accept a Large Capacity Magazine detachable or otherwise and one or more of the following: (a) Only a pistol grip without a stock attached; (b) Any feature capable of functioning as a protruding grip that can be held by the non-trigger hand; (c) A folding, telescoping or thumbhole stock; (d) A shroud attached to the barrel, or that partially or completely encircles the barrel, allowing the bearer to hold the Firearm with the non-trigger hand without being burned, but excluding a slide that encloses the barrel; or (e) A Muzzle Brake or Muzzle Compensator . . . .[355]

The ban was upheld by the district court in *Friedman v. City of Highland Park*, the Seventh Circuit affirmed, and the Supreme Court denied certiorari. Neither the district court nor the Seventh Circuit articulated any justification for upholding the bans of these features; they barely mentioned some features and upheld their prohibition for superficial reasons.

The district court in *Friedman* decided that "the particular features banned by the Ordinance were developed for or by militaries to increase lethality."[356] It quoted from a single declaration for the city alleging that:

- "[p]rotruding foregrips allow increased stability . . . thus increasing the hit probability of successive shots"
- "[f]olding and/or telescoping stocks allow the operator to more easily conceal or maneuver the rifle in a confined space" and facilitate "firing from positions other than the shoulder"
- the M1 Garand Rifle features "a wooden handguard . . . to steady and control the rifle during rapid, repeat firing without getting burned by the hot barrel"
- a "muzzle brake . . . allow[s] the operator to control the rifle during rapid, repeat firing without taking time to reacquire the target."[357]

Although the case was in the posture of cross motions for summary judgment—such that the court should have viewed all evidence in the light most favorable to the non-moving party—the court made no mention of any of the plaintiffs' contrary evidence.[358] Nor did the court state any justification for allowing the city to ban guns featuring "only a pistol grip without a stock attached,"[359] a thumbhole stock, or a muzzle compensator. Indeed, it ignored the statement in the declaration for the city that "[t]humbhole stocks have traditionally been utilized on firearms for sport and target shooting," and disregarded the declarant's statement that the M1 Garand Rifle "incorporated a traditional wooden stock similar to most hunting and sporting rifles of the period . . . ."[360] Of the features listed, no mention was made of the ordinary civilian uses, such as the utility of a telescoping stock to adjust a rifle to one's physique.

The Seventh Circuit, in an opinion by Judge Frank Easterbrook, affirmed the decision of the district court in *Friedman* and upheld the ordinance. It listed some features in the definition of assault weapon as "a pistol grip without a stock . . .; a folding, telescoping, or thumbhole stock; a grip for the non-trigger hand; a barrel shroud; or a muzzle brake or compensator."[361] But it did not discuss the features.

The court made several assertions without citing to the record, such as "assault weapons generally are chambered for small rounds (compared with a large-caliber handgun or rifle), which

352 § 54-211(1)(A), Cook County, Ill., Ordinance No. 06–O–50 (2006).

353 *E.g.*, N.Y. Penal Law § 265.00(22)(a)(ii). *See also id.* (11) ("rifle" means a weapon made "to be fired from the shoulder").

354 Md. Code, Criminal Law, §§ 4-301(h)(1) ("copycat weapon"), 4-301(d) ("assault weapon" includes "a copycat weapon").

355 Friedman v. City of Highland Park, 68 F. Supp. 3d 895, 898 (N.D. Ill. 2014) (quoting Highland Park, Ill., City Code § 136.005(a)(2)).

356 *Id.* at 908.

357 *Id.* (quoting from Dkt. No. 45, Ex. C ¶ 33 (Declaration of James E. Yurgealitis)).

358 *See* Dkt. Nos. 42 & 49, *Friedman v. City of Highland Park*, Case No. 1:13–cv–9073 (N.D. Ill.).

359 The city's declarant averred about this feature:

> A semiautomatic rifle which includes only a pistol grip (or does not include a shoulder stock) increases the ability of the operator to conceal the firearm, maneuver the firearm in confined space and facilitates easier firing from positions other than the shoulder (firing from the hip or a point position directly in front of the operator). Rifles traditionally considered sporting firearms are generally not designed and produced as such.

Id. at Dkt. No. 45, Ex. C ¶ 33. But that dramatic statement means nothing more than that removing the shoulder stock converts the rifle into a large handgun. As the city's declarant also stated, "*Handguns* are generally defined as a firearm having a short stock (grip), and are designed to be held, and fired, with one hand." *Id.* at ¶ 6. That left no articulated reason in the record for banning the feature in question.

360 *Id.* at Dkt. No. 45, Ex. C ¶ 33.

361 Friedman v. City of Highland Park, Ill., 784 F.3d 406, 407 (7th Cir. 2015).

emerge from the barrel with less momentum and are lethal only at (relatively) short range," and thus "that they are less dangerous per bullet—but they can fire more bullets. And they are designed to spray fire rather than to be aimed carefully."[362] It added that they are thus more dangerous to innocent persons "yet more useful to elderly householders and others who are too frightened to draw a careful bead on an intruder or physically unable to do so."[363]

The court criticized *Heller*'s common-use test as circular and as incapable of application.[364] Eschewing "[t]he problems that would be created by treating such empirical issues [common use] as for the judiciary rather than the legislature,"[365] the court asserted the test to be "whether a regulation bans weapons that were common at the time of ratification or those that have 'some reasonable relationship to the preservation or efficiency of a well regulated militia,' . . . and whether law-abiding citizens retain adequate means of self-defense."[366] The court continued:

> The features prohibited by Highland Park's ordinance were not common in 1791. . . . Semi-automatic guns and large-capacity magazines are more recent developments. Barrel shrouds, which make guns easier to operate even if they overheat, also are new; slow-loading guns available in 1791 did not overheat. And muzzle brakes, which prevent a gun's barrel from rising in recoil, are an early 20th century innovation.[367]

Yet *Heller* rejected such tests, holding that the Second Amendment protects modern firearms, does not require them to have a militia nexus, and precludes arms from being banned on the basis that the government deems other arms to be adequate. The court's further assertion that "states, which are in charge of militias, should be allowed to decide when civilians can possess military-grade firearms"[368] conflicts with *McDonald*'s holding that states may not violate the Second Amendment.[369]

While conceding that "assault weapons can be beneficial for self-defense because they are lighter than many rifles and less dangerous per shot than large-caliber pistols or revolvers," the court found them to be "more dangerous in aggregate" and thus balanced the right away.[370] It further justified the ban on the basis that it "may increase the public's sense of safety."[371] Diminishing a constitutional right on the basis that it might make some members of the public feel better would leave the right without objective meaning and would subject it to manipulation based on propaganda.

Judge Daniel Manion dissented, noting that under *Heller*, "the ultimate decision for what constitutes the most effective means of defending one's home, family, and property resides in individual citizens and not in the government."[372] Moreover, "[t]he court ignores the central piece of evidence in this case: that millions of Americans own and use AR-type rifles lawfully."[373] Nor was there any evidentiary basis for the finding that the ordinance "may increase the public's sense of safety."[374]

The Supreme Court denied certiorari in *Friedman*. But Justice Thomas, joined by Justice Scalia, dissented from the denial.[375] The ordinance banned common firearms "which the City branded 'Assault Weapons,'" but that are "modern sporting rifles (e.g., AR-style semiautomatic rifles), which many Americans own for lawful purposes like self-defense, hunting, and target shooting."[376]

The Seventh Circuit erroneously asked whether the banned firearms were common in 1791, when the Second Amendment was adopted, Justice Thomas continued, but *Heller* recognized protection for bearable arms generally without regard to whether they existed at the Founding.[377] The Seventh Circuit also asked whether the banned firearms relate to a well regulated militia, which states and localities would decide. But the scope of the Second Amendment "is defined not by what the militia needs, but by what private citizens commonly possess," and states and localities do not have "the power to decide which firearms people may possess."[378]

The dissenting Justices argued that it did not suffice that other alternatives allegedly existed for self-defense. The ban was suspect because "[r]oughly five million Americans own AR-style semiautomatic rifles. . . . The overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting."[379] Nor could the ban be upheld "based on conjecture that the public might *feel* safer (while being no safer at all) . . . ."[380] Declining to review a decision that flouted *Heller* and *McDonald*, according to Justice Thomas, contrasted

362 *Id.* at 409.

363 *Id.*

364 *Id.* at 408-09.

365 *Id.* at 409.

366 *Id.* at 410 (citing *Heller*, 554 U.S. at 622–25, and *Miller*, 307 U.S. at 178–79).

367 *Id.* Despite the court's confident assertion otherwise, long guns at the Founding generally had wooden shrouds that covered the barrel. *See* George C. Neumann, The History of Weapons of the American Revolution ch. 4 & 5 (1967).

368 *Id.*

369 *McDonald*, 561 U.S. 742.

370 *Friedman*, 784 F.3d at 411.

371 *Id.*

372 *Id.* at 413 (Manion, J., dissenting).

373 *Id.* at 420.

374 *Id.*

375 *Friedman*, 784 F.3d 406, *cert. denied*, 136 S. Ct. 447 (2015) (Thomas, J., dissenting from denial of cert.).

376 *Friedman*, 136 S. Ct. at 447.

377 *Id.* at 448.

378 *Id.* at 449.

379 *Id.*

380 *Id.*

with the Court's summary reversal of decisions that disregarded other constitutional precedents.[381]

D. The Fourth Circuit Decides Kolbe

Maryland applies the term "assault weapon" to what it calls an "assault long gun," which includes a list of some 68 rifles and shotguns identified mostly by the names of manufacturers and models.[382] The term "assault weapon" also encompasses a "copycat weapon," which is defined generically as:

> a semiautomatic centerfire rifle that can accept a detachable magazine and has any two of the following:
>
> 1. a folding stock;
>
> 2. a grenade launcher or flare launcher; or
>
> 3. a flash suppressor . . . .[383]

Given that flares are distress signals for emergencies, it is unclear why this feature was included. A folding stock does not make a rifle concealable, and in any event gives it the profile of a very large pistol. A flash suppressor reduces blinding flash when firing in low light conditions, which could occur in home defense or hunting coyote at night. A grenade launcher means nothing without a grenade, and both grenades and grenade launchers are so strictly regulated by the federal law as to be virtually banned.[384] No evidence exists that these features have ever played any role in facilitating a crime.

If this is the list of objectionable features, one is left to wonder why the specifically named models of assault long guns are objectionable. While most of those named appear to be semiautomatic centerfire rifles that can accept a detachable magazine, they need not have any of the listed generic features, *i.e.*, a folding stock, grenade or flare launcher, or flash suppressor. Moreover, this list of generic features is strikingly small compared to those of other jurisdictions, and it does not include the protruding pistol grip, either with or without a stock. This again illustrates the arbitrary and contradictory nature of the features that legislative bodies use to define the slippery term "assault weapon."

Maryland's ban was challenged in *Kolbe v. Hogan*. On appeal, a panel of the Fourth Circuit found that "law-abiding citizens commonly possess semi-automatic rifles such as the AR-15."[385] The court found *Heller II*'s claim that such rifles may be banned because other weapons are available for home defense as "plainly contrary to the Supreme Court's logic and statements in *Heller*. . . ."[386] Holding that the banned rifles and magazines are protected by the Second Amendment, the court remanded the case for further consideration under the exacting strict scrutiny standard.[387]

However, in an en banc rehearing, a majority held that the banned firearms are not protected by the Second Amendment because they are "exceptionally lethal weapons of war," and that the AR-15 and other listed firearms "are unquestionably most useful in military service."[388] It further claimed that "[t]he difference between the fully automatic and semiautomatic versions of those firearms is slight."[389] The court transposed *Heller*'s reference to "M-16 rifles and the like" (which the *Heller* Court said are fully automatic and not in common use) to say that the banned rifles are "like" "M-16 rifles" that are not protected by the Second Amendment.[390]

Instead of discussing the features of a copycat weapon as defined in the law at issue, the court dramatically singled out nine features, six of which aren't listed in the statute: "flash suppressors, which are designed to help conceal a shooter's position by dispersing muzzle flash," "barrel shrouds, which enable 'spray-firing' by cooling the barrel and providing the shooter a 'convenient grip,'" "folding and telescoping stocks, pistol grips, grenade launchers, night sights, and the ability to accept bayonets and large-capacity magazines."[391] The court lists these "military combat features" in the opinion without providing any further explanation of how they make the banned firearms more "lethal" than other semiautomatic firearms.[392] Nor did the court explain how these firearms were "exceptionally lethal" even though, due to the relatively small caliber of most "assault weapons," they are typically less powerful than hunting rifles routinely used across the nation to shoot deer and other medium-sized game.[393]

The dissenting opinion by Judge William Traxler, joined by three other judges, emphasized *Heller*'s holding that firearms in common use are protected by the Second Amendment.[394] The banned semiautomatic rifles overwhelmingly meet the common-use test, as over 8 million were made in or imported into the U.S. during 1990-2012, and accounted for 20% of retail firearm sales in 2012.[395] Moreover, these semiautomatic rifles "are not in regular use by any military force, including the United States Army, whose standard-issue weapon has been the fully automatic M-16- and M-4-series rifles."[396] Contrary to the majority's assertion that the difference is slight, a U.S. Army manual states that M-4 and

381 *Id.* at 449-50.

382 Md. Code, Criminal Law, § 4-301(b) & (d); Public Safety, § 5-101(r)(2).

383 Md. Code, Criminal Law, § 4-301(h)(1)(i). "Copycat weapon" also includes a semiautomatic centerfire rifle that has "a fixed magazine with the capacity to accept more than 10 rounds" or "an overall length of less than 29 inches." § 4-301(h)(1)(ii) & (iii).

384 26 U.S.C. § 5845(f).

385 Kolbe v. Hogan, 813 F.3d 160, 174 (2016).

386 *Id.* at 183.

387 *Id.* at 182-84.

388 *Kolbe*, 849 F.3d at 121.

389 *Id.* at 125.

390 *Id.* at 135 (citing *Heller*, 554 U.S. at 627).

391 *Id.* at 125.

392 *Id.* at 137.

393 Smith, *supra* note 17, at 359.

394 *Kolbe*, 849 F.3d at 155 (Traxler, J., dissenting).

395 *Id.* at 153.

396 *Id.* at 158.

M-16 rifles fire only 45 to 65 rounds per minute in semiautomatic mode, but fire 150 to 200 rounds per minute in fully automatic.[397]

As noted, the *Kolbe* majority barely mentioned in passing what it incorrectly supposed to be the features of the banned rifles, and it offered virtually no comment on why those features are supposedly dangerous.[398] As the dissent explained, these features "increase accuracy and improve ergonomics."[399] In particular:

> A telescoping stock, for example, permits the operator to adjust the length of the stock according to his or her physical size so that the rifle can be held comfortably. . . . Likewise, a pistol grip provides comfort, stability, and accuracy, . . . and barrel shrouds keep the operator from burning himself or herself upon contact with the barrel. And although flash suppressors can indeed conceal a shooter's position—which is also an advantage for someone defending his or her home at night—they serve the primary function of preventing the shooter from being blinded in low-lighting conditions.[400]

The dissent would have held that the banned rifles are commonly possessed arms protected by the Second Amendment. It added, "Once it is determined that a given weapon is covered by the Second Amendment, then obviously the in-home possession of that weapon for self-defense is core Second Amendment conduct and strict scrutiny must apply to a law that prohibits it."[401] (The dissent did not discuss the alternative test of text, history, and tradition.) The dissent put the majority opinion in perspective:

> Today the majority holds that the Government can take semiautomatic rifles away from law-abiding American citizens. . . . [T]he Government can now tell you that you cannot hunt with these rifles. The Government can tell you that you cannot shoot at targets with them. And, most importantly, the Government can tell you that you cannot use them to defend yourself and your family in your home. In concluding that the Second Amendment does not even apply, the majority has gone to greater lengths than any other court to eviscerate the constitutionally guaranteed right to keep and bear arms.[402]

E. The First Circuit's Decision in Worman

Massachusetts bans what it derogatorily calls "assault weapons," defined in part as "the weapons, of any caliber, known as . . . Colt AR-15" and other makes and models and "copies or duplicates" thereof.[403] It incorporates the same definitions that applied in the now-expired federal law, which in turn included the following partial generic definitions:

> A semiautomatic rifle that has an ability to accept a detachable magazine and has at least 2 of—
>
> (i) a folding or telescoping stock;
>
> (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;
>
> (iii) a bayonet mount;
>
> (iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and
>
> (v) a grenade launcher . . . .[404]

Also banned are "large capacity feeding devices," defined as a magazine "capable of accepting . . . more than ten rounds of ammunition or more than five shotgun shells."[405]

These provisions were enacted in 1998. In 2016, without any change in the statute, the attorney general issued an Enforcement Notice expanding the meaning of "copies or duplicates" of the listed firearms to include firearms in which (a) the "internal functional components are substantially similar" to a listed firearm, or (b) the receiver "is the same as or interchangeable with" that of a listed firearm.[406]

The statute and the Enforcement Notice were challenged in *Worman v. Healey*. The district court followed *Kolbe*, holding that AR-15 rifles are "like" M-16 rifles, are "most useful in military service," and thus have no Second Amendment protection.[407] The court listed some "characteristics of a military weapon," such as "'folding/telescoping stocks,' advantageous for military purposes"—but equally advantageous for civilian purposes.[408] It also mentioned "pistol grips designed to allow the shooter to fire and hold the weapon or aid in one-handed firing of the weapon in a combat situation"—but also helpful in freeing the other hand to call 911.[409] The court also said, "The AR-15 is also lightweight, a characteristic important for the military"—but also preferable for many civilians, including women, the handicapped, and the elderly.[410] "Other similarities between the M16 and the AR-15"

397 *Id.* (citing U.S. Dep't of Army, Field Manual 3-22.9, Rifle Marksmanship, M16-/M4-Series Weapons, Table 2-1 (2008)). The majority's focus on the semiautomatic feature being dangerous and unusual actually is a non-sequitur, because Maryland does not ban any firearm just for being semiautomatic. While one can only guess at what features the 68 named assault long guns have in common, the generic definition of a copycat weapon is "a semiautomatic centerfire rifle that can accept a detachable magazine" *with at least two other features*. Md. Code, Criminal Law, § 4-301(h)(1)(i). Semiautomatic rifles without two such features, if not on the list of named rifles, are not restricted at all. So nothing *Kolbe* says about the rate of fire of a semiautomatic is even relevant.

398 *Kolbe*, 849 F.3d at 125, 137.

399 *Id.* at 158-59 (Traxler, J., dissenting).

400 *Id.* at 159.

401 *Id.* at 160.

402 *Id.* at 151.

403 M.G.L. 140 § 121.

404 *Id.* (incorporating 18 U.S.C. § 921(a)(30) (expired)).

405 *Id.*

406 Worman v. Healey, 293 F. Supp. 3d 251, 258 (D. Mass. 2018).

407 *Id.* at 264 (citing *Kolbe*, 849 F.3d at 136). While rejecting a vagueness challenge to the Notice, *id.* at 267-71, the court did not explain how an ordinary person would know that a firearm is a copy or duplicate under these criteria.

408 *Id.* at 265.

409 *Id.* (internal quotation marks and citation omitted).

410 *Id.*

include "the ammunition," "[t]he way in which it is fired and the availability of sighting mechanisms," "[t]he penetrating capacity," and "[t]he velocity of the ammunition as it leaves the weapon"—even though many civilian firearms can use the same cartridge as the AR-15.[411] The court disregarded the unique feature of military rifles: their ability to fire in the full automatic mode.

The district court concluded that "because the undisputed facts convincingly demonstrate that AR-15s and LCMs are most useful in military service, they are beyond the scope of the Second Amendment."[412] That was a rather odd conclusion given that it is "undisputed" that the military services exclusively use fully automatic firearms and do not use semiautomatic AR-15s.

The First Circuit affirmed in *Worman*, but it did not agree with the assertion that the banned firearms are "like" M-16 machine guns.[413] It assumed without deciding that "the proscribed weapons have some degree of protection under the Second Amendment" and that "the Act implicates the core Second Amendment right of self-defense in the home by law-abiding, responsible individuals."[414] It claimed that "*Heller* provides only meager guidance," despite its "common use" test and the acknowledgment that in 2013 "nearly 5,000,000 people owned at least one semiautomatic assault weapon."[415] It found the record sparse as "to actual use" of the banned firearms and magazines for self-defense in the home.[416]

The court went on to uphold the law under intermediate scrutiny on the basis that the ban does not "heavily burden" self-defense in the home.[417] It prohibits "only" the named firearms, magazines of a certain capacity, and firearms with "certain combat-style features."[418] The court did not explain what makes any of the specific features "combat-style." In the course of its intermediate scrutiny analysis, the court asserted that "such weapons can fire through walls."[419] But that would depend on the caliber, it could be said about any firearm, and the act bans the described firearms "of any caliber."[420] This assertion is one among many that show how courts are often content to be ignorant of the facts upon which they are supposedly basing their decisions about laws that burden constitutional rights. The First Circuit upheld the Massachusetts ban without any discussion, meaningful or otherwise, of the specific features that cause a firearm to fall into the assault weapon category and therefore lose Second Amendment protection.

411 *Id.*

412 *Id.* at 266.

413 *Worman*, 922 F.3d at 36.

414 *Id.* at 30.

415 *Id.* at 35.

416 *Id.*

417 *Id.* at 37.

418 *Id.*

419 *Id.*

420 M.G.L. 140 § 121 ("Assault weapon").

F. How the District for the Northern Mariana Islands Got It Right

The issue of how the Second Amendment applies to assault weapon bans is far from settled. That is demonstrated by the dissents by then-Judge Kavanaugh in *Heller II*, Judge Manion and Justice Thomas (joined by Justice Scalia) in *Friedman*, and Judge Traxler in *Kolbe*. But it fell to the U.S. District Court for the Northern Mariana Islands—which sits in Saipan, the site of a hard-fought American victory against Japan in 1944—to get the law right in a binding decision.

The ban at issue listed the usual features seen in other assault weapon bans such as a pistol grip, telescoping stock, and flash suppressor.[421] In a case styled *Murphy v. Guerrero*, Chief Judge Ramona V. Manglona found that the law failed intermediate scrutiny because "the banned attachments actually tend to make rifles easier to control and more accurate—making them safer to use."[422] There was expert evidence from an officer of the Department of Public Safety, who testified that a flash suppressor "reduces noise and potentially increases accuracy," and that "there is no law enforcement concern for pistol grips or thumbhole stocks, which simply assist a shooter in absorbing recoil."[423] Illustrations showed legal and banned rifles to be, aside from these features, essentially the same.

Regarding a telescoping stock, the expert confirmed that "there is essentially no difference between a short standard stock and a shortened retractable stock, except that the former is legal and the latter is not. . . . Both would be legal under federal law, which requires that rifles be 26 inches in length."[424] An illustration showed a rifle with its stock retracted to be no shorter than one with a fixed stock.

Judge Manglona concluded that "none of the Commonwealth's evidence shows that restricting any particular attachment makes any particular public safety impact," but "[t]o the contrary, it appears that several of the attachments would actually make self-defense safer for everyone."[425] She added, "To the extent that the Commonwealth worries about stray bullets striking innocent bystanders, features that make guns more accurate—as it appears most of the grips and the flash suppressor may do—actually serve public safety by making such stray shots less likely."[426]

While the appellate court opinions upholding bans include little meaningful discussion of the actual verboten features, Judge Manglona's opinion details each feature and explains, even using illustrations, why each serves lawful purposes and is protected by the Second Amendment. Hers is a far cry from the overly-lengthy

421 Murphy v. Guerrero, No. 1:14-CV-00026, 2016 WL 5508998, *18 (D. N. Mariana Islands Sept. 28, 2016).

422 *Id.*

423 *Id.* at *19.

424 *Id.*

425 *Id.* at *19-20.

426 *Id.* at *20.

appellate opinions with endless discussion of levels of scrutiny that never quite get to the particulars of what is banned and why.[427]

V. Conclusion

By now the pattern should be clear. Legislatures prohibit so-called assault weapons, but that term has no fixed meaning, and thus its features can be defined in contradictory and meaningless ways. Cook County bans generically a rifle with pistol grip and no stock, Massachusetts bans a rifle with pistol grip and a stock, and Maryland does not ban either one. The courts reviewing these bans repeat the terms "assault weapon" and "military style," throw in some intermediate-scrutiny hocus pocus, and *voilà*—no Second Amendment violation. Rarely is there any meaningful analysis of the specific features that are supposedly so dangerous and unusual that they lose Second Amendment protection.

Beginning in the 1960s, the Second Amendment was a subject never to be discussed in polite company, and some judges (and Justices) reacted to the *Heller* decision with disdain.[428] A significant element of the judiciary is only too happy to uphold any and every restriction on Second Amendment rights, no matter how outlandish.

Perhaps the most extreme example is *NYSRPA v. City of New York*, which upheld New York City's prohibition on transporting an unloaded, inaccessible, locked handgun away from the premises where it is licensed, on the basis that public safety so required.[429] After the Supreme Court granted certiorari, the city amended the law to make it slightly less restrictive, leading the Court to hold the case to be moot.[430] Although he concurred in the opinion, Justice Kavanaugh cited his *Heller II* dissent (in which as a D.C. Circuit judge he would have invalidated the District of Columbia's assault weapon ban) and expressed "concern that some federal and state courts may not be properly applying *Heller* and *McDonald*."[431] Justice Alito, joined by Justices Gorsuch and Thomas, dissented. Besides finding the controversy still live, Justice Alito would have invalidated the law, partly on the basis that the city "points to no evidence of laws in force around the time of the adoption of the Second Amendment" like the one at issue.[432] That historical approach would doom any of today's rifle bans.

Gun design is not a required class in law school, and it is no surprise that judges are not experts in the subject. Given the political and media adoption of the term "assault weapon," it is no small wonder that judges who know little about firearms may be readily persuaded to uphold prohibitions. The complexity of the assault weapon definitions contributes to judges' failure to systematically and seriously review the specifics to decide whether bans are really warranted. Faced with ten or twenty generic definitions together with scores of mostly unfamiliar firearm names, not to mention "copies or duplicates" thereof, the easiest route is to throw up one's hands and defer to the legislature. But that forfeits the judicial function.

Judicial review could perhaps be simplified if litigants would forego across-the-board challenges and focus only on one or two features of the banned rifles. The tendency has been to challenge everything in a statutory ban all at once, which makes it easier for courts to avoid serious discussion of any specific feature. If the validity of a single feature were to be challenged as a starting point, it could be more difficult for a court to dismiss the legitimacy of the feature with a single phrase of jargon. The ban on that specific feature would have to be justified. And that would prove impossible.

The notorious protruding pistol grip would be a good choice for such focus, particularly since it is a defining feature of the AR-15 rifle. The urban myth that the purpose of this design is to spray fire from the hip evaporates when seriously discussed. The purpose of the pistol grip is to enable the user to hold the rifle comfortably to take a precise shot. That's the case regardless of whether the rifle is semiautomatic or—as Olympic competitors know—a bolt-action, single-shot.

In a broader sense, it is important that courts not spray-fire from the hip in denigrating or belittling unpopular constitutional rights. To have a checklist of excuses to uphold every restriction that comes down the pike is to disrespect the Constitution. Going down that path on the Second Amendment creates an atmosphere in which other constitutional liberties are endangered.

All of that said, decisions upholding bans must be put in context. That only six states ban certain long guns and handguns as assault weapons, and that 44 states do not, reflects a national, popular consensus that such bans violate the Second Amendment and are ineffectual. Judges from the mainstream states have had no occasion to opine on the issue because no such bans exist in those states. Instead, many of these states have a long tradition of judicial recognition of Second Amendment rights. The absence of prohibitions and correspondingly of judicial decisions across the heartland is a silence that is deafening.

427 Judge Manglona also authored the opinion declaring unconstitutional the last handgun ban in an American jurisdiction. Radich v. Guerrero, 2016 WL 1212437 (D. N. Mariana Islands Mar. 28, 2016).

428 J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 99 Va. L. Rev. 253 (2009); Richard Posner, *In Defense of Looseness*, New Republic, Aug. 27, 2008, https://newrepublic.com/article/62124/defense-looseness. *See also* John Paul Stevens, *The Supreme Court's Worst Decision of My Tenure*, The Atlantic, May 14, 2019, https://www.theatlantic.com/ideas/archive/2019/05/john-paul-stevens-court-failed-gun-control/587272/; Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. Times, July 10, 2016 ("I thought *Heller* was a very bad decision."), https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html.

429 New York State Rifle & Pistol Association, Inc. v. City of New York, 883 F.3d 45 (2018) (not an infringement to prohibit taking a handgun out of one's home), *vacated & remanded*, 140 S. Ct. 1525 (2020).

430 *Id.* at 1526.

431 *Id.* at 1527 (Kavanaugh, J., concurring) (citing *Heller II*, 670 F.3d 1244 (Kavanaugh, J., dissenting)).

432 *Id.* at 1541 (Alito, J., dissenting).

Note: As this article goes to press, U.S. District Judge Roger T. Benitez just declared California's "assault weapon" ban violative of the Second Amendment. This 94-page opinion, rendered after a full trial of the issue, is highly persuasive. The case is *Miller v. Bonta*, and it opens with these words:

> Like the Swiss Army Knife, the popular AR-15 rifle is a perfect combination of home defense weapon and homeland defense equipment. Good for both home and battle, the AR-15 is the kind of versatile gun that lies at the intersection of the kinds of firearms protected under *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *United States v. Miller*, 307 U.S. 174 (1939). Yet, the State of California makes it a crime to have an AR-15 type rifle. Therefore, this Court declares the California statutes to be unconstitutional.[433]

The judgment was immediately appealed to the Ninth Circuit.

433 2021 WL 2284132, *1 (S.D. Cal. 2021).

The Race Card in ARPA's Food Supply Deck

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Other Views:

• Elazar Sontag, *Congress's Restaurant Revitalization Fund Is Out of Money and Restaurants Are Still in Need*, Eater, July 2, 2021, https://www.eater.com/2021/5/18/22442063/restaurant-revitalization-fund-sba-applications-exceed-funding.

• Elliot Mincberg, *Trump Judge Grants Preliminary Injunction Against Important Part of Congressional COVID Relief Law and Indicates it is Unconstitutional: Confirmed Judges, Confirmed Fears*, People for the American Way, May 28, 2021, https://www.pfaw.org/blog-posts/trump-judge-grants-preliminary-injunction-against-important-part-of-congressional-covid-relief-law-and-indicates-it-is-unconstitutional-confirmed-judges-confirmed-fears/.

• Ariana Figueroa, *Warnock works to remedy decades of USDA discrimination against Black farmers*, Wisc. Examiner, May 3, 2021, https://wisconsinexaminer.com/2021/05/03/warnock-works-to-remedy-decades-of-usda-discrimination-against-black-farmers/.

• Michael Morley, *Plaintiff-Oriented Injunctions in Equal Protection Cases: Wynn v. Vilsack and the American Rescue Plan Act of 2021*, Notice & Comment, June 28, 2021, https://www.yalejreg.com/nc/wynn-v-vilsack-and-the-american-rescue-plan-act-of-2021/.

It is an old aphorism that a prudent person should not watch the making of sausage or legislation. In this era of mega-bills running hundreds of pages and involving huge sums of money, the analogy of sausage to legislation is especially fitting. That is certainly true of the fourth installment of COVID-19 relief legislation, the American Rescue Plan Act of 2021 (ARPA).[1] This law was passed by Congress with little debate on a near-party-line vote and signed by a recently inaugurated President Joe Biden. It appropriated $1.9 trillion for various beneficiaries, some justified by the extraordinary circumstances of the pandemic, and some the reflection of special interests hiding in its hastily assembled 658 pages.

Two ARPA provisions appear to violate the Due Process Clause of the Fifth Amendment, which prohibits denying to any person the equal protection of the laws.[2] First, the law provides for a $28.6 billion Restaurant Revitalization Fund (RRF), to be administered by the Small Business Administration (SBA).[3] The SBA adopted fund dispersal guidelines that prioritized restaurants owned by women, racial minorities, and veterans. For the first 21 days of providing this RRF money, the SBA excluded restaurants owned by non-veteran white males from eligibility.[4] Second, ARPA provides for forgiving up to 120 percent of United States Department of Agriculture (USDA) loans to "socially disadvantaged" farmers and ranchers, defining social disadvantage by race and ethnicity and excluding similarly situated whites.[5] These provisions were challenged early in their implementation process.

I. SBA's Race and Sex Priorities

There is no question that the food service industry was hurt badly by COVID-19, and for many of those businesses, recovery will not be quick. RRF money was appropriated to help the recovery process, but the scale of the industry will make it difficult to make a dent. In 2018, there were 660,775 restaurants in the United States.[6] Moreover, SBA's definition of food business beneficiaries is quite expansive: in addition to conventional restaurants, food trucks, caterers, bars, bakeries, wineries, distilleries, and other food service establishments are eligible for

1 Pub. L. No. 117-2. President Biden signed ARPA on March 11, 2021.

2 United States v. Windsor, 570 U.S. 744, 774 (2013).

3 ARPA, § 5003, 15 U.S.C.A. § 9009c (Support for Restaurants). *See id.* at § 9009c(b) (Restaurant Revitalization Fund).

4 *See id.* at § 9009c(c)(3) (Priority in Awarding Grants).

5 ARPA, § 1005 (Farm Loan Assistance for Socially Disadvantaged Farmers and Ranchers).

6 *Number of Restaurants in the United States from 2011 to 2018*, Statista, https://www.statista.com/statistics/244616/number-of-qsr-fsr-chain-independent-restaurants-in-the-us/.

relief money.[7] Each qualifying business is eligible for up to $10 million in grants, which have to be expended by recipients by March 11, 2023.[8] Even the $28.6 billion appropriated will not cover all the food industry's needs.

SBA could have defined its grant priorities economically or epidemiologically, for example by providing relief to individual firms according to the states or regions that were hurt most by COVID-19. Since the agency believed restaurants owned by women and minorities were disproportionately harmed by the pandemic,[9] it could have distributed funds to the most impacted zip codes, which would have been a race- and sex-neutral plan raising no constitutional issues. Instead, following the relevant ARPA statutory provision, SBA created priorities based on identity group categories used in various other federal programs. Small businesses owned at least 51% by women, "socially and economically disadvantaged individuals," or veterans were put at the head of the grant distribution line.[10]

The term "socially and economically disadvantaged individuals" is a euphemism for racial and ethnic minorities. It is used in other SBA programs, federal transportation disadvantaged business enterprise (DBE) programs,[11] numerous state and local minority- and women-owned business enterprise (MWBE) programs, and now in the USDA's debt relief program. Decades before Critical Race Theory catapulted into the nation's discourse by dividing oppressed and oppressors into racial categories, a series of obscure bureaucratic decisions created a list of races and ethnicities that presumptively determined who were "socially and economically disadvantaged" persons.[12] The list developed almost three decades ago has almost never been altered and now includes:

> Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal) . . . .[13]

Persons identified with these racial or ethnic groups are presumed disadvantaged unless someone comes forward "with credible evidence to the contrary."[14] These categories have not been revisited and exclude U.S. citizens with roots in several Asian and Middle Eastern countries who might objectively be "socially and economically disadvantaged," except that they are bureaucratically considered to be "white." Nevertheless, in all of the litigation regarding federal, state, and local contracting and aid preferences, the group list above has almost never been challenged,[15] and the cases have been decided on other issues.

According to SBA rules, during the initial application period for RRF funds, only prioritized food businesses—those owned by racial minorities, women, or veterans—could apply.[16] After that, relief applications by a food business owned by a white male could be processed. There are about 40,000 Chinese and a similar number of Mexican restaurants alone in the U.S.,[17] so if white males remained relegated to the back of the application line, they might have been left out altogether.

The RRF race and sex preferences were almost immediately challenged in Texas and Tennessee. The plaintiffs, however, faced a difficult litigation problem. SBA had established a limited window of 21 days—May 3-24—for processing applications for its priority groups.[18] A few days into the program window, SBA announced that $2.7 billion had already been distributed

7 ARPA, § 5003(a)(4) (defining "eligible entity").

8 *Id.* at (c)(4)(A)(i). *See also* Brendan Tuytel, *A Guide to the Restaurant Revitalization Fund*, Bench, Apr. 28, 2021, https:/bench.co/blog/operations/restaurant-revitalization-fund-grant/.

9 *See* Vitolo v. Guzman, 999 F.3d 353, 2021 WL 2172181, at *22-23 (6th Cir. May 27, 2021) ("Moreover, minority-owned businesses were more likely to be in areas with higher rates of COVID-19 infections.").

10 ARPA, § 5003(c)(3)(A).

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

12 *See* George R. La Noue & John Sullivan, *Presumptions for Preferences: The Small Business Administration's Decisions on Groups Entitled to Affirmative Action,* 6 J. Pol'y History 439 (Fall 1994). *See also* George R. La Noue & John Sullivan, *Gross Presumptions,* 41 Santa Clara L. Rev. 103 (2000).

13 13 C.F.R. § 124.103(b)(1) (establishing a "rebuttable presumption" that members of these groups are "socially disadvantaged"). *See also* 7 U.S.C. Sect. 2279(a)(5) (defining "socially disadvantaged farmer or rancher" as one who "is a member of a socially disadvantaged group") and *id*. at (a)(6) (defining "socially disadvantaged group" as one "whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities").

14 13 C.F.R. § 124.103(b)(3). Judge Richard Posner noted, "The presumption can be rebutted, but given the difficulty of establishing whether a particular individual is socially and economically disadvantaged the availability of the presumption is likely to be decisive." Milwaukee County Pavers Ass'n v. Fielder, 922 F.2d 418 (7th Cir. 1991).

15 Justice Sandra Day O'Connor noted in *Croson* that Richmond, following the then-current federal categories, had included "Spanish-speaking, Oriental, Indian, Eskimo and Aleut persons" as beneficiaries of its race-based goals, which she called a "random inclusion" of groups "that may never have suffered from discrimination in the city's construction industry." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 506 (1989). Because of that statement, lawyers now consider that the narrow tailoring prong of strict scrutiny requires evidence of current discrimination against each specific racial or ethnic group of beneficiaries.

16 ARPA, § 5003(c)(3).

17 Roberto A. Ferdman, *Why delicious Indian food is surprisingly unpopular in the U.S.*, Washington Post, March 4, 2015, https://www.washingtonpost.com/news/wonk/wp/2015/03/04/why-delicious-indian-food-is-surprisingly-unpopular-in-the-u-s/. This assumes that Mexican and Chinese restaurants are Mexican- and Chinese-owned.

18 ARPA, § 5003(c)(3)(A). U.S. Small Bus. Admin., Restaurant Revitalization Funding Application, Form 3172 (effective April 19, 2021), *available at* https://www.sba.gov/document/sba-form-3172-restaurant-revitalization-funding-application-sample.

to 21,000 restaurants whose owners were in its priority groups.[19] For restaurants owned by non-veteran white males to obtain any relief, the litigation had to proceed on a very fast track, which normally handicaps plaintiffs.

A. Greer's Ranch Café v. Guzman

In Texas, Greer's Ranch Café, a small business that lost almost $100,000 during the pandemic, sued the SBA over its race and sex preferences.[20] Philip Greer, a white male, prepared an application for RRF, but he did not file it because his race and sex barred him from being considered during the limited priority window. Consequently, he sought a Temporary Restraining Order (TRO) to bar RRF awards based on race and sex. Such orders are considered "an extraordinary remedy" since federal judges are usually reluctant to interfere early in the process of administering federal programs.[21] Judge Reed O'Connor laid out four requirements the plaintiff had to satisfy to be entitled to a TRO: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm; (3) the balance of hardships weighs in the movant's favor; and (4) the issuance of the preliminary injunction will not disserve the public interest.[22] Judge O'Connor found that Greer's Ranch Café met all four criteria.[23]

There was another hurdle that Greer's restaurant had to overcome. Since the restaurant had not applied for RRF funds, did it have standing? The Department of Justice (DOJ)—representing Guzman and the SBA—argued it did not. Still, the evidence of the restaurant's financial loss due to COVID-19 and that the owner's declared intent to file was deterred by SBA priorities led the court to conclude it had standing.[24]

Both parties agreed strict scrutiny was the relevant standard for review. Following *Croson* and *Adarand*, this standard requires the government to show a compelling interest to justify race and sex preferences, and that those preferences are narrowly tailored.[25] Typically, in a DBE or MWBE case, the issue of compelling interest turns on the validity of the findings of a specific and recent disparity study.[26] No such contemporary study exists on a national scale for the restaurant industry. The last attempt at such a national study was conducted in 1998 by the U.S. Department of Commerce.[27] The 12-page Benchmark Limits study compared the relative availability of minority firms to their utilization in federal contracting.[28] The study found a mixed pattern of under- and over-utilization, but it never concluded why those patterns existed. After that study, a federal district court struck down the application of a racial preference in a military equipment simulation contract because:

> The fact that Section 8(a) is constitutional on its face, however, does not give the SBA . . . or any other governmental agency carte blanche to apply it without reference to the limits of strict scrutiny. Rather agencies have a responsibility to decide if there has been a history of discrimination in a particular industry.[29]

So the DOJ was forced to justify the RRF race and sex priorities according to strict scrutiny with the evidence at hand. It cited a report by the House Committee on Small Business which found that, during the pandemic, "[w]omen—especially mothers and women of color—are exiting the workforce at alarming rates, [and] eight out of ten minority-owned businesses are on the brink of closure . . . ."[30] The Committee entered into the record several studies and expert reports that found minority- and women-owned businesses generally were more likely to encounter capital and credit problems.[31] Judge O'Connor, however, concluded that the SBA's evidence was insufficient with respect to restaurants because "it lacks the industry-specific inquiry need to support a compelling interest for a government-imposed racial classification."[32]

Nevertheless, although the court found that the RRF race and sex priorities did not have the required compelling interest, the plaintiff had not adequately briefed the need for relief that would extend beyond his personal situation to an injunction of the program as a whole.[33] The only remedy that could be ordered was an injunction that the plaintiff be permitted to file an application during the remainder of the priority period and

19 Press Release, SBA, *Recovery for the Smallest Restaurants and Bars: Administrator Guzman Announces Latest Application Data Results for the Restaurant Revitalization Fund*, May 12, 2021, https://www.sba.gov/article/2021/may/12/recovery-smallest-restaurants-bars-administrator-guzman-announces-latest-application-data-results.

20 Complaint, Greer's Ranch Café v. Guzman, No. 4:21-cv-00651 (N.D. Tex. filed May 13, 2021), *available at* https://wordpress.aflegal.org/wp-content/uploads/2021/05/1-Greers-Ranch-Cafe-v.-Guzman-Complaint-5.13.2021.pdf. Greer's Ranch Café is represented by America First Legal, a new nonprofit litigation firm.

21 Greer's Ranch Café v. Guzman, No. 4:21-cv-00651-O, 2021 WL 2092995, at *4 (N.D. Tex. May 18, 2021) (order granting TRO), *available at* https://s3.documentcloud.org/documents/20773795/order-granting-tro-against-biden-administration.pdf (citing Albright v. City of New Orleans, 46 F. Supp. 2d 523, 532 (E.D. La. 1999)).

22 *Id.* at *5.

23 *Id.* at *17.

24 *Id.* at *6-10.

25 *Croson*, 488 U.S. 469; Adarand v. Pena, 515 U.S. 200 (1995).

26 George R. La Noue, *Public Contracting Litigation after* Croson*: Data, Disparities & Discrimination,* 22 Federalist Soc'y Rev. 8 (2021), *available at* https://fedsoc.org/commentary/publications/public-contracting-litigation-after-croson-data-disparities-discrimination.

27 George R. La Noue, *To the "Disadvantaged" Go the Spoils?*, 138 The Public Interest 91 (Winter 2000).

28 Small Disadvantaged Business Procurement Reform of Affirmative Action in Federal Procurement, 63 Fed. Reg. 35,714 (June 30, 1998) (Department of Commerce Benchmark Study).

29 DynaLantic Corp, v. Department of Defense, 885 F. Supp. 2d. 237, 282 (D.D.C. 2012).

30 H.R. Rep. 117-7, at 2 (2021), *available at* https://www.congress.gov/117/crpt/hrpt7/CRPT-117hrpt7.pdf.

31 *Greer's Ranch Café*, 2021 WL 2092995, at *12.

32 *Id.* at *14.

33 *Id.* at *17 n.11.

that SBA be required to consider his application as though it were filed on May 13, the date of his complaint.[34]

B. Vitolo v. Guzman

Even without a judicially recognized compelling interest, SBA dodged the Texas bullet regarding wider remedies, but it was soon back in court over the same issues. Antonio Vitolo, co-owner of Jake's Bar and Grill LLC, sued the SBA in the Eastern District of Tennessee challenging the same race and sex preferences.[35] Because of the pandemic, Vitolo's restaurant had an estimated loss of about $104,000. The establishment was owned 50% by Antonio Vitolo and 50% by his wife. Ironically, Vitolo's wife is Hispanic, so if 51% of the business had been put in her name, Jake's Bar would have eligible for SBA's priorities.[36]

The plaintiffs sought a TRO prohibiting SBA from paying out RRF grants unless they were processed in a race- and sex-neutral manner. They also asked for a declaratory judgment that SBA's race and gender classifications are unconstitutional, together with a permanent order enjoining SBA from using these factors in determining eligibility or priorities in distributing RRF grants. In these complaints, all the central constitutional issues were in play.

Judge Travis McDonough began his opinion in *Vitolo v. Guzman* by describing the economic chaos the pandemic had caused.[37] He noted House committee testimony by economist Lisa Cook that 27% of small white-owned firms reported in a survey prior to the pandemic they were at risk or in distress, while that was true of 49% of small Hispanic-owned firms and 57% of small black-owned firms.[38] She attributed that disparate outcome to the fact that white-owned firms have better relationships with large banks.[39] In upholding the SBA priorities, the judge described other committee testimony about the general problems minority- and women-owned small businesses faced.[40] There was little information specific to restaurants, however, and no pre- or post-pandemic disparity study which, according to *Croson*, would have had to control for the qualifications, willingness, and ability of the restaurant businesses being compared.[41]

Vitolo then made an Emergency Motion for Injunction Pending Appeal and to Expedite Appeal to the Sixth Circuit.[42] The motion was the equivalent of a Hail Mary football pass since the plaintiff was asking the appellate court to interrupt its appellate calendar to render an immediate opinion on an extremely important constitutional issue involving billions of dollars. The panel was split in its response. Judges Amul Thapar[43] and Alan Eugene Norris saw the immediate need of hearing the case since "[t]he key to getting a grant is to get in the queue before the money runs out."[44] They found the case was not moot because "[t]here is a real risk that the RRF funds would run out before Vitolo's application could be processed."[45] In fact, SBA subsequently reported to a restaurant industry publication that as of nine days after applications opened, more than 260,000 businesses had already applied for relief funds totaling more than $65 billion.[46]

The majority then considered the four factors for granting a preliminary injunction and came to the same conclusion as the Texas court.[47] In evaluating the likelihood that the plaintiff would win on the merits, the majority noted *Croson*'s binding holding that governmental racial classifications cannot rest on "a generalized assertion that there has been past discrimination in an entire industry."[48] The government seeking to defend a race or gender preference must provide evidence of intentional discrimination,[49] specifically active or passive governmental discrimination.[50] The majority found that the SBA rules were based only on general allegations of "societal discrimination," which were not sufficient to support a compelling interest in reversing the effects of past discrimination.[51]

Further, the majority noted that the government did not justify the inclusion of the specific racial and ethnic groups on its preferred list, which was both overinclusive and underinclusive.[52] Judge Thapar's opinion made a point no other judge has publicly raised about the socially and economically disadvantaged group

34 *Id.* at *17. *See also* Blessed Cajuns v. Guzman, No. 4:2021cv00677 (N.D. Tex. May 28, 2021) (order granting preliminary injunction). In *Blessed Cajuns*, a similar case in the same district styled as a class action, Judge O'Connor again found that the plaintiffs met the criteria for a preliminary injunction.

35 Complaint, *Vitolo*, 999 F.3d 353, *available at* https://will-law.org/wp-content/uploads/2021/05/Vitolo-v-Guzman-Complaint-Stamped.pdf. The plaintiffs are represented by the Wisconsin Institute for Law & Liberty (WILL).

36 *Vitolo*, 999 F.3d 353, at *2.

37 Vitolo v. Guzman, 2021 WL 2132106, at *1 (E.D. Tenn. May 25, 2021).

38 *Id.* at *3.

39 *Id.*

40 *Id.* at *3-4 (citing *Access Denied: Challenges for Women- and Minority-Owned Businesses Accessing Capital and Financial Services During the Pandemic*, at 9 (July 9, 2020), *available at* https://www.govinfo.gov/content/pkg/CHRG-116hhrg43195/pdf/CHRG-116hhrg43195.pdf).

41 *Croson*, 488 U.S. at 509.

42 *Vitolo*, 999 F.3d 353.

43 Judge Thapar had a particularly interesting background related to this decision. After his family emigrated from India, he became the first South Asian federal judge in American history. His father owned a heating and air conditioning supply company, and his mother owned a restaurant at one time. Given SBA's definitions, Judge Thapar would have been presumptively a socially and economically disadvantaged person, and his mother's restaurant would have been eligible for RRF priority funding.

44 *Vitolo*, 999 F.3d 353, at *2.

45 *Id.* at *6.

46 Jessica Fu, *What, exactly, is going on with the Covid-19 restaurant relief fund?*, The Counter, June 10, 2021, https:/thecounter.org/covid-19-restaurant-relief-fund-stephen-miller-sba/.

47 *Vitolo*, 999 F.3d 353, at *14. *See supra* notes 22-23 and accompanying text.

48 *Id.* at *8 (citing *Croson*, 488 U.S. at 498).

49 *Id.* (citing *Croson*, 488 U.S. at 503).

50 *Croson*, 488 U.S. at 492.

51 *Vitolo*, 999 F.3d 353, at *8.

52 *Id.* at *9.

categories: "the schedule of racial preferences detailed in the government's regulation—preferences for Pakistanis, but not for Afghans; Japanese but not Iraqis; Hispanics but not Middle Easterners—is not supported by any record evidence at all."[53] There is no good reason this should be acceptable—just decades of rote bureaucratic repetition and judicial abdication. Now that Judge Thapar has raised the issue, we can expect judges to ask government witnesses wherever group membership on the list is relied upon to distribute preferences; we can also expect that cases involving such questions will be brought more frequently.[54]

The majority concluded that the government's RRF prioritization failed to meet strict scrutiny's requirements of both a compelling interest and narrow tailoring. The majority found that SBA had failed to prove that women-owned restaurants were discriminated against by anybody, which was the government's burden if it was to show a compelling interest in undoing the effects of past discrimination.[55] SBA also failed to meet narrow tailoring because it did not attempt to find race- and sex-neutral alternatives to help the neediest restaurants before turning to preferences.[56] Thus, Vitolo's restaurant, like Greer's, was entitled to have its grant application considered without regard to processing time or considerations of race or sex.[57] But the Sixth Circuit also granted a preliminary injunction on the race- and sex-based priority process "until the case is resolved on the merits and all appeals are exhausted."[58]

Judge Bernice Bouie Donald dissented. "It took nearly 200 years for the Supreme Court to firmly establish that our Constitution permits the government to use race-based classifications to remediate past discrimination," she said, citing *Bakke*, but "[i]t took only seven days for the majority to undermine that longstanding and enduring principle."[59] Her interpretation of Justice Lewis Powell's *Bakke* plurality opinion was unusual. After reviewing the judicial evolution of the Equal Protection Clause and Title VI of the Civil Rights Act from laws aimed at protecting "Negroes" to laws that protected all persons from racial and ethnic discrimination, Powell wrote in *Bakke*, "'[o]ver the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality."'"[60] Powell continued:

> The concept of "majority" and "minority" necessarily reflect temporary arrangements and political judgments . . . [T]he white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality . . . .[61]

Judge Donald argued to the contrary: "The majority's reasoning suggests we live in a world in which centuries of intentional discrimination and oppression of racial minorities have been eradicated" and that the COVID-19 pandemic did not exacerbate those disparities.[62] She thought the congressional testimony regarding racial disparities among restaurant owners created a compelling interest in remedying past discrimination, and she was particularly concerned that because of the majority's "unusual procedure in handling this appeal, we are now left with a binding published opinion, etched in the stone of time."[63]

The Sixth Circuit panel's preliminary injunction and Judge Thapar's questioning of the whole concept of the racial and ethnic categorization of "socially and economically" disadvantaged persons placed the DOJ in a difficult position. If it appealed en banc, the precedents in the circuit were not favorable.[64] The majority had carefully cited Supreme Court precedents supporting its ruling,[65] and the DOJ might have believed that the high Court would not be favorable to the RRF's use of racial priorities and might even strike down the whole race-based "socially and economically disadvantaged" concept. Furthermore, the political optics of excluding from relief white male-owned restaurants in every congressional district in the country might have been unattractive. In any event, on June 3, the SBA announced that it was halting its race- and sex-based priority payments and would now process claims from white male-owned restaurants filed on time before accepting any more from the priority group.[66]

The RRF was overwhelmed with relief claims. There have been delays in obtaining relief for some deserving firms, and there is not nearly enough money now to satisfy all valid claims. Minority- and women-owned firms that had received notice that they would receive payments have been getting emails from the SBA saying it would have to cancel their grants due to the lawsuits. Naturally, this is upsetting to the owners.[67] On June 10,

53 *Id.*

54 *See* David E. Bernstein, *The Modern American Law of Race*, S. Cal. L. Rev. (forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3592850.

55 *Id.* at *13.

56 *Id.* at *10-11.

57 *Id.* at *14-15.

58 *Id.* at *15.

59 *Id.* at *16 (Donald, J., dissenting) (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)).

60 *Bakke*, 438 U.S. at 294 (quoting Loving v. Virginia, 388 U.S. 1, 11 (1967) (internal citation omitted)).

61 *Id.* at 295-96.

62 *Vitolo*, 999 F.3d 353, at *16.

63 *Id.* at *27.

64 *See* Michigan Road Builders Ass'n, Inc. v. Milliken, 834 F.2d 583 (6th Cir. 1987); United Black Firefighters Ass'n v. City of Akron, 976 F.2d 999 (6th Cir. 1992); Aiken v. City of Memphis, 37 F.3d 1155 (6th Cir. 1994) (en banc); Associated General Contractors, Inc v. Drabik, 214 F.3d at 736 (6th Cir. 2000).

65 *Adarand,* 515 U.S. at 234-35; League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 511 (2006); Parents Involved in Community Schools v. Seattle, 551 U.S. 701, 720, 748 (2007).

66 Declaration of John A. Miller, SBA Deputy Associate Administrator for Capital Access, June 3, 2021.

67 Jessica Fu, *"It feels like a punishment" The Restaurant Revitalization Fund was supposed to help businesses recover from the pandemic. It's plunging them into financial uncertainty.*, The Counter, June 24, 2021, https://

a bipartisan group in both Houses filed a proposal to supplement the RRF by $60 billion.[68]

In its new policy, SBA is still prioritizing COVID-19 relief based on race and sex. First, it was women and racial minorities, and now it is white males. Readers may remember the old slogan, "Two wrongs do not make a right." New challenges to the SBA policy may prove that dictum to be legally sound.

II. USDA Race-Based Debt Relief Programs

ARPA also establishes a USDA debt relief program.[69] As part of the legislation, "Congress appropriated 'such sums as may be necessary to pay for the cost of loan modifications and payments to 'socially disadvantaged' farmers and ranchers."[70] Any loans issued by the USDA are eligible for up to 120% forgiveness, as long as the farmer or rancher who received the loan is "socially disadvantaged."[71] ARPA incorporates the definition of this term from 7 U.S.C. § 2279(a), which defines a socially disadvantaged farmer or rancher as one from a "socially disadvantaged group," which is defined as "a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities."[72] "In other words," summarized a court considering a challenge to the provision, "the loan forgiveness program is based entirely on the race of the farmer or rancher."[73]

According to the USDA announcement by the Administrator of the Farm Service Agency, "socially disadvantaged" food producers have faced "systemic discrimination" with cumulative effects that have led or contributed to, among other consequences, a substantial reduction in their numbers, a reduction of the amount of farmland they control, and a cycle of debt that was exacerbated during the COVID-19 pandemic.[74] No hearings or documents were cited in USDA's statement.

National Public Radio captured the story with the headline "Black Farmers Will Receive Stimulus Aid After Decades of USDA Discrimination," and two black farmers were interviewed who had been denied loans.[75] But the new ARPA debt relief program was more complex than the NPR story related because, in addition to benefitting black farmers, the program defined socially disadvantaged beneficiaries as encompassing farmers of "American Indian or Alaskan native, Hispanic or Latino, and Asian American or Pacific Islander" descent.[76] The beneficiaries did not have to be currently in arrears on their USDA loans to have debt forgiven, and a January 26, 2021, federal rule stopped all debt collections, foreclosures, and evictions for borrowers of any race.[77] Agriculture Secretary Thomas Vilsack testified before the House Committee on Agriculture about USDA's commitment to undoing discrimination against socially disadvantaged farmers through, among other things, the debt relief program established by ARPA and the same law's "approximately $1 billion in additional funding for assistance and support to socially disadvantaged producers and groups."[78]

Under the new debt relief plan, food producers are permitted to "verify, update or submit a new ethnicity and race designation" with their local USDA service centers so checks can be sent quickly,[79] although socially disadvantaged persons do not actually have to apply for loan forgiveness but receive it automatically.[80] Secretary Vilsack said that the USDA "must redress the discrimination that has proven to be systemic," and argued that "[b]y focusing on determining whether producers can prove specific, individualized discrimination, our past actions have failed to do the necessary work tailored to addressing the systemic discrimination socially disadvantaged producers face."[81] Food producers who are white, however, cannot have their debt canceled, regardless of their individual circumstances or the effect of the pandemic on their business. At the end of the USDA announcement, Zach Ducheneaux, the Administrator for the Farm Service Agency, provides an explanation for the program: the Biden-Harris Administration's USDA is committed "to equity across the Department by removing systemic barriers and building a workforce more representative of America."[82]

There has been a substantial decrease in the amount of farmland owned by blacks in the 20th century, partly caused by urban migration.[83] Some of the loss, however, has been caused by discrimination. In 2010, black farmers won a $1.25

thecounter.org/restaurant-relief-program-businesses-financial-purgatory-sba-covid-19/.

68 Fu, *supra* note 46.

69 ARPA, § 1005(a)(2).

70 Faust v. Vilsack, No. 21-C-548, 2021 WL 2409729, at *1 (E.D. Wisc. June 10, 2021) (Decision and Order Granting Plaintiffs' Motion for a TRO), *available at* https://will-law.org/wp-content/uploads/2021/06/ORDER-on-TRO.pdf (citing ARPA § 1005(a)(1)).

71 *Id.* (citing 1005(a)(2)).

72 *Id.* (citing 1005(b)(3), which cites 7 U.S.C. § 2279(a)(5)).

73 *Id.*

74 Zach Ducheneaux, *American Rescue Plan Socially Disadvantaged Farmer Debt Repayments*, USDA Blog, March 26, 2021, https://www.farmers.gov/connect/blog/loans-and-grants/american-rescue-plan-socially-disadvantaged-farmer-debt-payments.

75 Seth Bodine, *Black Farmers Will Receive Stimulus Aid After Decades of USDA Discrimination*, NPR, March 17, 2021, *available at* https://www.npr.org/2021/03/17/978288305/black-farmers-will-receive-stimulus-aid-after-decades-of-usda-discrimination.

76 Ducheneaux, *supra* note 74.

77 *Id.*

78 *See* Opening Statement of Thomas J. Vilsack Before the House Committee on Agriculture – Remarks as Prepared, March 25, 2021, *available at* https://www.usda.gov/media/press-releases/2021/03/25/opening-statement-thomas-j-vilsack-house-committee-agriculture.

79 Ducheneaux, *supra* note 74.

80 *Id.*

81 Vilsack, *supra* note 78.

82 Ducheneaux, *supra* note 74.

83 *See* Chuck Abbott, '*Justice' bill would transfer up to 32 million acres to Black farmers*, Fern's AG Insider, Nov. 19, 2020, https://thefern.org/ag_insider/justice-bill-would-transfer-up-to-32-million-acres-to-black-farmers/. The proposed Justice for Black Farmers Act died, but some saw the USDA debt relief program as a substitute with a greatly expanded list of beneficiaries. S.300, 117th Congress (2021), *available at* https://www.congress.gov/bill/117th-congress/senate-bill/300/all-info.

billion settlement from USDA in what was called the Pigford II agreement, enabling black farmers who missed the deadlines for filing complaints of discrimination between 1981 and 1997 to obtain a remedy.[84] There are important differences between the Pigford settlements and the new USDA debt relief program. For one thing, only black farmers were involved in the settlements, whereas ARPA empowers the USDA to forgive the loans of any farmers as long as they are not white.

Further, to benefit from the Pigford settlement agreement, each farmer individually had to make a discrimination complaint, while in the new USDA program, any farmer with USDA debt who is a member of a statutorily defined socially and economically disadvantaged group is eligible for relief. Beneficiaries under the new program merely have to review and sign a letter mailed to them from the Farm Service Agency verifying the amount of their debt and their race or ethnicity.[85] They do not have to allege or prove any previous discrimination.

Apparently, there is no relevant agricultural disparity study, and certainly not one that encompasses all of the racial and ethnic groups prioritized by the USDA program. Further, courts have not been sympathetic to using current racial preferences to remedy discrimination dating from earlier decades, which would leave the door wide open to government reallocations whenever there was a political majority to support them.

A. Faust v. Vilsack

On April 29, 2021, a dozen farmers in nine states—represented by the Wisconsin Institute for Law & Liberty (WILL)—filed a class action in the Eastern District of Wisconsin asking for declaratory relief and an injunction.[86] On June 10, Judge William C. Griesbach granted a motion for a TRO enjoining USDA from forgiving any loans under the ARPA program.[87] He began his opinion by quoting at length from the *Vitolo* opinion decided thirteen days earlier.[88] He found that the government had no compelling interest to support the racial preferences in its debt relief program.[89] Judge Griesbach pointed to the *Croson* holding that a "generalized assertion that there has been past discrimination in an entire industry" does not establish a compelling interest in remedying past discrimination.[90] He concluded that "[a]side from a summary of statistical disparities, Defendants have no evidence of intentional discrimination by the USDA in the implementation of the recent agricultural subsidies and pandemic relief efforts."[91] Furthermore, the judge found the USDA program was not narrowly tailored because there was no consideration of race-neutral programs, such as those that would require "individual determinations of disadvantaged status or giving priority to loans of farmers and ranchers that were left out of the previous pandemic relief funding."[92]

B. Wynn v. Vilsack

Two weeks later, Judge Marcia Morales Howard of the Middle District of Florida also found the USDA debt relief program unconstitutional. Her reasoning, if sustained on appeal, presents a powerful challenge to all race-based public aid or contracting programs.[93] Scott Wynn, a white farmer denied USDA debt relief, was represented by the Pacific Legal Foundation (PLF) and asked the court to enjoin the Section 1005 plan.[94] In her 49-page opinion, Judge Howard considered the cautions against nationwide injunctions,[95] but she ultimately held that "[t]he implementation of Section 1005 will be swift and irreversible, meaning the only way to avoid Plaintiff's irreparable harm is to enjoin the program."[96] The parties were then required to "proceed with the greatest of speed" in completing discovery to the end of "reaching a final adjudication in this case."[97]

In coming to her conclusion, the judge found the plaintiff met his burden on all four requirements for a preliminary injunction.[98] Judge Howard considered USDA's arguments that Section 1005 had a compelling interest, but she found "serious concerns over whether the Government will be able to establish a strong basis in evidence warranting the implementation of Section

84 Jasmin Melvin, *Black Farmer win $1.25 billion in discrimination suit*, Reuters, Feb. 18, 2010, https://www.reuters.com/article/us-usa-farmers-pigford/black-farmers-win-1-25-billion-in-discrimination-suit-idUSTRE61H5XD20100218.

85 U.S. Department of Agriculture, American Rescue Plan Debt Payments, (effective Jan. 1, 2021), https://www.farmers.gov/americanrescueplan.

86 Complaint, *Faust*, 2021 WL 2409729, *available at* https://will-law.org/wp-content/uploads/2021/04/Vilsack-Draft-complaint-v12.pdf. The Mountain States Legal Foundation (Tenth Circuit), Southeastern Legal Foundation (Sixth Circuit), and American First Legal (Fifth Circuit) are also representing white plaintiffs challenging the USDA debt relief program in separate cases. In the Tenth Circuit case, the plaintiff is a Wyoming white female rancher, Liesl Carpenter, who with her husband runs a ranch with 500 cattle on 2,400 acres which she inherited from her grandparents along with a substantial debt on the drought-afflicted land. Valerie Richardson, *White farmers, ranchers fight Biden administration's race-based loan program,* Washington Times, May 27, 2021, https://www.washingtontimes.com/news/2021/may/27/white-farmers-ranchers-fight-biden-administrations/.

87 *Faust*, 2021 WL 2409729, at *5.

88 *Id.* at *2-3.

89 *Id.* at *3.

90 *Id.* (quoting *Vitolo*, 2021 WL 2172181, at *4-5, which quotes *Croson*, 488 U.S. at 498) (internal quotation marks omitted).

91 *Id.* at *3.

92 *Id.*

93 Wynn v. Vilsack, No. 3-21-cv-514-MMH-JRK (M.D. Fla. June 23, 2021) (Order Granting Preliminary Injunction), *available at* https://pacificlegal.org/wp-content/uploads/2021/05/Wynn-v-Vilsack-Order-granting-PI.pdf.

94 Complaint, *id.*, *available at* https://pacificlegal.org/wp-content/uploads/2021/05/5.18.21-Wynn-v-Vilsack-Complaint.pdf. Wynn operated a farm that produced sweet potatoes and corn, and he also raised cattle. At the time of the lawsuit, he owed USDA $300,000. PLF also filed complaints on behalf of a Texas farmer (*McKinney v. Vilsack*) and an Illinois farmer (*Kent v. Vilsack*).

95 *Wynn*, No. 3-21-cv-514-MMH-JRK, at *46.

96 *Id.* at *47-48.

97 *Id.* at *48.

98 *Id.* at *46.

1005's race-based remedial action."[99] But she deferred a final ruling on that issue.[100] Then she went into new judicial territory. Even if a compelling interest for this race-based program could be established, she concluded Section 1005 was not narrowly tailored because it provided debt relief to all minority farmers whether or not there was any evidence of discrimination against them as individuals.[101]

Typically, in cases involving race-based programs, the issue is whether statistics showing general disparities or other evidence demonstrates discrimination against a particular group, and whether such evidence creates a compelling interest in remedying the identified discrimination. If the answer is yes, all members of that group—whether or not they have personally suffered discrimination—become eligible for race-based preferences. In the segregation era, it didn't matter whether individual African-Americans were educated, affluent, or successful entrepreneurs, all still suffered from racial discrimination. In the 21st century, that argument can still be made, but it will be harder to prove, as Judge Howard's opinion shows.

USDA has announced that it plans to appeal the *Faust* and *Wynn* decisions, and there is litigation on the same issues in other jurisdictions.[102] Unlike with the RRF program, which has access to limited funds, Congress appropriated "such sums as may be necessary" for the agricultural debt relief program, so there are no immediate financial constraints on the government.[103]

III. Equity and Equal Protection

The two RRF cases and the ongoing USDA litigation may be only the beginning of a long-term conflict over how the concepts of equity and equal protection should inform the use of race in government programs to determine beneficiaries. It may be that the use of racial preferences in ARPA constitutes an overreach that will undermine those preferences at every government level. Indeed, after a quiescent period, conservative litigating agencies including America First Legal, Mountain States Legal, Pacific Legal, Southeastern Legal, and WILL seem poised to challenge preferences, and now they have new precedents to use.

There is far more at stake than the allocation of about $30 billion of federal COVID-19 relief money. The challenges to racialized definitions of socially and economically disadvantaged groups used in so many SBA, Department of Defense, and Department of Transportation programs, if judicially affirmed, have huge implications for decades' worth of previous federal policy. On the other hand, if governments are given free rein to pursue representational equity for every racial minority in every economic sector, there will be major consequences for most domestic policies and programs. Judicial sorting out of the permissible application of the equity and equal protection theories will affect almost every area of American society.

From the equity viewpoint, when there are substantial group disparities in business ownership, wealth, homeownership, health, education, etc., the Constitution should not stand in the way of race-targeted programs to eliminate those gaps.[104] After all, equity advocates assume the disparities must have been created or influenced by public or private institutional discrimination sometime in the past or present. In almost every jurisdiction in the United States, women and minorities constitute a majority of the population. If mobilized to pursue equity goals of proportional representation or even reparations, there is nothing politically that could stop them.

Under traditional equal protection principles, individuals, not groups, are protected. Race can only be used to remedy relatively recent and specifically identified discrimination, and the remedy must be narrowly tailored to benefit only those individuals or firms who have actually suffered from discrimination. As Justice Sandra Day O'Connor stated in *Croson*, if general statistical disparities were defined as "identified discrimination," that would give "governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor."[105]

Probably it will take a fresh set of Supreme Court decisions to establish clear lines on whether the equity or equal protection theory will prevail. If the courts hold the racial classifications used in the RRF and the USDA programs unconstitutional, the traditional equal protection theory might yet prevail. But the equity theory is culturally ascendant and seemingly unstoppable. The food producer cases discussed here may provide the vehicle for determining the outcome of this jurisprudential battle.

99 *Id.* at *15. *See also id*. at *30 (labeling the congressional statements supporting Section 1005 as inadequate "perfunctory" findings) (citing Eng'g Contractors Ass'n of S. Fla. v. Metro. Dade Cnty., 122 F.3d 895, 927-28 (11th Cir. 1994)).

100 *Id*. at *16.

101 *Id.* at *25-26.

102 Helena Bottemiller Evich, *USDA will 'forcefully defend' debt relief for farmers of color after judge's order*, Politico, June 14, 2021, https://www.politico.com/news/2021/06/14/usda-defend-debt-relief-farmers-of-color-494348.

103 ARPA § 1005(a)(1).

104 *See, e.g.*, *Vitolo*, 999 F.3d 353, at *16 et seq. (Donald, J., dissenting).

105 *Croson*, 488 U.S. at 499.

There Is No Conservative Case for Class Actions

By William P. Barnette

Litigation Practice Group

A Review of:

The Conservative Case for Class Actions, by Brian T. Fitzpatrick (Chicago), https://press.uchicago.edu/ucp/books/book/chicago/C/bo43233299.html

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William P. Barnette is an in-house counsel in Atlanta, Georgia. He has successfully defended over 200 class actions in his career and is one of the few in-house counsel to have argued before the U.S. Supreme Court, which he did in *Home Depot v. Jackson*, 139 S. Ct. 1743 (2019). His article on the *Jackson* case in the *Review of Litigation (University of Texas)* ranked in the top ten federal civil procedure downloads on SSRN. Mr. Barnette has represented parties in a number of the cases discussed in this review, but the views expressed herein are the author's alone and do not represent those of any past or present client.

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Other Views:

• Kenneth K. Lee, *A Counterintuitive and Compelling Case for Class-Action Lawsuits*, Nat'l Rev. (Dec. 2, 2019), https://www.nationalreview.com/2019/12/conservative-case-for-class-actions-counterintuitive-compelling-argument/.

• Jasminka Kalajdzic, *A Return to First Principles: Class Actions & Conservatism*, Jotwell (Feb. 24, 2020), https://courtslaw.jotwell.com/a-return-to-first-principles-class-actions-conservatism/.

• Donald R. Frederico, *Book Review: The Conservative Case for Class Actions, by Brian T. Fitzpatrick*, 30 ABA Class Actions & Derivative Suits Litigation Comm. (May 29, 2020), *available at* https://www.pierceatwood.com/sites/default/files/Don%20Frederico%20ABA%20book%20review.pdf.

• Brian Fitzpatrick & John H. Beisner, *The Conservative Case for Class Actions: Point/Counterpoint*, 104 Judicature 68 (2020), https://judicature.duke.edu/wp-content/uploads/2020/08/Classactions_Summer2020.pdf.

Over the past few decades, class actions have changed the face of litigation in America. Class actions—where one or a few plaintiffs sue on behalf of up to thousands or more absent class members—dramatically up the stakes facing defendants. What previously would have been small-dollar disputes involving a single plaintiff are frequently transformed into potential bet-the-company matters. Not surprisingly, given the enormous pressure defendants face, settlements often result even for objectively weak class claims. The money that has changed hands in settlements and fees paid to plaintiffs' class counsel in recent decades is staggering. Largely as a result, the plaintiffs' bar has become a potent special interest group, leading the efforts against tort reform generally and reform of class action litigation in particular.

The impact of class litigation has been felt by industries across the economy, most prominently from the plaintiffs' bar and allied state attorneys' general attacking "Big Tobacco" in the nineties and "Big Pharma" and opioids now, with scores of other businesses bearing the brunt with less publicity. Businesses routinely face workplace-related class actions, such as employee wage and hour challenges, job classification disputes, and suits involving the right to overtime pay.[1] Statutory penalty provisions are also a prime source of class litigation. For example, the Telephone Consumer Protection Act contains draconian penalties for illegal texts or phone calls,[2] as seen in a recent $210 million settlement involving Dish Network.[3] Privacy is another burgeoning area of class litigation; Facebook recently settled a case involving facial recognition technology for $650 million.[4] Any company that suffers a significant data breach—which occur with increasing frequency and arise from criminal conduct—must anticipate class litigation afterwards, with the cases often filed the day or within days of the breach becoming public. Likewise, any significantly sized company that does business in California will quickly become acquainted with class claims under that state's Unfair Competition Law.[5]

More recently, the plaintiffs' bar has not let the COVID-19 crisis go to waste. McDonald's is facing a class action for allegedly

1 *See* Gerald Maatman & Jennifer Riley, *A Busy Year in Workplace Class Action Litigation is Expected,* Law360, Jan. 8, 2021.

2 Facebook, Inc. v. Duguid, No. 19-511, slip op. at 3 (April 1, 2021) (noting TCPA "creates a private right of action for persons to sue to enjoin unlawful uses of autodialers and to recover up to $1,500 per violation or three times the plaintiffs' actual monetary losses").

3 *See* Lauren Berg, *Dish to Pay $210M Telemarketing Penalty to Feds, 4 States*, Law360, Dec. 7, 2020.

4 *See* Amanda Bronstad, *Judge Approves Facebook's $650M Privacy Settlement as 'Major Win for Consumers',* Law.com, Feb. 26, 2021.

5 *See* Cal. Bus. and Prof. Code §17200 (broadly prohibiting "unlawful, unfair, or fraudulent" conduct in connection with business activities).

providing inadequate protections for its employees.[6] Amazon has been sued for price gouging,[7] Major League Baseball faces a billion-dollar class action challenging the lack of refunds for season ticket holders,[8] and major airlines are facing similar litigation regarding cancelled flights.[9] A number of Ivy League colleges are also facing class actions for failing to give refunds after classes were moved online.[10] In short, there is good reason class actions consistently rank as a top perceived threat for corporate counsel.[11]

Against this backdrop, it is surprising to see a former clerk for the late Justice Antonin Scalia attempt to make the affirmative case for class actions—from a conservative perspective, no less. While Professor Brian T. Fitzpatrick of Vanderbilt Law School is to be credited for his thought-provoking attempt in *The Conservative Case for Class Actions*, in the end his argument is the legal equivalent of Pickett's Charge at Gettysburg—doomed to fail from the outset.

Fitzpatrick begins by contending that "what is good for conservative principles is not always what is good for big corporations."[12] No doubt. If nothing else, the Trump era highlighted differences between big business and the conservative base on things like trade, immigration, and criminal justice reform. But the fight against class actions is not solely a big business or U.S. Chamber of Commerce concern. Class actions are a huge problem for big corporations, but they are even more likely to be an existential threat for smaller businesses. The demarcation in support for class actions is thus between businesses of all sizes and the plaintiffs' bar, rather than between political factions.

Fitzpatrick defines "conservative" as the "political right" or people who typically vote Republican.[13] In the context of class litigation, however, a more accurate definition of a conservative would perhaps be the old saw of a liberal who has been mugged by reality.[14] That is, while there is not a conservative case for class actions, nor is there a liberal or progressive one either—at least from a business perspective. On the contrary, from Apple to Hobby Lobby, from the most progressive to the most conservative, there actually is a bipartisan business consensus that class actions are a big problem. As there are no atheists in foxholes, there likewise are no fans of class actions—regardless of political persuasion—among businesses who have been on the receiving end of one.

I. Critique of Class Actions Generally

Fitzpatrick claims his book is "about conservative principles," and he elucidates those principles by drawing on the works of, among other luminaries, Milton Friedman, Friedrich Hayek, Judge Richard Posner, and Professor Richard Epstein.[15] In essence, Fitzpatrick contends that because conservatives favor market forces, the profit motive, and privatization, they should prefer regulating corporations through private class actions, rather than through regulation by big government. In particular, Fitzpatrick focuses on privatization, noting conservatives favor the concept generally because they believe better incentives in the private sector will typically lead it to outperform the government. Indeed, Fitzpatrick recognizes that private actors have to be more efficient because, unlike the government, they have to make a profit. Relatedly, he notes that private actors tend to be better resourced than government enforcers, making them more effective. All of this leads Fitzpatrick to conclude that private class actions "are not only the most effective way to hold corporations accountable, they are also the most *conservative* way to hold them accountable."[16]

The problem with this argument is that whatever its merits in theory, in reality the conservative principles Fitzpatrick espouses are either wholly missing or fundamentally distorted as applied in modern class action practice. As Fitzpatrick acknowledges, "[a]lmost no country in the rest of the world allows class action lawsuits in the way we do . . . ."[17] And for good reason. The criticisms of class actions are well-known and well-founded. As Justice Scalia noted in a major case involving Wal-Mart's promotion practices, a class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."[18]

In his book *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit*, scholar Martin H. Redish recognized that this exception frequently leads to abuse because "in all too many class action suits, there is, for all practical purposes, no class being represented. Instead, . . . the attorneys themselves are the real parties in interest."[19] Before going to prison, prominent plaintiffs' securities litigator William Lerach put the matter more colorfully, noting that "I have the greatest practice of law in the world. I have no clients."[20]

6 *See* Tom Hals, *U.S. Workers Hit McDonald's With Class Action Over Covid-19 Safety*, Reuters, May 19, 2020.

7 *See* Lauren Berg, *Amazon Wants to Arbitrate Covid-19 Price-Gouging Claims*, Law360, June 23, 2020.

8 *See* Zaxhary Zagger, *Ticket Buyers Sue MLB for Covid-19 Refunds*, Law360, April 21, 2020.

9 *See* Amanda Bronstad, *Class Actions Seeking Refunds for Flights Cancelled Due to Covid Hit Turbulence*, Law.com, Oct. 14, 2020.

10 *See* Hailey Konnath, *Ivy League Schools Swept Up in Covid-19 Refund Suits*, Law360, April 23, 2020.

11 *See Class Actions Still Top Concerns of Businesses Globally*, Claims J., June 9, 2015.

12 Brian T. Fitzpatrick, The Conservative Case for Class Actions 1 (2019).

13 *Id.* at 6.

14 *See* Wesley J. Smith, *Science Proves a Conservative Really is a Liberal Mugged by Reality*, Nat'l Rev., Jan. 9, 2012, https://www.nationalreview.com/human-exceptionalism/science-proves-conservative-really-liberal-mugged-reality-wesley-j-smith/ (quoting Irving Kristol's quip that "A conservative is a liberal mugged by reality.").

15 Fitzpatrick, *supra* note 12, at 1, 6.

16 *Id.* at 3.

17 *Id.* at 59.

18 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348 (2011).

19 Martin H. Redish, Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit 42-43 (2009).

20 *See Shakedown Street*, Forbes, Feb. 11, 2008, https://www.forbes.com/2008/02/11/lerach-milberg-weiss-biz-cz_nw_0211lerach.html.

Fitzpatrick essentially concedes Redish's point, but he posits that we should rely on judges and legislatures to control plaintiffs' class counsel.[21] Conspicuously absent from Fitzpatrick's analysis is the apparently old-fashioned notion of the client controlling his lawyer, which is the typical model in traditional litigation and is the basis for our ethical rules governing attorney conduct. Doing away with the fig leaf that real plaintiffs are actually in control of class actions is to be commended. But the recommended fix of relying on judges to control them has not been shown to be effective. Needless to say, judges can only exert meaningful control after a case is filed, which is simply too late to limit unnecessary or abusive filings in the first place. And indeed, the number of class filings, many questionable at best, continues to increase year after year.[22]

The disconnect between the nominal plaintiff and the counsel driving the litigation is significant because it distorts the profit motive, which leads to more litigation overall and more filing of marginal claims. Unlike a regulator, class counsel is interested in theories that will lead to or at least threaten certification, which in turn creates pressure on defendants to settle, which then generates a fee for class counsel. The bottom line is that we regularly see private class actions filed based on theories that a government regulator would never pursue. The underlying merits of any individual claim—and frequently even the merits of the class's claims in the aggregate—are often an afterthought. So, for example, many consumer class actions are based on nothing more than novel theories concocted by plaintiff's counsel that are divorced from the realities of how a business actually operates. Or class actions may be based on weak merits claims that, even if true, would be exceptions to company policy, rather than uniform practices susceptible to class treatment. Despite their relative weakness, these cases keep getting filed. Why?

Because if plaintiffs' counsel succeeds in forcing a settlement, the merits of such marginal claims are never litigated. As Judge Posner noted twenty-five years ago, even a defendant with strong defenses "may not wish to roll [the] dice" when certification puts a sufficient number of claims at issue; instead, the defendant often succumbs to the "intense pressure" to settle.[23] Twenty years earlier, Judge Henry Friendly characterized as "blackmail settlements" those resulting from the small risk of a crushing class action judgment.[24]

The decades since have done nothing to lessen those risks; on the contrary, over time the stakes for defendants have grown higher and higher, as recent settlements demonstrate. For instance, a proposed settlement recently announced in the opioids litigation is valued at $26 billion.[25] Private antitrust class actions likewise resulted in over $24 billion in settlements between 2009 and 2019,[26] not including Blue Cross's recently announced $2.7 billion class settlement.[27] Similarly, securities class settlements cumulatively cost defendants over a billion dollars annually.[28]

In addition to the risks presented by class actions, another major concern for defendants is simply the cost of litigating. These costs, particularly those surrounding discovery, are asymmetrical and borne almost entirely by the defendant. For example, in a typical consumer class case, the plaintiff will possess relatively few relevant materials, while the defendant can easily be required to produce millions of pages of documents, including emails, texts, and other electronic data. Likewise, key employees, including the defendant's senior executives, will have to prepare for and give depositions, with the attendant disruption to normal business operations that entails. In many circumstances, imposing that cost and disruption upon the business defendant is in fact the point. The potential for harassment through discovery favors plaintiffs and plays a key role in driving settlements of class litigation, regardless of the merits of the claims.

More fundamentally, incentives again are skewed in the sense that meritless cases are not punished or even meaningfully discouraged. Unlike most of the world, the American system does not employ two-way cost-shifting, under which the loser of a suit pays the winner's attorney's fees. The majority rule creates an obvious incentive for plaintiffs' counsel to carefully consider and evaluate their cases before they file, knowing that their client may have to pay the other side's fees if he loses.

But the American rule does not require the loser to pay.[29] Thus, there is no market discipline involved in the decision to file cases. As a result, the entrepreneurial spirit and creativity of class counsel are unleashed, which has led to both an increase in the filing of class litigation and the pursuit of more marginal claims.

If class action litigation operated in an efficient market, as Fitzpatrick contends,[30] we would expect to see one or a few filings per dispute and not redundant, copycat filings. But that is not what happens. Any major company that is sued in a class action all too frequently receives numerous similar, indeed essentially identical, follow-on suits. Plaintiffs' counsel is incentivized to file a slew of cases. Some will be copycats while others will explore different, and sometimes conflicting, theories. If only one of these cases hits, class counsel will get a significant return on their investment. And no matter what, plaintiffs won't have to pay the defendants' costs for their losses. Thus, the profit motive driving class counsel does not lead to efficiency, but rather abuse.

21 Fitzpatrick, *supra* note 12, at 54.

22 *See* 2020 Carlton Fields Class Action Survey, *available at* https://classactionsurvey.com/. *See infra* note 52 and accompanying text.

23 In re Rhone Polenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995).

24 Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973).

25 *See* Amanda Bronstad, *Lawyers Suing Over Opioid Crisis Announce $26B Proposed Settlement*, Law.com, Nov. 5, 2020.

26 *See* Matthew Perlman, *Antitrust Class Actions Netted $24B in Deals Last Decade*, Law360, Sept. 22, 2020.

27 *See* Anna Wilde Matthews and Brent Kendall, *Blue Health Insurers Reach Tentative Antitrust Settlement for $2.7 Billion*, Wall Street J., Sept. 24, 2020.

28 *See* NERA, *Recent Trends in Securities Class Action Litigation*: *2019 Full-Year Review,* at 13-17, Feb. 12, 2020.

29 Baker Botts L.L.P. v. ASARCO LLC, 576 U.S. 121, 126 (2015) (defining the American Rule as "Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise.").

30 Fitzpatrick, *supra* note 12, at 44-45.

To give a real-life example of this dynamic, one major retailer I represented faced a series of class actions challenging the sale of damage waivers in connection with its tool rental business. Plaintiffs' original theory was that the damage waivers were misrepresented as mandatory instead of optional. These claims inevitably failed on a class basis due to the inherently individualized liability issues underlying the transactions (e.g., what the customers were told regarding the damage waiver, whether the customers saw signs disclosing the damage waiver as optional, etc.).[31] Class counsel then shifted theories to allege that the waivers were worthless and should not have been offered for sale at all. These claims likewise failed.[32] So at the end of the litigation, defendant had defeated 17 class actions alleging seriatim counsel-created theories, none of which had merit, but which were nevertheless alleged and copied in cases across the country. This total "victory" cost the defendant several million dollars in defense costs, but the various class counsel essentially nothing, other than wasted time and effort.

The problem of copycat filings has been exacerbated by the increasing prevalence in the federal system of Multi-District Litigation ("MDL") proceedings,[33] where similar cases are consolidated in front of one judge for pretrial proceedings. Indeed, one side effect of a 2005 law that expanded federal jurisdiction over class actions, the Class Action Fairness Act ("CAFA"), has been an increase in just such filings.[34] As a result, post-CAFA MDL practice in the federal courts has blossomed. In fact, cases in MDLs now account for more than half of the federal docket; many of these are class actions where jurisdiction is based on CAFA.[35]

Because of the sheer number of claims and the level of associated risk to defendants, MDLs typically function as massive settlement claims processing proceedings, rather than true litigation. So-called "steering" or "leadership" committees, typically consisting of ten or more plaintiffs' firms, are appointed by the court to manage the litigation and in essence function as full employment acts for plaintiffs' lawyers. Enterprising class counsel do not want to be left out of any potential settlement, thus incentivizing the filing of copycat class actions which are then consolidated in the MDL. For example, in two recent data breaches involving Target and Home Depot, more than fifty class actions were consolidated against each company in MDLs.[36] This redundant litigation, which is a typical occurrence, does not scream market efficiency. On the contrary, marginal claims proliferate. In the Chinese Drywall MDL, for instance, my client was sued in eight different class actions despite there being no evidence that it ever sourced or sold any of the relevant drywall.[37] Indeed, several of the plaintiffs there alleged they bought the drywall at the address for the defendant's corporate headquarters, an impossibility given that location, not surprisingly, does not sell products at retail.

Fitzpatrick nevertheless contends that there "is little reason to think that most or even many class action lawsuits are meritless."[38] He bases this on the fact that motions to dismiss class actions are only granted roughly 20-30% of the time.[39] But the motion to dismiss tests only whether, taking the allegations as true, the individual class representative has stated a claim that if ultimately proven would entitle him to relief. It does not address either the merits of the class allegations or the appropriateness of class treatment of those allegations, each of which are resolved later in the case. And even with the Supreme Court in recent years having tightened up the pleading standards on a motion to dismiss,[40] it is still relatively easy for any competent attorney to craft a complaint that states a claim. Significantly, once the motion to dismiss hurdle is cleared, the plaintiff is then off to the races on the expensive, time-consuming, and often harassing discovery process, which is often leveraged to force a settlement.

Given that it is the class allegations that make these cases significant, the proper metric for assessing their merit should be whether the class ultimately prevails (or at least is certified). Here, definite numbers are hard to come by, but my experience indicates most class allegations do not ultimately succeed. For instance, the major retail client I am most familiar with has faced over 200 class actions over the last decade, with only two litigation classes being certified and a couple of others settling on a class basis. Certainly not all those cases that failed on a class basis were frivolous, but a good number were. The problem, of course, is that to get to the point where the defendant can show the case is not a proper class action costs significant amounts of time and money, while class counsel is running up their fees for any potential settlement in the meantime.

And class counsel's fees ultimately are the heart of the matter. It is well known (and Fitzpatrick concedes) that the claim rates in consumer class settlements are abysmal; typically, well less than 10% of class members even bother to make claims.[41] So it's

31 *See* Berger v. Home Depot U.S.A., Inc., 741 F.3d 1061 (9th Cir. 2014).

32 Rickher v. Home Depot, 535 F.3d 661 (7th Cir. 2008).

33 *See* 28 U.S.C. § 1407.

34 *See* Senate Rep. 109-14, *The Class Action Fairness Act of 2005*, at 5 (hereinafter "S. Rep. 5") (CAFA allows "overlapping and 'copycat' cases to be consolidated in a single federal court"); *id.* at 38 (claims of similar classes can "be handled efficiently on a coordinated basis pursuant to" MDL process); Catherine R. Borden, *Managing Related Proposed Class Actions in Multidistrict Litigation*, at v (Federal Judicial Center, Pocket Guide Series 2018).

35 *See* Dave Simpson, *MDLs Surge to Majority of Entire Federal Civil Caseload*, Law360, March 14, 2019, https://www.law360.com/articles/1138928/mdls-surge-to-majority-of-entire-federal-civil-caseload (noting MDLs account for 52% of all pending federal civil cases).

36 *See* Erin Coe, *Target Presses Panel to Send Data-Breach Cases to Minn.*, Law360, March 27, 2014 (noting 100 proposed data breach class actions had been filed against Target in 39 district courts); Jonathan Stempel, *Home Depot Settles Consumer Lawsuit Over Big 2014 Data Breach*, Reuters, March 8, 2016 (noting 57 data breach class filings against Home Depot).

37 *See* In re Chinese-Manufactured Drywall Products Liability Litigation, MDL 2047 (E.D. La.); Elizabeth Leamy and Susan Rucci, *Some China-Made Drywall Causing a Stink*, ABC News, March 23, 2009.

38 Fitzpatrick, *supra* note 12, at 74.

39 *Id.* at 75.

40 Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009); *see* Fed. R. Civ. P. 12(b)(6).

41 Fitzpatrick, *supra* note 12, at 88.

not class members who primarily benefit from class settlements. Fitzpatrick argues that class members do benefit because settlement funds are typically distributed pro rata, meaning the total settlement amount is divided up among however many class members submit valid claims.[42] But even accepting that characterization, which is not universally true, that just means that those few people who submit claims receive windfalls bearing little relation to their alleged injury; the vast majority of class members still receive nothing.

But class counsel does always benefit from settlements in the form of attorney fees. As noted earlier, there is no true market discipline over fees because the American rule does not make the loser pay. Indeed, in many ways the American rule is even worse than each party simply bearing its own fees. If plaintiff loses, then each party bears its own fees; but if plaintiff prevails or forces a settlement, then defendant is typically responsible for both the class counsel's and its own lawyer's fees. That is, defendant is often responsible for both sides' fees. And usually class counsel's fee amount (or at least a maximum award, which the defendant agrees not to object to) is agreed to in the settlement and thus not effectively litigated.

Nevertheless, according to Fitzpatrick, class counsel on average end up with a fee that is only 15% of the overall settlement value, which he contends is "too little rather than too much."[43] Given the gross amounts that are awarded,[44] focusing solely on the percentage of the award tends to miss the forest for the trees, particularly given how few class members are actually benefiting in any event. Fitzpatrick, however, puts his money where his mouth is here, frequently serving as an expert in support of class counsel's fee applications (and, in full disclosure, he has been opposite my client before).

Perhaps the easiest way to consider this contention is to ask: is there a shortage of willing class counsel in this country? After all, if class counsel were truly underpaid, we would expect to see an inadequate supply of attorneys filing class actions. Needless to say, that is not the case, as evidenced by both the number of class filings we see each year and the number of plaintiffs' attorneys involved in prosecuting those cases.

Indeed, in the two most recent class cases I've litigated that resulted in settlements, both cases saw over twenty different plaintiffs' firms—that's firms, not attorneys—submitting requests seeking a portion of the fee. That was against the one firm that represented the defendant in each case.[45] Fitzpatrick contends that private class actions will result in better regulatory outcomes because of the better incentives class counsel have in the form of the profit motive.[46] But in any other business realm, the notion that such redundant and inefficient staffing practices served market forces would be laughable. It should be here as well.

II. Class Actions Remain on the Rise

Fitzpatrick claims that class actions are on the road to extinction due to the Supreme Court's decade-old holding in *AT&T Mobility v. Concepcion*,[47] which he terms a "game changer."[48] *Concepcion* and its progeny permit defendants to force some cases into individual, i.e., non-class, arbitration rather than class action litigation. As a result, according to Fitzpatrick, the "status quo is now few and maybe no class actions."[49] The reality does not come close to supporting this contention.

To begin, arbitration is under sustained assault by the plaintiffs' bar and its congressional allies. The subtly-named Forced Arbitration Injustice Repeal ("FAIR") Act, which would render unenforceable employer-imposed arbitration and class action waiver requirements, passed the House in September 2019.[50] The 2020 election results certainly raise the odds of this bill becoming law. Meanwhile, some plaintiffs' firms have developed a tactic of flooding companies with mass arbitration claims, filing thousands or more individual arbitration proceedings at once. Door Dash, for example, was hit with 6,000 simultaneous arbitration claims with a bill for filing costs—borne by the defendant—of $9 million.[51] The transparent purpose of these tactics is to try to force, in essence, a class settlement from supposed individual arbitrations.

More importantly, despite all the wailing by the plaintiffs' bar, the reality is *Concepcion* has not even slowed the pace of growth in class action filings, much less halted them. On the contrary, class filings overall continue to steadily increase year after year. For instance, according to one prominent study, in 2011, the year *Concepcion* was decided, 53.4% of companies were facing class action litigation. According to that same study, by 2019, there was a slight increase (to 54.9%) in companies defending class actions. But significantly, the average number of class actions those companies were facing had increased nearly four-fold, from 4.4 in 2011 to 15.1 in 2019.[52]

More fundamentally, the notion that class actions are on the verge of going away is nothing new. The plaintiffs' bar makes this claim every time there is a major reform effort. For example, congressional enactments over twenty years ago like the Securities Litigation Uniform Standards Act and the Private Securities Litigation Reform Act were supposed to lead to the demise of securities class actions.[53] The passage of CAFA over a decade ago was allegedly going to do the same with class actions generally.[54]

42 *Id.* at 87.

43 *Id.* at 85, 96.

44 *See, e.g.*, *Lawyers Share $175M Payday in VW Settlement*, Courthouse News Service, March 20, 2017.

45 *See* In re The Home Depot, Inc. Customer Data Security Breach Litig., MDL 2583 (N.D. Ga).

46 Fitzpatrick, *supra* note 12, at 31-32.

47 563 U.S. 333 (2011).

48 Fitzpatrick, *supra* note 12, at 16.

49 *Id.* at 128.

50 *See* H.R. 1423, *available at* congress.gov/bill/116th-congress/house-bill/1423.

51 *See* Jim McAuley, *'Scared to Death' by Arbitration: Companies Drowning in Their Own System*, N.Y. Times, April 6, 2020.

52 *See* 2020 Carlton Fields Class Action Survey, *supra* note 22, at 12, 14.

53 *See* 15 U.S.C. §78a; 15 U.S.C. §78u.

54 *See* 28 U.S.C. §1332(d).

None of these doomsday predictions have panned out. Securities class actions are as prevalent and dangerous to companies as ever, as evidenced by the 433 federal cases filed in 2019, marking the third consecutive year that such filings topped 400.[55] Eighty securities class actions settled in 2019 for an average of $30 million.[56] Likewise, antitrust class filings nearly doubled from 2009 to 2019, to over 200.[57] CAFA has moved a significant portion of class action practice from state to federal courts, but it has not reduced the overall number of filings.

More generally, even a cursory review of the Supreme Court's jurisprudence over the last decade reveals that there is not a solid conservative majority standing ready to slay any class action that ventures nearby, particularly with Justice Scalia no longer there. The Court's high-water mark from the defense perspective is clearly *Wal-Mart v. Dukes*, where it reversed certification of a nationwide class action alleging sex discrimination in Wal-Mart's promotion practices. *Dukes* stands for what should be the common sense proposition that the alleged illegality of a million local promotion decisions spanning several years cannot be proven based on the individualized experiences of a handful of plaintiffs.[58] Similarly, in an antitrust case involving Comcast, the Court cut back on the types of expert testimony that will support class certification, sensibly holding that such testimony must reasonably fit the class theory of liability to be considered.[59] Notably, both *Dukes* and *Behrend* were close-run, 5-4 decisions.

But for every pro-defense class decision by the Court, there are plenty of cases going the other way. For example, in an opinion by Justice Elena Kagan, the Court held that the denial of class certification does not have collateral estoppel effect as to absent class members.[60] The practical effect of this ruling is to sanction the filing of copycat class actions by allowing plaintiffs to keep taking bites at the certification apple until they succeed or defendant settles. Likewise, in an employment case dealing with the right to overtime for Tyson poultry factory workers handed down the month after Justice Scalia's death, the Court retreated from *Dukes*' analysis of what constitutes a common injury sufficient to support certification. Rather than requiring that the class suffer the same injury, as in *Dukes*, Justice Anthony Kennedy's opinion affirmed certification of a class that admittedly included both injured and uninjured members.[61]

Allegations of fraud are typically not good candidates for certification because they involve individualized issues—e.g., what the plaintiff was told, whether he relied on the alleged misrepresentation, etc. In securities fraud class actions, however, the Court has adopted a presumption of reliance based on a fraud-on-the-market theory, which greatly facilitates class certification.[62] In a major case involving Halliburton, the Court unanimously held that the presumption could be rebutted. The Court, however, rejected defendant's request to overrule the presumption entirely, leaving the threat of securities fraud class actions intact.[63]

Then there are the cases that, while victories for the defense, tend to be of the pyrrhic nature. For instance, in an employment class action challenging a meal break policy, the defendant sought to moot plaintiff's claim through an unaccepted offer of judgment. Because the offer if accepted would have fully satisfied the plaintiff's individual claim, Justice Clarence Thomas for the Court held that the case had to be dismissed for lack of standing.[64] So far, so good. But in dissent, Justice Kagan argued that the case was not moot because despite being made whole, the plaintiff should have had the opportunity to seek class certification as well—that is, it should have been the plaintiff's "choice, and not the defendant's or the court's, whether satisfaction of her individual claim, without redress of her viable classwide allegations, is sufficient to bring the lawsuit to an end."[65] The determination of standing, needless to say, should never be left to the plaintiff's subjective "choice," as opposed to the existence of an objective, concrete injury; otherwise, no case would ever be dismissed on such grounds.

Over time, however, the dissent's position has proved persuasive. Three years later, the Court reversed itself and held that an unaccepted offer of judgment does not render the class representative's claim moot.[66] Long-standing precedent establishes that a class representative must have individual standing, i.e., must have his own injury, and cannot rely on the standing of absent class members.[67] Thus, if the offer of judgment mooted the class representative's claim, one would think the class claim would have to be dismissed as well, as in *Genesis Healthcare*. To get around the possibility of what it called "picking off" the class claims, the Court accepted the questionable notion that a plaintiff who sues for a statutory penalty amount, is then offered that exact amount by the defendant, and rejects the offer, still has a concrete injury allowing him to pursue . . . the exact amount he just rejected. In effect, the Court sanctioned a litigation-for-litigation's-sake approach that benefits no one aside from class counsel. The result is that defendants can no longer offer judgment to defeat class certification, which is not the kind of outcome a Court supposedly hell-bent on killing off all class actions would reach.

Likewise, the Court acknowledged in *Dart Cherokee* that in passing CAFA, Congress did away with the presumption against removal in class actions that exists in ordinary cases.[68] But in

55 *See Recent Trends in Securities Litigation*, *supra* note 28, at 1.

56 *Id.*

57 *See* Perlman, *supra* note 26, and accompanying text.

58 *Dukes*, 564 U.S. 338.

59 Comcast v. Behrend, 133 S. Ct. 1426 (2013).

60 Smith v. Bayer Corp., 564 U.S. 299 (2011).

61 Tyson v. Bouaphakeo, 136 S. Ct. 1036 (2016).

62 Basic Inc. v. Levinson, 485 U.S. 224 (1985).

63 Halliburton v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014).

64 Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013).

65 *Id.* at 1536 (Kagan, J., dissenting).

66 Campbell-Ewald Co. v. Gomez, 577 U.S. 153 (2016).

67 Blum v. Yaretsky, 457 U.S. 991, 999 (1982); *see* William P. Barnette, *The Limits of Consent: Voluntary Dismissals, Appeals of Class Certification Denials, and Some Article III Problems*, 56 S. Tex. L. Rev. 451 (2015).

68 Dart Cherokee Basin Operating Co., LLC v. Owens, 574 U.S. 81 (2014).

a later case, *Home Depot v. Jackson*, where the *Dart Cherokee* holding should have been outcome-determinative, the majority opinion by Justice Thomas simply failed to mention the case. As a result, CAFA, the whole purpose of which was to bring more class actions into federal court, has been trimmed back so only the original defendant to a class action can remove from state court.[69] Defendants who face class claims brought after the original complaint are stuck defending in the very state courts whose abuses caused the passage of CAFA in the first place (full disclosure: I argued *Jackson* before the Court for the defendant).

Amazingly, four Justices were in the majority in both *Jackson* and *Bostock v. Clayton County*,[70] where the Court held that Title VII protects employees against sexual orientation and gender identity discrimination. That is, in *Jackson*, where Congress had enacted a new statute to facilitate the removal of interstate class actions to federal court, these four Justices agreed that a "closer" than "plausible" reading of CAFA's text was still not enough for defendant to prevail;[71] rather, the Court held that Congress had more homework to do to amend the removal statutes yet again. But in interpreting Title VII, these same four Justices concluded that even in the face of repeated failed attempts to amend the statute to coincide with petitioner's textual argument—which admittedly never occurred to the Congress that enacted Title VII—the original plain text nevertheless was close enough for government work and mandated a ruling in petitioner's favor.

Notably, the outcome in both cases expands, rather than restricts, the potential for class action litigation. Thus, whatever the ultimate merits of the two cases, the contrast between the modes of analysis used in *Jackson* and *Bostock* starkly illustrates the Court's priorities, which, contrary to Fitzpatrick's thesis, emphatically have nothing to do with killing off all class actions. Perhaps the jurisprudence will change going forward, but nothing to date supports Fitzpatrick's contention that the Court has targeted class actions for extinction.

III. Fundamental Conservative Principles Conflict with Modern Class Action Practice

Despite the serious flaws inherent in current practice, Fitzpatrick argues that conservatives should favor class litigation as a means of furthering private, rather than government, enforcement of the law.[72] In Fitzpatrick's view, conservatives "want to privatize everything" and thus should favor class actions because they are "*privatized* enforcement of the law."[73] Leaving aside that class actions, which are decided by government-employed judges and courts, are not truly private enforcement of the law—that would actually be arbitration—his thesis runs headlong into several fundamental principles that make it an especially hard sell for conservatives.

To begin, it is simply not the case that regulation of corporations is currently performed solely or even largely by the government to the exclusion of the plaintiffs' bar. Rather, we now get the worst of both worlds. If there is a real issue, like a data breach or the Volkswagen emissions scandal, there is over-enforcement. Every possible regulator will investigate and prosecute, from the alphabet soup of federal agencies—DOJ, SEC, EPA, FTC—to state attorneys general. There will also be numerous pile-on private class actions filed. So we end up with situations like Volkswagen or the Puerto Rican Cabotage antitrust matter, where on the regulatory side company executives face jail time, and the company still must pay out millions or even billions of dollars in private class action settlements.[74] But more frequently, action is taken solely on the private enforcement side: cases are filed that government regulators would never pursue because there is no "there" there. Instead, the claims are simply class counsel's novel theories. Thus, more emphasis on regulation through private class actions, as Fitzpatrick champions, would simply result in more class filings where they are not needed to curb bad behavior. It is hard to see how that would benefit conservatives, or anyone else aside from class counsel.

Further, the focus by conservatives on privatization, while perhaps overstated by Fitzpatrick, is nevertheless rooted in real benefits, such as efficiency and decentralization. Indeed, Fitzpatrick agrees that "centralization is our enemy, not our friend."[75] Primary among the benefits of decentralization, according to Austrian school of economics leader and Nobel Prize winner Friedrich Hayek, are "experimentation" and "competition," which in turn promote innovation.[76] But class actions by definition result in *centralization* of claims, not decentralization. Fitzpatrick weakly argues that a class action "still offers *some* decentralization benefit" because each "is prosecuted by a different private attorney before a different court."[77] This, of course, ignores the impact of MDL practice on class actions. As noted above, it is now typical for one federal judge to rule on dozens of class actions in one MDL proceeding. Needless to say, collectivizing the claims of millions of class members before one decision-maker results in no decentralization benefit.

Significantly, decentralization underlies subsidiarity, a fundamental conservative principle that gives life to federalism. Pursuant to subsidiarity, "a central authority should . . . perform only those tasks which cannot be performed at a more local level."[78] It is hard to see how collectivizing the claims of thousands or even millions of class members on a state-wide or national basis before a single judge comports with this principle, particularly when compared to alternative modes of dispute resolution. The oft-cited prototypical example of a necessary class action is the

69 Home Depot v. Jackson, 139 S. Ct. 1743 (2019); *see* William P. Barnette, *Misunderstanding Original Jurisdiction and the Meaning of Defendant: A Textual Analysis of* Home Depot v. Jackson, 39 Rev. Litig. 119 (2019).

70 140 S. Ct. 1731 (2020).

71 *See Jackson*, 139 S. Ct. at 1748, 1750.

72 Fitzpatrick, *supra* note 12, at 3.

73 *Id.* at 3, 5.

74 Hiroko Tabuchi & Jack Ewing, *Volkswagen to Pay $14.7B to Settle Diesel Claims in U.S.*, N.Y. Times, June 27, 2016; Walter Pavlo, *Antitrust on the High Seas, An Assault on the Jones Act*, Forbes, April 20, 2012.

75 Fitzpatrick, *supra* note 12, at 55.

76 *Id.* at 33.

77 *Id.* at 63.

78 *Subsidiarity Definition*, Lexico.com, https://www.lexico.com/definition/subsidiarity.

so-called small value or negative value claim. As Fitzpatrick puts it, "private enforcement of small harms is not possible without the class action device," so it's either "the class action or no private enforcement at all."[79] But that is simply not true. Every state has small claims courts that are specifically designed to resolve individual low-dollar disputes. Some states, like California, prohibit parties from being represented by attorneys in small claims proceedings.[80] Thus, in those states, the lack of an attorney prosecuting a small value claim—thereby lowering the cost—is a feature, not a bug.

Indeed, one senses that the repeated incantations from the plaintiffs' side that without class actions small value claims wouldn't be litigated is in reality an acknowledgement that the real parties in interest are the class counsel. As Redish puts it in *Wholesale Justice*, "uninjured plaintiff attorneys . . . act as private enforcers of substantive legal restraints."[81] Further, the fact that people often choose not to resort to small claims court to resolve minor disputes does not justify class proceedings; if anything, that simply again shows that life is short and the real parties in interest in many class actions are the attorneys who file the cases. That is, an individual's lack of interest in pursuing a claim should not somehow justify a third party pursuing the claim on his behalf. And indeed, the previously noted abysmal claims rates in class settlements further confirm the issue with small value claims is largely a lack of interest, not the lack of an attorney.

Fitzpatrick tries to enlist Judge Posner in support of his argument here, quoting Posner's statement that only "a lunatic or a fanatic sues for $30."[82] But in a later case, Posner more carefully noted that the denial of class certification "does not mean that the class members are remediless, but they will have to seek their remedies in small claims courts."[83] Subsidiarity would be better served by moving away from massive class actions and towards enforcement of individual small dollar disputes in small claims courts, where local judges can pass on claims brought by their citizens who are actually invested in pursing them.

Modern class action practice also lacks any substantial basis in this nation's jurisprudential history, thus further contravening fundamental conservative principles. For example, Edmund Burke's theory of prescription, described in Yuval Levin's *The Great Debate: Edmund Burke, Thomas Paine, and the Birth of Right and Left*, is that, to the extent society improves, it does so over time by building on its strengths and traditions. Prescription is thus a "model of gradual change—of evolution rather than revolution."[84] It is "a way of adapting well-established practices and institutions to changing times, rather than starting over and losing the advantages of age and experience."[85] Similarly, Russell Kirk noted that conservatives adhere to "custom, convention, and continuity" because they "prefer the devil they know to the devil they don't."[86] This country's 240-year dispute resolution tradition is rooted in bilateral litigation. The "invention" in 1966 of the modern class action has radically changed that tradition, particularly over the last few decades.[87] Allowing that "revolutionary change"[88] to occur is, according to Fitzpatrick, the "biggest mistake corporate America has ever made with regard to our system of civil justice."[89] Indeed, Redish notes that the modern class action is "unprecedented in the manner in which it collectivizes the adjudication of individual rights."[90]

It is difficult to square an unprecedented invention that has caused radical changes in the risks attendant to litigation with any conservative notion of prescription or adherence to tradition. Indeed, Burke believed that prescription should result in "pursu[ing] change carefully, preferring changes to substance over changes to form where possible, and incremental over radical reform where necessary."[91] Federal law, in the Rules Enabling Act, similarly holds that procedural rules may not affect substantive rights.[92] Crucially, however, modern class counsel's "bounty hunter" role is "not created by the substantive law itself."[93] Thus, by permitting a radical change in procedure, i.e., form, to effect a tremendous change in substance, i.e., in how the merits of disputes are collectivized and resolved, the move to class over bilateral litigation fails the prescription standard on all counts.[94]

Further, increasing reliance on the class action device has also contributed to another loss of tradition, that of the jury trial.

79 Fitzpatrick, *supra* note 12, at 60, 66.

80 Cal. Code Civ. Pro. 116.530(a).

81 Redish, *supra* note 19, at 132.

82 Fitzpatrick, *supra* note 12, at 67 (quoting Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004)).

83 Pastor v. State Farm Mut. Auto. Ins. Co., 487 F.3d 1042, 1047 (7th Cir. 2007).

84 Yuval Levin, The Great Debate: Edmund Burke, Thomas Paine, and the Birth of Right and Left 67 (2014).

85 *Id.* at 77.

86 Russell Kirk, *Ten Conservative Principles*, *available at* https://kirkcenter.org/conservatism/ten-conservative-principles/.

87 Fitzpatrick, *supra* note 12, at 8.

88 Richard Marcus, *Revolution v. Evolution in Class Action Reform*, 96 N.C. L. Rev. 903, 905 (2018); *id.* (quoting John Frank, member of the committee which drafted them, referring to the 1966 amendments to Rule 23 as the "'most radical act of rulemaking since'" Rule 2).

89 Fitzpatrick, *supra* note 12, at 11.

90 Redish, *supra* note 19, at 230.

91 Levin, *supra* note 84, at 143.

92 *See* 28 U.S.C. § 2072.

93 Redish, *supra* note 19, at 14.

94 In his famous 1774 Bristol speech, Burke "told his new constituents that he would not see his role as merely the representative of their views: 'Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.'" Levin, *supra* note 84, at 111. That is, Burke believed the role of "each member of Parliament was not to stand in for his constituents but to apply his wisdom to advance their interests and needs . . . ." *Id.* Some commentators have contended that Burke's "theory of interests" is "important for it has become the basis of much of modern class action doctrine." John E. Kennedy, *Book Review: Digging for the Missing Link, From Medieval Group Litigation to the Modern Class Action*, 41 Vand. L. Rev. 1089, 1110 (1988) (citing Stephen Yeazell, From Medieval Group Litigation to the Modern Class Action 202-03 (1987)). Under this reading, Burke's understanding that a representative is "not the agent of the electorate, but rather its trustee, positively charged to

It is no secret that jury trials—the fundamental basis of dispute resolution in the American system of litigation—have long been in decline, to the point that numerous articles and studies have been published on the "vanishing trial" phenomenon for even ordinary cases. Class actions by design collectivize claims and consequently result in such significant risk for defendants that, even more so than regular cases, they almost always are too risky to try. As a result, settlements frequently occur, whatever the merits of the claims.

Even when defendants are willing to roll the dice, class actions are simply too large and unwieldy to try in a fair and appropriate manner. In this regard, Redish correctly notes that the class action device creates no substantive rights, nor could it without violating the Rules Enabling Act. Rather, it simply allows for the aggregation of "*pre-existing* individual private rights created by substantive law."[95] Invariably, however, we end up with corners being cut and substantive law being altered to accommodate the procedural class action device, particularly in those rare instances in which class trials have been attempted.[96] For example, the Fourth Circuit has noted the problem of the "perfect plaintiff" approach to trying class claims, where class counsel is allowed to piece together various bits of evidence from members of the amorphous class that in reality affected no single, real individual.[97]

Other examples of the problems inherent in trying class actions are found in the tobacco wars, such as in the *Scott* and *Engle* cases, smoker class actions which were absolute train wrecks that consumed over a decade of time and judicial resources in the state courts of Louisiana and Florida, respectively. Jury selection in *Scott* alone took over a year and a half, largely because the trial judge kept insisting on trying to seat jurors with immediate family members in the class that was suing for supposedly life-saving medical monitoring benefits, leading to multiple appeals.[98] *Engle* likewise devolved into the jury trying to decide whether individual smoking advertisements, which were obviously run at different times and seen by different people and relied on, if at all, differently, somehow affected all class members. Not surprisingly, both cases largely failed as class actions, but plaintiffs' counsel still walked away with several hundred million dollars in fees in each.[99] Neither conservative principles nor the legal tradition in this country support such outlandish outcomes.

Finally, and most fundamentally, class actions promote collectivization, at the expense of individual liberty. As Redish notes, class actions infringe on an individual's interest in choosing whether to prosecute a claim—a property right—and, if so, how to prosecute the claim.[100] That is, in a class action, the decision as to whether a claim will be prosecuted is left to the class representative in theory but to the class counsel in reality. In any event, the decision is taken from the individual holder of the property right, unless he happens to be the class representative. Thus, the "class action inevitably constrains an individual's ability to direct the course of his interaction with the judicial process because class representatives [guided by counsel] make all the decisions about how the individually possessed claims will be pursued."[101] Money damages class actions at least provide class members with the opportunity to opt out and pursue claims on their own. Mandatory injunctive relief classes, by contrast, do not allow class members to opt out. Thus, they further exacerbate the infringement on individual liberty inherent in class actions by removing from a class member "even the basic choice whether to participate in the collective and passive litigation of his rights."[102]

Nor are these concerns academic. For example, in recent antitrust litigation against the leading credit card brands and card issuing banks, the class sought approval of a $6 billion settlement that included a release of all future damages claims; the class was mandatory in nature, so members had no opportunity to opt out. Under the proposed settlement, leading companies, such as Amazon, Target, and Home Depot, would have had their claims against the defendants released forever despite the fact that those companies were actively litigating against the defendants. And the decision to accept that release would have been made not by those companies, but by class counsel and their putative class representatives. Thus, at bottom, the class sought to take from certain of its members the "foundation of the procedural due process guarantee: the individual litigant's autonomy in deciding whether to pursue her claim and if so, how best to conduct

seek the electorate's best interest by his own means," presages the role of the class representative. *Id.* Significantly, however, Burke's theory was stated in the context of political representation, not litigation. Further, as discussed above, much of modern class practice is driven by class counsel, rather than the nominal class representative. Given that class counsel is thus choosing to represent the class, rather than being chosen by the class as Burke was chosen by his constituents, the notion that Burke's theory of interests supports modern class practice is structurally unsound.

95 Redish, *supra* note 19, at 155.

96 In the recent Supreme Court oral argument for *TransUnion v. Ramirez,* Justice Kagan posited that the class representative "could have brought this as a class action and not testified at trial. Or, alternatively, he could have had somebody else testify at trial, a different member of the class. I mean, there's no necessary relationship between who's the class representative and who testifies at trial." No. 20-297, Tr. at 52 (March 30, 2021). The fundamental issue in *TransUnion* revolves around the class representative's alleged damages and whether they are typical of the class or highly individualized instead. Justice Kagan's notion that somehow because it's a class action the named plaintiff would not have to testify to establish his individual damages and instead could rely on some absent class member to do so for him is a textbook—if unwitting—illustration of a Rules Enabling Act violation. That is, in an individual case, there would be no argument that the plaintiff could prove his own damages without testifying at trial. The fact that the plaintiff brought the case as a class action does not change the procedure required for him to prove his claim. On the contrary, the point of a class action is that the claims of the class rise or fall on whether the named plaintiff proves his own claim. Indeed, a commonly stated test is that predominance is met when proving the claims of the class representative establishes a right of recovery in the absent class members—not the other way around. *See* Avery v. State Farm Mut. Auto. Ins. Co., 216 Ill.2d 100, 128 (2005).

97 Broussard v. Meineke, 155 F.3d 331 (4th Cir. 1998).

98 *See* Scott v. Am. Tobacco Co., 795 So. 2d 1176 (La. 9/25/01).

99 *See* Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006); Scott v. Am. Tobacco Co., Inc., 949 So. 2d 1266 (La. Ct. App. 4th Cir. 2/7/07).

100 Redish, *supra* note 19, at 126.

101 *Id.*

102 *Id.*

that litigation."[103] Fortunately, the settlement was vacated on appeal, with a concurrence noting that the terms amounted to a "confiscation, not a settlement."[104] Such an attempted fundamental infringement on individual liberty, in favor of collectivism, can in no way be said to further conservative principles.

IV. Conclusion

Ultimately, Fitzpatrick's thesis fails on perhaps the most fundamental conservative principle of all—seeing the world as it is, instead of how we wish it to be. Class actions are not on the verge of disappearing, because of arbitration or any other aspect of Supreme Court jurisprudence. Class actions vastly increase the regulatory burden on companies, creating issues that government enforcers would never bother to pursue. Class actions typically do not meaningfully benefit class members, but they do enrich class counsel. Class actions are not driven by market forces, but rather the profit motive has been distorted to incentivize copycat, abusive filings. Finally, class actions as currently practiced have no basis in this country's legal tradition, have effected a radical change in the risk defendants face for many types of claims, and promote collectivization at the expense of individual liberty. Aside from the plaintiffs' bar, no one should be happy with how class actions are litigated in the country today, least of all conservatives.

103 *Id.* at 135-36.

104 In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, 827 F.3d 223, 242 (2nd Cir. 2016) (Leval, J., concurring).

Learning to Change: New Takes on Education Reform

By Kirby Thomas West

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A Review of:

The Choice We Face: How Segregation, Race, and Power Have Shaped America's Most Controversial Education Reform Movement, by Jon N. Hale (Beacon Press), http://www.beacon.org/The-Choice-We-Face-P1635.aspx

A Search for Common Ground: Conversations about the Toughest Questions in K-12 Education, by Frederick M. Hess & Pedro A. Noguera (Teachers College Press), https://www.tcpress.com/a-search-for-common-ground-9780807765166

Unshackled: Freeing America's K–12 Education System, by Clint Bolick & Kate J. Hardiman (Hoover Press), https://hooverpress.bookstore.ipgbook.com/unshackled-products-9780817924454.php

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Other Views:

• Peter Bergman & Isaac McFarlin, Jr., *Education for All? A Nationwide Audit Study of School Choice* (May 2020), *available at* http://www.columbia.edu/~psb2101/BergmanMcFarlin_school_choice.pdf.

• Erica Frankenberg et al., *Choice Without Equity: Charter School Segregation and the Need for Civil Rights Standards*, Civil Rights Project (Dec. 2010), *available at* https://escholarship.org/uc/item/4r07q8kg.

"Education is America's great conundrum," say Clint Bolick and Kate J. Hardiman in their new book, *Unshackled: Freeing America's K-12 Education System*.[1] Few would disagree. The nation's lackluster test scores, underperforming schools, and persistent racial and socio-economic achievement gaps have long been symptoms of a system in need of reform. And the sudden, often rocky, shift to virtual schooling during the COVID-19 pandemic has only heightened awareness of the inefficiencies and inequalities that plague American education. While there is wide agreement that there is a problem, however, there is little consensus on the best solutions.

Three new books are representative of the diverse viewpoints of education reformers. One, Jon Hale's *The Choice We Face: How Segregation, Race, and Power Have Shaped America's Most Controversial Education Reform Movement*, is a critical examination of the history of American education and its persistent inequality problem.[2] Another, *A Search for Common Ground: Conversations About the Toughest Questions in K-12 Education*, by Frederick M. Hess and Pedro A. Noguera, is an effort by reformers with opposing philosophies to identify areas of consensus on difficult problems in education.[3] The third, and most useful, is Bolick and Hardiman's *Unshackled*, which proposes bold solutions to redesign the education system to better serve all students.

This review addresses each book in turn, identifying causes for both optimism about the future of the education reform debate and concern that—despite opportunities for consensus and innovation—that debate will remain contentious. Hale's *The Choice We Face* offers a useful history lesson, but it does little to advance the conversation around education reform. Making an unconvincing case that the movement for educational choice is irredeemably rooted in racism, Hale deems educational choice reformers as guilty by (often distant) association and spends little time engaging with their ideas on their own terms. In contrast, Hess and Noguera use *A Search for Common Ground* to engage one another's opposing ideas in good faith, seeking to build the necessary consensus for needed change. Finally, in *Unshackled*, Bolick and Hardiman offer innovative proposals for what that change should look like, identifying practical steps toward a better future in education.

1 Clint Bolick & Kate J. Hardiman, Unshackled: Freeing America's K-12 Education System 1 (2020).

2 Jon Hale, The Choice We Face: How Segregation, Race, and Power Have Shaped America's Most Controversial Education Reform Movement (2021).

3 Frederick M. Hess & Pedro A. Noguera, A Search for Common Ground: Conversations About the Toughest Questions in K-12 Education (2021).

I. A Cynical Critique

Among the most strident critics of the educational choice movement today are those who view it as a barrier to racial equity in education. This criticism lies at the heart of Professor Jon Hale's forthcoming book, *The Choice We Face: How Segregation, Race, and Power Have Shaped America's Most Controversial Education Reform Movement*.[4] In *The Choice We Face*, Hale recounts the tumultuous history of American public education in the years following the Supreme Court's landmark decision in *Brown v. Board of Education*. The book details public and private efforts to resist desegregation in the wake of *Brown* and highlights the undeniable fact that the promise of *Brown*—equality of educational opportunities for all American children—remains far from realized.

When it serves as a record of the historical battle over integration of American schools, *The Choice We Face* is effective. Most compellingly, it contains the stories of individuals on the front lines of the post-*Brown* fight for integration. Hale recounts, for example, the story of Millicent Brown, one of the first eleven students to desegregate public schools in Charleston, South Carolina.[5] Drawing on an interview he conducted with Brown, Hale relates how she moved north after graduating from high school to attend Emerson College in Boston. Brown chose Boston, she tells Hale, because she "decided that these problems were of the South" and so she would "go North where things were different."[6] Brown arrived in Boston, however, at the height of the city's busing controversy.[7] The city's transportation plan seeking to integrate schools had sparked heated, and at times violent, opposition.[8] Brown soon learned that the racism she had faced in her youth was not unique to her home state. "I ran away from southern racism but ran into something else," Brown tells Hale.[9]

Stories like Millicent Brown's are important. They remind us that the national shame of de jure segregation is uncomfortably recent. They also remind us that the Supreme Court's decision in *Brown v. Board of Education* was not the final word on the problem of racism in American education. But although this history is part of *The Choice We Face*, it is not the book's primary focus. Rather, Hale tries to show that today's movement for increased choice in education is poisoned by its alleged ties—both historical and contemporary—to segregation and racism. In this central argument, the book falls flat.

"School choice in its contemporary form," Hale argues, "developed in fierce opposition to desegregation."[10] Yet the two chapters in which Hale develops this argument center on a form of "choice" that bears little resemblance to the programs advanced by today's educational choice advocates. Hale discusses "freedom of choice" plans enacted by southern states in the 1960s. Under those plans, families could apply to any school in their districts; in practice, this meant applying to either the white school or the black school.[11] Although black families could theoretically choose to apply to formerly all-white schools under these plans, as Hale notes, they faced overwhelming pressure—and often intimidation—from their white neighbors to keep their children in all-black schools.[12] As a result, in 1969, only 2 percent of black students in the South attended desegregated schools.[13]

The Supreme Court struck down these "freedom of choice" programs in *Green v. County School Board* and *Alexander v. Holmes County Board of Education*, holding that they violated the *Brown* rule that public schools admission must be determined on a nonracial basis.[14] Though they were called "freedom of choice" programs, these programs were nothing like school choice as we know it today. The architects of these programs did not design them to foster competition and innovation in schools—two objectives at the heart of the modern educational choice movement. Nor did they seek to offer families a range of educational options.[15] Rather, the alleged choice was limited to two options: a nearly all-white public school and a nearly all-black public school. Hale rightly characterizes these programs as efforts to resist mandated desegregation. But despite his claims that this "regional massive resistance" turned into "national policy" in the form of contemporary educational choice reforms, he fails to convincingly link the two movements.[16]

To bridge the gap between post-*Brown* "freedom of choice" plans and the modern educational choice movement, Hale attempts to link failures to desegregate schools to Milton Friedman—widely regarded as the forefather of today's educational choice movement. Hale first explains how racial covenants and segregationist residential policies in the City of Chicago led to a de facto segregation in schools which resembled the pre-*Brown* de jure segregation in southern states.[17] In response to demands for integration following *Brown*, the city enacted a "voluntary transfer

4 Hale, *supra* note 2.

5 *Id.* at 63.

6 *Id.*

7 *Id.*

8 *Id.* at 62-63.

9 *Id.* at 63.

10 *Id.* at 19.

11 *Id.* at 33.

12 *Id.* at 33-34.

13 *Id.* at 34.

14 *Id.* at 35. *See* Green v. Cty. Sch. Bd., 391 U.S. 430 (1968); Alexander v. Holmes Cty. Bd. of Ed., 396 U.S. 19 (1969).

15 Hale does point to one briefly lived program in South Carolina that included state funding of private tuition. He uses this program as evidence that "like the concept of school choice in general, vouchers originated with racism and the politics of segregation in the aftermath of *Brown*." Hale, *supra* note 2, at 123. But that is not true. South Carolina was not the first state to offer state funding for private tuition. In fact, when *Brown* was decided, Vermont had been operating a town tuitioning program (to serve children in rural areas without public schools) for 85 years. EdChoice, *School Choice: Vermont—Town Tuitioning Program*, *available at* https://www.edchoice.org/school-choice/programs/vermont-town-tuitioning-program/. Similarly, Maine has operated a town tuitioning program since 1873. EdChoice, *School Choice: Maine—Town Tuitioning Program*, *available at* https://www.edchoice.org/school-choice/programs/maine-town-tuitioning-program/.

16 *See* Hale, *supra* note 2, at 37.

17 *Id.* at 50-57.

plan" that allowed black families to elect to transfer and enroll in historically white public schools.[18] This supposedly voluntary plan posed the same problems, and had similarly negligible success at integration, as the "freedom of choice" programs of the South.

About the Chicago transfer plan, Hale puzzlingly declares, "Friedman's 'free market' was not free to all."[19] It is true that Milton Friedman, a professor at the University of Chicago, lived in Chicago when the city enacted its voluntary transfer plan. Friedman's physical presence in the city of Chicago, however, is the only link that Hale provides between Friedman and that plan. In fact, as any serious observer of the educational choice movement will immediately recognize, the school choice envisioned by Friedman bears no resemblance to Chicago's transfer plan—which was, indeed, not a market at all.

Friedman's vision of school choice was a systematic rethinking of government-funded education. Under his approach, the state would distribute education funding to individual families rather than government entities. In Friedman's vision, families would vote with their educational dollars, fostering competition among schools and encouraging innovation in education. Such a plan is a far cry from Chicago's plan, which—like the "freedom of choice" plans in the South—offered only a choice between two segregated public schools, both directly funded and operated by the same government actor.

But the dissimilarity between Chicago's approach and Friedman's proposed policies is not the only problem with Hale's attribution of the Chicago plan to Friedman. Friedman himself explicitly disavowed segregated public schools. In a footnote[20] to his seminal essay, *The Role of Government in Education*, Friedman lays out his position on segregation in public schools. He notes his libertarian opposition to any state coercion in a family's school selection, but he writes, "so long as the schools are publicly operated, the only choice is between forced nonsegregation and forced segregation; and if I must choose between these evils, I would choose the former as the lesser."[21] Yet Hale blames Friedman in part for Chicago's failure to desegregate, writing that Friedman "fiddled as Chicago burned."[22] Worse, Hale asserts, without evidence, that supporters of Friedman's theory were interested less in improved educational outcomes than they were in segregationist goals. "Friedman's theory," he writes, "gave northerners an alibi for their racism" and paved the way for "dismantling of public education . . . on a national scale."[23]

Besides being unsupported by his proffered historical evidence, Hale's depiction of an irredeemably racist underpinning to today's educational choice movement is complicated by the fact that educational choice is extremely popular among racial minorities. According to surveys cited in the book, 73 percent of Latinos and 67 percent of African Americans support school choice.[24] To his credit, Hale acknowledges this popularity, as well as the work of prominent civil rights leaders who have taken up the cause of school choice.[25] He even concedes in the abstract that "[i]t is particularly important to listen to and prioritize the recommendations of people of color who advocate for school choice from a civil rights perspective."[26] Yet Hale—who describes himself in the introduction as "problematically white"[27]—seems to be conflicted about how best to engage with black proponents of educational choice.

Hale's discussion of the intersection of educational choice and the civil rights movement focuses in part on Dr. Howard Fuller. When it comes to civil rights activism, few can match Fuller's wide-ranging experience. He participated in Freedom Rides to desegregate southern bus terminals in the 1960s, worked with a program to combat poverty in black communities in North Carolina, and established Malcolm X Liberation University, a university "committed to the principles of Black Power."[28] And in a role that Hale describes as "rais[ing] eybrows" and "perplexing white progressives," Fuller is also a leader in the school choice movement.[29] Today, Fuller operates a successful charter school in Milwaukee.

Hale portrays Fuller as an exception to a perceived rule of racism in educational choice advocacy. Yet he simultaneously views Fuller as problematically tainted by his connections to unsavory allies such as former Wisconsin governor Tommy Thompson, former president George W. Bush, and former Secretary of Education Betsy DeVos (DeVos is a recurring bogeyman throughout the book). About these relationships, Hale writes, "It was easy to wonder how Fuller—a radical Black activist—ended up in the company of conservative whites. It was even easier to criticize him for it."[30] Later, Hale asserts that Fuller is "forced to constantly fend off allegations of working with the worst of the worst."[31] In the same breath, Hale quotes Fuller as responding in an interview with exasperation—"[If you are] saying that I'm trying to help Donald Trump, you're insane"—presumably in response to Hale's allegation that he works with "the worst of the worst."[32]

18 *Id.* at 58.

19 *Id.* at 60.

20 Lest it seem unfair to expect Hale to have read every Friedman footnote, Hale cites this very footnote (which he describes as "often overlooked in the history of school choice") as representative of a perceived lackluster opposition to racism on Friedman's part.

21 Milton Friedman, *The Role of Government in Education*, in Economics and the Public Interest 131 n.2 (Robert Solo & Eugene Ewald eds., 1955).

22 Hale, *supra* note 2, at 60.

23 *Id.* at 61.

24 *Id.* at 141.

25 *Id.*

26 *Id.* at 208.

27 *Id.* at 3.

28 *Id.* at 139-140.

29 *Id.* at 140, 162.

30 *Id.* at 141.

31 *Id.* at 162.

32 *Id.*

Though he implies guilt by association, Hale does also distinguish Fuller's work from the "agendas of Donald Trump and billionaire education reformers."[33] Fuller, Hale writes, views choice as "an opportunity for poor families to escape, if not control and repair, a broken system."[34] In a telling aside, Hale also describes Fuller's commitment to the school choice movement as "obviously for very different reasons than southern whites."[35] Hale's determination to find nefarious racialized motivations in the educational choice movement creates a troubling blind spot. He cannot see that the goals he concedes are worthy when pursued by black choice advocates—goals like "community control, autonomy, and the best means given the reality of public education in the twenty-first century"—are shared by the movement more broadly.[36] Fuller's vision is inspiring to people of any race or class who agree that "[g]iving low-income and working-class parents the power (and the money) to make choices about the schools their children attend will not only revolutionize education but provide the compass to a better life."[37]

Throughout the book, Hale lays out various other objections to educational choice programs. Some are thoughtful and actionable. He notes, for example, a fact laid bare by the COVID-19 pandemic: in the context of virtual learning, low-income communities need more support to ensure that children have the technology they need to succeed.[38] Others are oft-repeated myths about educational choice presented without support—like the old canard that educational choice inevitably leads to "divestment" and underfunded public schools.[39] But his focus is on impugning the educational choice movement for its supposed ignoble lineage, and educational choice advocates for their supposed racism.

Besides finding little support in the cited evidence, such an attack on educational choice reformers is counterproductive. As Hale admits, educational choice is one of the rare areas of contemporary politics in which alliances cut across the too-often intractable lines of party, race, and class. People like Hale who have thought hard about the problems facing American education should capitalize on this atmosphere of collaboration to propose solutions and search for areas of common ground. That does not mean that Hale should keep his criticisms to himself. He should advocate vigorously for the reforms he sees as best suited to improve our system and poke holes in those he views as wrongheaded. But painting the entire educational choice movement, and his adversaries themselves, as committed to goals of racial exclusion is not just incorrect; it shuts down the debate before it can get started.

33 *Id.* at 163.

34 *Id.* at 140.

35 *Id.*

36 *Id.* at 163.

37 *Id.* at 140.

38 *Id.* at 137.

39 *See, e.g.*, *id.* at 175.

II. A Conscientious Conversation

In stark contrast to Hale's heavy-handed critique is a new book by Frederick M. Hess and Pedro A. Noguera, *A Search for Common Ground: Conversations About the Toughest Questions in K-12 Education*. In a series of letters, Hess (an educational choice advocate) and Noguera (an opponent of most choice programs) discuss important topics in education and—as the title suggests—seek to find common ground. Both men bring to the table an impressive history of academic and practical experience in education. Amid our increasingly polarized climate, they refreshingly engage one another's ideas with respect and goodwill, even on the most contentious topics. The letters also reveal a genuine friendship between the men, who relay birthday wishes, commiserate over their children's sudden transition to virtual learning at the start of the pandemic, and even—in another relatable early-pandemic missive—bemoan the unavailability of toilet paper at the grocery store. The back-and-forth style can, at times, make for choppy reading, but the format serves a greater purpose. It is a reminder that, when education reformers can learn to agreeably disagree, they may find that they don't disagree quite so much as they thought.

Noguera and Hess address a wide range of topics related to education. Their exchanges on three of these topics are particularly illustrative of their ability to identify shared goals and values. The two men manage to build consensus around important points related to per-pupil funding, social and emotional learning, and teacher pay.

In an exchange about school choice, Noguera expresses a concern that traditional public schools may suffer a loss of funding when students leave for charter or private schools (a notion, as mentioned, also advanced by Hale). Hess counters that, when a student leaves through a voucher program or to a charter school, federal and local funding structures largely insulate districts from financial loss, enabling them to retain much of the funding that had been allocated to that child. As a result, the district may have *more* money per child when students depart.[40] And as Hess observes later, many public schools seem unable to provide strong educational outcomes even with per-pupil expenditures that are comparatively very high.

Noguera concedes that evaluating public funding is complex, but in a related later discussion, he makes the important point that more money spent per child is not necessarily indicative of failure in traditional public schools as compared to charter or private counterparts. This is because the kids left in traditional public schools in urban districts are disproportionately "high-need," that is, "students with disabilities, kids in foster care, kids experiencing homelessness, English learners, and so forth."[41] These kids require more services and are thus more expensive to educate.[42] For this reason, it's essential that comparisons of schools not only examine per-pupil funding, but also analyze how dollars are being spent.

40 *Id.* at 27.

41 *Id.* at 46.

42 *Id.*

Both men raise counterintuitive, yet important, considerations in comparing educational options based on per-child spending. And both ultimately agree that "simply putting more money into failed school systems does not produce better results."[43] Rather, according to both men, any discussion about spending must include a commitment to fiscal transparency.[44]

In another set of letters, Noguera and Hess discuss social and emotional learning, or SEL. Both men highlight SEL as a corrective measure balancing the overzealous focus on test preparation that followed the passage of No Child Left Behind two decades ago. As Hess describes it, "support for SEL is really just a reminder that schools should unapologetically embrace both academic achievement and the social and emotional skills that equip students for citizenship, life, and work."[45] Noguera agrees that SEL is a "common sense" idea that emphasizes that children's academic needs cannot be separated from their "social, emotional, and psychological needs."[46] As an example of successful implementation of SEL, Noguera describes a school he visited which fully integrated the arts into the entire curriculum. He recounts, "[k]ids are singing, drawing, playing music, and acting while they write, problem-solve, and learn history and science." We should expect such a whole-child focus to succeed, Noguera argues, because "kids learn better when they're happy and when we teach them in ways their brains are hardwired to understand."[47] While both men agree on the value of SEL, they both also acknowledge difficulties in implementation. Success or failure of SEL efforts can be hard to measure,[48] schools and teachers may be ill-equipped to handle the array of challenges that come from tackling mental health and psychological issues,[49] and there is little research on how best to support teachers seeking to transform culture within schools.[50] In their discussion of SEL, Noguera and Hess reveal a promising glimpse that perhaps not every issue in education need be controversial. Though they do not advocate a singular best practice for SEL implementation (such an idea would likely be impossible, at least in Hess's preferred decentralized model of effective education), they broadly agree at least that teachers and schools should embrace the philosophy.

Another area on which Noguera and Hess find that they largely agree is, perhaps surprisingly, teacher pay. Both agree that "[t]eachers should be paid more, and terrific teachers should be paid much more."[51] They also broadly agree that teacher pay should include incentives for taking on greater responsibility, as well as incentives for taking hard-to-fill jobs in urban and very rural schools.[52] That's not to say they arrive at a full consensus. Noguera sees value in a robust support staff, for example, while Hess regards the over-proliferation of support personnel as a challenge to ensuring the availability of sufficient teacher pay.[53] Both men agree, however, that there is room for substantial improvement in teacher education and professional development.[54]

Noguera and Hess's colloquy on teacher pay is interesting because it defies the usual stereotypes of advocacy on teacher pay. It was uncontroversial to Noguera, for example, that we should tie teacher pay in some way to teacher performance (for example, higher pay for taking on greater responsibility). And Hess did not respond to Noguera's expressed appreciation for the value of tenure, which many educational choice advocates view as a too-strong measure of job security that makes it hard to get rid of bad teachers. To a certain extent, these priorities around teacher pay defy tidy political categorization. Even in the controversial area of teacher pay, it appears, there is room for consensus-building.

Noguera and Hess, though able to find an impressive amount of common ground, still maintain strong opposing views on crucial areas of education reform. Perhaps most notably, Noguera opposes vouchers and for-profit charter schools; Hess, on the other hand, like most choice-oriented reformers, sees both as useful parts of a wide-ranging menu of educational choice options. Noguera acknowledges that some choice can be useful in education; he sees value in some nonprofit charter schools and chose bilingual schools for two of his kids, for example. His primary concern about educational choice, however, is about "kids who are never chosen: the homeless kids, the kids in foster care, the undocumented kids, and the kids who don't have caring parents."[55] He worries that in a system of full choice, these kids will be left in schools that are "underfunded and overwhelmed by their needs."[56]

Hess shares Noguera's concern about underserved kids, but he reminds Noguera to ask a question that is essential—and too often overlooked—in the debate about educational choice: "Compared to what?"[57] As Noguera observes, educational choice is not a "panacea."[58] It cannot and will not solve the problem of poverty and the social ills that accompany it. There will always be kids who suffer, and Noguera is right that we do well to continue to search for ways to ease that suffering. But restricting the choices of non-affluent families—because, as Hess and other choice advocates rightly observe, wealthy families already have educational choice—will not achieve that noble goal. Expanding choice empowers families to find schools that best meet their children's unique needs and educational goals. And it encourages

43 *Id.* at 45.

44 *Id.* at 48.

45 *Id.* at 62.

46 *Id.* at 63.

47 *Id.*

48 *Id.* at 65.

49 *Id.* at 64-65.

50 *Id.* at 71.

51 *Id.* at 124.

52 *Id.* at 128.

53 *Id.* at 130-131.

54 *Id.* at 134.

55 *Id.* at 32.

56 *Id.*

57 *Id.* at 26.

58 *Id.* at 34.

schools and teachers to innovate solutions that can benefit all kids. This is a welcome alternative to a system in which a child's educational opportunities—and, too often, outcomes—are determined by her zip code.

III. A Call to Action

Another valuable addition to the national conversation about educational reform is *Unshackled: Freeing America's K-12 Education System*, a new book by Clint Bolick and Kate J. Hardiman.[59] While Noguera and Hess usefully identify areas of agreement on tough problems in education, Bolick and Hardiman propose bold solutions. Bolick, an Associate Justice of the Arizona Supreme Court,[60] and Hardiman, a Georgetown law student and legal fellow at Cooper & Kirk, are both former teachers who have spent time considering thorny issues in American education. They identify four crucial elements to systemic educational reform: choice, competition, deregulation, and decentralization.[61] They show how choice and competition can lead to the development of new, innovative educational options, and how deregulation and decentralization can dramatically improve the options that already exist.

The argument for increased choice in education is familiar. Empowering families to choose their schools puts the responsibility of school assignment into the hands of those most invested in a child's well-being—and with the most knowledge of his unique needs. As an added benefit, as more families can choose among schools, competition among schools for their tuition dollars challenges all schools to improve and leads to the emergence of innovative methods to better educate children. The attraction of choice is intuitive, but its implementation atop the preexisting educational landscape can take many forms, including vouchers, tax-credit scholarships, and education savings accounts. Among these policy options, Bolick and Hardiman consider education savings accounts, or ESAs, to be the gold standard in education reform.[62]

ESAs are savings accounts funded by the state or a third party with funds earmarked for education. If a family decides to withdraw a child from her public or charter school, it receives a deposit of funds in an ESA. It may then use those funds for any approved educational expense.[63] This, of course, includes private school tuition, but it also includes things like "distance learning, software, educational therapies, community college courses, [and] extracurricular activities."[64] Transferring to parents the full power over how and where to spend education dollars allows them to choose among schools, but it also allows them to create personalized, non-traditional educational plans for their children.[65]

By giving money directly to families, Bolick and Hardiman argue, we can be more confident that public money "spent on *schooling* is actually going toward *educating* [] children"[66] (rather than, for example, the administrative bloat that plagues the public school system[67]). The amount of public money we spend on education can be staggering. New York, for example, spends $22,366 per pupil each year.[68] And where policies like vouchers may be less useful for families in rural areas where the emergence of many competing schools is unlikely,[69] ESAs open the door to creative alternatives. The authors detail, for example, the promise of new technologies and programs in homeschooling (of which, the authors convincingly argue, pandemic-induced virtual school is not representative).[70] Bolick and Hardiman acknowledge that because ESAs are new and not yet widely adopted, there is little empirical evidence on their impact.[71] But early studies and reports from families who use them are promising.[72] As families push for reforms in education, particularly in the wake of the educational challenges brought on by COVID-19, ESAs should be at the top of their list of goals. By offering choice and encouraging competition, ESAs could revolutionize American education.

Bolick and Hardiman rightly acknowledge that, as promising as educational choice reforms are, any comprehensive plan to improve the nation's education system must include plans to improve the nation's *public* schools, which will continue to educate the "vast majority of children."[73] The argument that there is room for improvement in our public schools should be uncontroversial. The authors point out, for example, the academic gap dividing black and Hispanic students from their white and Asian American peers, and national test scores that persistently lag those of our international counterparts.[74] The most promising public school reforms, Bolick and Hardiman argue, aim to deregulate and decentralize.

The authors offer an alternative vision to a public school system they view as bogged down by bureaucratic inefficiencies and too rigidly tied to arbitrary geographic lines dividing

59 Bolick & Hardiman, *supra* note 1.

60 Before joining the bench, Bolick spent much of his career litigating educational choice cases at my firm, the Institute for Justice, of which he was a co-founder.

61 Bolick & Hardiman, *supra* note 1, at 10.

62 *Id.* at 73.

63 *Id.* at 76.

64 *Id.* at 73.

65 *Id.* at 76.

66 *Id.* at 77.

67 *Id.* at 29.

68 *Id.* at 77.

69 *Id.* at 74.

70 *Id.* at 91-104.

71 *Id.* at 82.

72 *Id.* (citing Jonathan Butcher & Jason Bedrick, *Schooling Satisfaction: Arizona Parents' Opinions on Using Education Savings Accounts*, The Friedman Foundation for Educational Choice (Oct. 2013), *available at* https://www.cato.org/sites/cato.org/files/articles/bedrick-friedman-foundation.pdf; Andrew D. Catt et al., *Nevada K–12 & School Choice Survey*, edChoice (Mar. 2019), *available at* https://www.edchoice.org/wp-content/uploads/2019/03/2019-2-NV-Poll.pdf).

73 *Id.* at 51.

74 *Id.* at 17-19.

districts. Rather than school districts with duplicative layers of governance (the school board and the administrative staff),[75] Bolick and Hardiman suggest a system of "community schools" which, subject to baseline educational standards set by the state, would be "largely free to adopt strategies and allocate resources to fulfill those responsibilities as they deem best."[76] The authors envision community schools as governed by a public board and accountable to the state. This would give them the degree of autonomy currently exercised by charter schools, but they would be operated by the state instead of a private entity. They point to innovative, successful charter schools as evidence of the promise of such a system.[77]

The case for community schools is compelling. Even those already skeptical of the efficiency of public school funding may be shocked to learn the scale of the bureaucratic behemoth of public education. The United States spends more on school administration than any other OECD country. As of a decade ago, the United States spent 25 cents of every public education dollar on administrators and support personnel—twice as much as other OECD countries.[78] This means money that could be spent on, for example, hiring and retaining the best and brightest teachers is caught up in administrative bloat. The numbers bear this out. According to the same 2011 analysis, the United States spent 54.8 cents of every school operating dollar on teachers, compared to 63.8 cents spent by our international peers.[79] And the public education bureaucracy continues to grow. Between 1950 and 2015, Bolick and Hardiman tell us, the number of administrative and support personnel in public education has grown seven times faster than the number of students.[80] The community school model offers a more cost-effective approach by concentrating funding at the school level and cutting out an entire level of administration at the district level. And because, under this model, that funding would come from the state rather than localities, it would not hinge on property tax revenue in the school's area. Further, the community school plan would give principals and teachers more control over decisions on how best to run their classrooms and educate students.

Closely tied to their suggestion to abolish school districts is the authors' proposal to eliminate the attendance zones that accompany them.[81] Rather than determine each child's school by zip code, Bolick and Hardiman advocate for open enrollment public schools—a policy already adopted in part in some states. In Maricopa County, Arizona, for example, nearly half of students attend a school other than the one for which they are zoned, and 37 percent attend a school outside their district.[82] Open enrollment achieves the twin goals of promoting competition—and all its attendant benefits—in the public school context and eliminating the geographic barriers that too often keep low-income kids out of the best public schools.

Abolishing school districts, or even reimagining their role, is not without challenges. Bolick and Hardiman imagine turning over responsibility for things like "transportation, recruitment and hiring, payroll and benefits, [and] special services for students with disabilities"—traditionally district responsibilities—to the state, regional service providers, or private vendors contracting with schools.[83] Though possible, such a dramatic change would be complicated. More challenging, though, is winning support for such profound reforms. The authors acknowledge that "abolishing school districts and attendance zones would be fiercely resisted by the powerful entities benefiting from the status quo."[84] And even this seems like an understatement. Bolick and Hardiman imagine an alliance of "teachers and principals, parents, taxpayers, and liberal reformers"[85] who could be sold on their plan, but it is just as easy to imagine an opposing alliance of teachers' unions, administrators, and taxpayers (many of whom paid top dollar for homes in good school districts) who are already happy with their local public schools and resistant to change.

Hardiman and Bolick acknowledge the challenges for reformers in a chapter on the legal framework for education reform.[86] New measures increasing choice in education are routinely met with immediate legal challenges by opponents. Bolick and Hardiman correctly identify the "main source of legal concern for school choice advocates" as Blaine amendments—state constitutional provisions which prohibit aid or funding for "sectarian" schools.[87] Named for James Blaine, the senator who advocated a similar failed amendment to the federal Constitution, these amendments were adopted among widespread anti-Catholic sentiment in the late 1800s. That anti-Catholic bigotry motivated an effort to prohibit the use of government funds for Catholic schools—which had emerged as an alternative to public schools, which were de facto Protestant schools. Opponents of educational choice have consistently relied on Blaine amendments, found in 37 state constitutions, in legal challenges to educational choice programs. They argue that, in allowing families to use choice programs to send kids to religious schools, states violate the prohibition on using state funds for sectarian schools.

The Supreme Court roundly rejected a version of this argument last year in *Espinoza v. Montana Department of Revenue*. There, considering a tax-credit scholarship program in Montana, the Supreme Court held that if a state subsidizes private education, "it cannot disqualify some private schools solely because they are religious."[88] And the Court is poised to resolve the final remaining question related to this issue in a case recently granted certiorari,

75 *Id.* at 26.

76 *Id.* at 39.

77 *Id.* at 39-44.

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.* at 32-33.

82 *Id.* at 33.

83 *Id.* at 34.

84 *Id.* at 35.

85 *Id.*

86 *Id.* at 127.

87 *Id.* at 132.

88 Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020).

Carson v. Makin.[89] There, the First Circuit held that Maine's exclusion of religious schools from a town tuitioning program is permissibly based not on the religious *status* of those schools, but rather on the religious *use* of state dollars. The distinction—if any—between exclusion based on religious status and exclusion based on religious use is a question expressly left open in *Espinoza*.[90] It is also a distinction that is particularly meaningless in the context of educational choice programs, where the flow of student aid to religious schools occurs through the free choice of families rather than at the direction of the government. The outcome of *Carson* will have a huge impact on the future of legal challenges to educational choice. If the Court reverses the First Circuit and holds that Maine's exclusion of religious schools from a choice program—like Montana's exclusion of religious schools from a choice program—violates the First Amendment, it will put the final nail in the coffin of legal challenges to choice programs based on state Blaine amendments.

Whatever the outcome of *Carson*, reformers can expect to continue to face legal challenges to their efforts to change the educational landscape. Because every state constitution guarantees a right to a public education, for example, Bolick and Hardiman predict that "creative advocates across the philosophical spectrum surely will continue to argue that essential constitutional guarantees are unfulfilled."[91] But no change in the educational space comes easy, and—as Bolick and Hardiman show—America's troubled education system needs bold new solutions.

IV. Conclusion

As advocates of educational choice know, no victory for education reform is easily won. Entrenched interests will always resist change. And the alternative to innovations in education—pouring more money into the system we have—is conventional wisdom in some corners despite past failure. But the stakes are too high to stop fighting for meaningful change. And as *A Search for Common Ground* shows, there are reformers on both sides of the educational choice debate working hard to identify policies and strategies that will help kids. After decades of evidence that our public education system is not serving the needs of America's youth, we will ultimately need to decide when enough is enough. There is cause for optimism on this front. More and more states are beginning to embrace new ideas like those proposed in *Unshackled*. As this trend continues, policymakers and advocates will need to decide whether to tighten their grip on the status quo or abandon the strategies of the past in favor of true, systematic reform. This is, to borrow a phrase from Hale, the choice we face.

89 979 F.3d 21 (1st Cir. 2020), *cert. granted* (U.S. July 2, 2021) (No. 20-1088).

90 *Espinoza*, 140 S. Ct. at 2257.

91 Bolick & Hardiman, *supra* note 1 at 129-30.

Should the "Hollow Core" of Constitutional Theory Be Filled with the Framers' Intentions?

By Stephen B. Presser

Federalism & Separation of Powers Practice Group

A Review of:

The Hollow Core of Constitutional Theory: Why We Need the Framers, by Donald L. Drakeman (Cambridge University Press), https://www.cambridge.org/core/books/hollow-core-of-constitutional-theory/6F565573B88F4E15D42F87A045A32132#

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Other Views:

• Lee J. Strang, *Originalism's Promise, and Its Limits - Symposium: History and Meaning of the Constitution* 63 Clev. St. L. Rev. 81 (2014), *available at* https://engagedscholarship.csuohio.edu/clevstlrev/vol63/iss1/8/.

• John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 Nw. U. L. Rev. 1371 (2019), *available at* https://scholarlycommons.law.northwestern.edu/nulr/vol113/iss6/4/.

• Jack M. Balkin, *The Construction of Original Public Meaning*, 31 Const. Commentary 71 (2016), *available at* https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1025&context=concomm.

I. The Problem: Judicial Arbitrariness

In one of the most memorable judicial sallies of the last few years, Chief Justice John Roberts—himself no stranger to judicial legerdemain (more about that below)—exploded at his five colleagues who had just discovered, in *Obergefell v. Hodges*, a previously unknown constitutional right to marry a person of the same sex:

> The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. *Just who do we think we are?*[1]

Who, indeed? No one should have been surprised by *Obergefell*, however, since the Supreme Court since Earl Warren's time—and possibly even earlier, when the New Deal Court reversed itself on the scope of the United States Congress's power to regulate interstate commerce in the late 1930s[2]—has been engaged more-or-less openly in a project to remake much of constitutional law without resorting to Article V.

So blatant has this arbitrary judicial behavior been that it is no exaggeration to say that, for almost the last 70 years, the principal concern among constitutional law scholars in this country has been attempting to come up with a defense for the creative activity of the Warren Court and its successors, such as the remarkable 7-Justice majority that decided *Roe v. Wade*.[3] Given that the Court's constitutional change of this type has been in the direction favored by liberals and progressives, and given that liberals and progressives make up the majority of law school faculties, this activity has been embraced by most of our law professors with enthusiasm, if not exactly jurisprudential acuity or fidelity to law. Still, a few have dissented, and Donald Drakeman is among their ranks.

1 Obergefell v. Hodges, 576 U.S. 644, 687 (Roberts, C.J., dissenting) (emphasis added) (internal citation omitted).

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

3 Roe v. Wade, 410 U.S. 113 (1973). Of *Roe* it might be said—and was, pungently and eloquently by one of our most brilliant and fearless constitutional scholars—that "Bluntly put: *Roe* is as wrong as wrong can be, and everybody knows it." Michael Stokes Paulson, *Repudiating Roe (Part I): The Most important Abortion Case in 30 Years*, Public Discourse, June 28, 2021, https://www.thepublicdiscourse.com/2021/06/76590/.

Among the best parts of the work here under review is the title: "The Hollow Core of Constitutional Theory."[4] It reminds us that much of the debate over constitutional interpretation in the last few decades has been arid and of interest only to specialists because we have all but lost sight of what it is a constitution is supposed to do, and, in particular, what the role of the Justices of the Supreme Court was originally conceived to be. Drakeman recognizes this, but the significance of his effort might be revealed a bit more satisfactorily by considering that there was a profoundly important debate on these issues which ran from the late 1950s to the late 1970s.

For our purposes, we can limit that debate to just a few participants, some of whom are at least noticed in passing by Drakeman, but some of whom are not mentioned at all. Perhaps the most important was Herbert Wechsler, who wrote what is still one of the most important relevant articles: "Toward Neutral Principles of Constitutional Law."[5] Wechsler, much like Drakeman, had the courage that is sometimes necessary to state the obvious: that the Warren Court was making constitutional law up as it went along.[6] The Warren Court was, to use a now trendy term employed by Drakeman, "consequentialist."[7] It cared little about doctrinal niceties and simply strove to get what it believed was the right result, or to do what the then-Chief Justice famously declared was "fair."[8] Wechsler reminded us that the need to make new rules was why we have *legislatures*, and that the task of courts was reasoned elaboration from the existing rules, not promulgating new ones.

Anticipating the activities of the Justices who would eventually enact such judicial legislation as *Roe* and *Obergefell*, there were defenders of the Warren Court, most notably Judge J. Skelly Wright of the District of Columbia Circuit, who echoed the idealism of the Chief Justice and called for a jurisprudence of "goodness"—one that would realize the wishes of progressives for a remaking of American society along lines they favored.[9]

One disciple of Wechsler, Yale's Alexander Bickel, archly noted that the Warren Court's ambitious plan of "centralization, equality and legality" was simply one version of an ideal polity for the United States, and one that might well *not* have been shared by the majority of Americans. In a provocative series of lectures from the same podium Wechsler had used, Bickel made the stunning claim that the Warren Court had worked from an imagined past and had misconstrued the future needs of our polity.[10] This is the obvious problem of consequentialist constitutional law interpretation—that a judge is not actually in a position to determine the political preferences of the populace—and, to his credit, Drakeman sensibly rejects consequentialist jurisprudence on that ground.

Consequentialist jurisprudence is also, of course, flagrantly undemocratic, since our constitutional principle of separation of powers dictates that it is the people's elected representatives, not their appointed, life-tenured judges, who are supposed to make law. Wechsler and Bickel, then, and now Drakeman, were following Blackstone in sensing that the temptation to do equity is one that must be resisted if we are to have the benefits of the rule of law, since it is actually better to have a system of pure law than it is to be guided only by what the old common lawyers called "the Chancellor's foot."[11]

The outrageous audacity of what the Warren Court did was perhaps best revealed in the work of a man whose project was very similar to Drakeman's, and who Drakeman does at least cite, although sparingly. This was Raoul Berger, whose masterpiece, *Government by Judiciary*,[12] was a frontal attack on the Warren Court on the grounds that it failed to understand that its assigned task was simply to effect the intentions of the framers, the precise principle which animates Drakeman's work. Like Drakeman's, Berger's constitutional theory grew out of his close reading of English common law authorities, in particular Blackstone and Coke.[13] As indicated in more detail below, Drakeman uses his intentionalist approach to evaluate and, in some instances, to question the Supreme Court's interpretation of particular constitutional provisions. Berger fearlessly went much further and argued that the Warren Court (and its successors) were actually betraying the framers' most basic principles of constitutional structure, in particular the *separation of powers* (which dictates that judges do not make law) and *federalism* (which means that

4 Donald L. Drakeman, The Hollow Core of Constitutional Theory: Why We Need the Framers (2021).

5 Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959). Wechsler, delivering the Oliver Wendell Holmes, Jr. Lecture at the Harvard Law School, was replying to the lecture delivered one year before, from the same podium, by Judge Learned Hand, who had also criticized the Warren Court from an originalist perspective. *See generally* Learned Hand, The Bill of Rights (1958). On the debate among Hand, Wechsler, J. Skelly Wright, and Alexander Bickel, see generally Stephen B. Presser, Law Professors: Three Centuries of Shaping American Law, ch. 11 (2017).

6 Drakeman emphasizes that judicial arbitrariness is contrary to the rule of law and that judicial policy-making is arbitrary. Accordingly, Drakeman criticizes the work of "noninterpretivist" scholars such as Brian Leiter, Cass Sunstein, and Mark Tushnet. *See generally* Drakeman, *supra* note 4, at 178-96. Wechsler excoriated the Warren Court's arbitrary policy-making in its equal protection decisions such as *Brown v. Board of Education*. 347 U.S. 483 (1954).

7 *See, e.g.*, Drakeman, *supra* note 4, at 74.

8 *See, e.g.*, *Earl Warren's Way: 'Is it Fair'?*, Time Mag., July 22, 1974, at 66 (Obituary of Earl Warren).

9 *See generally* J. Skelly Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 Harv. L. Rev. 769 (1971).

10 Alexander Bickel, The Supreme Court and the Idea of Progress (1970).

11 For Blackstone's argument that it is better to have law without equity than equity without law, see 1 William Blackstone, Commentaries on the Laws of England 62 (1765). For explication of the notion that the "Chancellor's foot," is an unsatisfactory jurisprudential guide, see, e.g. H. Jefferson Powell, *"Cardozo's Foot": The Chancellor's Conscience and Constructive Trusts*, 56 Law & Contemp. Problems 7 (1993).

12 Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977).

13 For a useful study of Berger's approach, see Johnathan G. O'Neill, *Raoul Berger and the Restoration of Originalism*, 96 Nw. U. L. Rev. 253 (2001).

the *states*, not the federal government, much less its judiciary, are the designated primary promulgators of public policy).[14]

Berger was an important influence on participants in conferences organized by the Federalist Society for Law and Public Policy, the publisher of this journal, and that Society was brought into existence because its founders understood that the Supreme Court, under Earl Warren, and quite possibly under his New Deal predecessors, had either forgotten or seriously eroded those two great structural principles of our Constitution. The ideas that prompted the eventual success of the Federalist Society, and the work of Justices such as Antonin Scalia and Clarence Thomas, have led to a renaissance in constitutional law scholarship rededicated to the work of the framers, or to put it in the language now routinely employed, to the promulgation of "originalist" theories of constitutional interpretation. Drakeman's book is clearly part of that effort, and it is a worthy companion to two key tomes that he frequently cites, two attempts to fill in Drakeman's "hollow core": Lee Strang's effort to interpret originalism through the lens of Thomistic natural law,[15] and John McGinnis and Michael Rappaport's approach to originalism as an embodiment of majoritarian popular sovereignty.[16]

II. Drakeman's Solution: Look to the Framers' Intentions

The particular spin that Drakeman applies is to argue that the key to originalism is, just as Raoul Berger maintained, to look for the *intent* of the framers, rather than the somewhat more esoteric search for the contemporary "public meaning" of constitutional terms, in which search, for example, Justice Scalia usually engaged.[17] Drakeman suggests that the intent-based approach is more satisfactory and more clarifying, because it requires a focus on the actual problems the framers confronted, and it is thus more faithful to what Drakeman argues were the policy choices the creators of the Constitution sought to make.

After a Preface acknowledging that he rejects the "living Constitution" view as arbitrary, and stating his position that we not only *can* discern the framers' intentions but that it is our *duty* to adhere to them, Drakeman, in 10 short chapters, outlines a blueprint for sensible constitutional interpretation for our time. In the course of his clear and thoughtful exposition, informed by a myriad of references to contemporary scholars, he seeks to solve two currently vexing doctrinal problems: the nature of permissible federal taxation under the Constitution, and the scope of the First Amendment's prohibition on the "establishment" of religion.

Chapter One, "The Framers and Contemporary Constitutional Theory," is a brief survey of the unsatisfactory nature of the work of several prominent constitutional theorists, particularly those who, in essence, argue for a legislative role for judges, including giants such as Jack Balkin, Cass Sunstein, David Strauss, Ronald Dworkin, and Richard Posner. This chapter also explains why Drakeman casts his lot with other prominent adherents to "original intent" such as Edwin Meese, Raoul Berger, and Robert Bork, and why he rejects the "original public meaning" school of Justice Scalia.

Chapter Two, "The Framers Intentions: Who, What and Where," signals Drakeman's dependence on the Anglo-American common law tradition of Sir Edward Coke, William Blackstone, Joseph Story, and William Rawle, for which the "will" of the "law-making body"[18] is the indispensable guide to interpretation. This is his key methodological exegesis, in which, using admirably clear and witty prose, he demonstrates how the purported difficulties of discerning the subjective "intent" of a myriad of individuals can be overcome by careful discernment of the legislative purpose at issue and the "end-means choice" employed.[19] Drakeman acknowledges that there are cases where intent is ultimately elusive, and he says that in such cases the judiciary should leave choices to the legislature; but he maintains that in some cases the framers' intent is certainly discernible.

Chapter Three, "Original Methods and the Limits of Interpretation," indicates Drakeman's agreement with recent work by John McGinnis and Michael Rappaport which argues that the framers were, in fact, "originalists" and demonstrates how the framers did leave some room for the meaning of some constitutional provisions to evolve, just as the framers understood the English common law's dynamic interpretation of Magna Carta. This is a laudably frank and sophisticated recognition that our constitutional tradition may have multiple legitimate interpretative strategies. Still, Drakeman is careful to indicate that focus on the framers' intentions prevents these multiple traditions from resulting in arbitrary judicial behavior. In a nice turn of phrase, he condemns the 20th century living constitutionalists' notion that "ends justify meaning."[20]

Chapter Four, "Original Methods Updating," continues Drakeman's explication of permissible dynamic constitutional interpretation. Intriguingly, though he had earlier rejected Antonin Scalia's general constitutional theory of "original public meaning," Drakeman praises the Justice's dynamic Fourth Amendment decisions. Drakeman underscores that he opposes arbitrary judicial discretion, but he makes clear that the application of old law to new facts—the enterprise in which he says Scalia was engaged in his Fourth Amendment opinions—is perfectly permissible and necessary. In this chapter, Drakeman defends *Brown v. Board of Education* as just such an exercise, arguing that advances in psychological knowledge invited an appropriate new application of the 14th Amendment's Equal Protection Clause to end racial segregation in public education. As discussed below, this is problematic and might be best explained as Drakeman's attempt to follow the prominent Yale Law Professor Jack Balkin's dictum

14 *See generally id.*; Raoul Berger, Federalism: The Founders' Design (1987).

15 Lee J. Strang, Originalism's Promise: A Natural Law Account of the American Constitution (2019).

16 John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution (2013).

17 *See, e.g.*, Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (Amy Gutmann ed., 2018).

18 Drakeman, *supra* note 4, at 27.

19 *Id.* at 53.

20 *Id.* at 73.

that no theory of constitutional interpretation is acceptable unless it validates *Brown*.[21]

Chapter Five, "The Semantic Summing Problem," further elaborates Drakeman's disagreement with original public meaning approaches to the Constitution and contains his explication of the two particular constitutional provisions he uses as models in support of the validity of his framers' intentions approach: the scope of Congress's taxing power and the meaning of the First Amendment's Establishment Clause. This chapter thus forms a sort of core to the book. In the opinion of this reviewer, Drakeman certainly must be correct on the meaning of the Establishment Clause,[22] but his effort to suggest that John Roberts correctly interpreted Congress's taxing power in *NFIB v. Sebelius*[23] is less convincing, as indicated below.

Chapter Six, "Is *Corpus Linguistics* Better than Flipping a Coin?" is a bit of a detour to explore the possibility that newly-available digitized databases might be able to reveal once and for all, through sophisticated searches, the precise nature of the framers' intentions. Drakeman wisely concludes that given the difficulties posed by questions of representativeness of the available data and of formulating the appropriate search queries, as well as the possible existence of multiple meanings of terms used in 18th century discourse, at this stage of development of Corpus Linguistics, coin-flipping as a determinant of meaning is likely to be as accurate as sophisticated database searching.

Given the methodological difficulties revealed in Chapter Six, Chapter Seven, "The Framers' Intentions Can Solve the Semantic Summing Problem," is a sensible restatement of Drakeman's key thesis that if we bear in mind the "ends-means" policy choices with which the framers were confronted, we can arrive at a single clear meaning for constitutional provisions. Here again Drakeman turns to the meaning of the Taxation and Establishment Clauses in the Constitution. Drakeman concludes that Chief Justice Roberts correctly decided *NFIB v. Sebelius* (the Obamacare decision) by interpreting the legislation's "penalty" for failing to purchase health insurance as a "tax." He argues that this interpretive move was consistent with the manner in which the framers had used the term "tax," for example in the early case of *Hylton v. U.S.*[24]

Whatever the meaning of the word "tax" to the framers, however, Drakeman fails to consider the more troubling questions of the consistent and repeated statements of the ACA's proponents that the penalty was *not* a tax, and the implication, made manifest in the dissents in *NFIB v. Sebelius*, that whatever Congress's taxing power, if Congress possessed the power to compel such acts of "commerce," the Tenth Amendment and federalism had become virtual dead letters. If the Federalist framers were able to be queried, one finds it hard to believe they would have approved of Roberts's deux ex machina performance in the case (assuming that his interpretation was meant to avoid plunging the Court into the political maelstrom of overruling the signature act of the Obama Administration). Surely an appropriate theory of constitutional interpretation ought to condemn such an act as improper politics rather than neutral interpretation of framers' intent.

Even so, as indicated earlier, Drakeman is convincing in his other argument in this chapter, that the original policy choice made in the First Amendment's Establishment Clause was a federalism-based decision to leave the question of the appropriate treatment of religious matters to the states, and simply to bar Congress from establishing a mandated national sect. This implies, of course, that all the First Amendment decisions that have interpreted the Establishment Clause to bar any favoring of religion over non-religion are incorrect, as I and others have argued.[25] Instead, as Drakeman understands, it was the framers' intention that the government should actively encourage public religious observances.

Chapter 8, "Interpretation and Sociological Legitimacy," is Drakeman's exploration of several scholars' thought regarding how the Court must be concerned with elite and public opinion regarding the legitimacy of its interpretations. Drakeman wisely suggests, however, that the legitimacy of the Court's interpretative operations actually depends only upon its adherence to the framers' intent. Drakeman also observes that a majority of the American people actually understand this, and he implies that this understanding is instrumental in creating a situation where 70% of American voters believe that the question of who appoints Supreme Court Justices is of vital concern.

Chapter 9, "Noninterpretive Decisions," underscores and repeats Drakeman's condemnation of prominent scholars, including, in particular, Brian Leiter and Cass Sunstein, who have essentially advocated the appropriateness and inevitability of the Supreme Court's functioning as a national Super-Legislature. Here, without reference to them, Drakeman echoes the ideas of Wechsler and Bickel. Further, Drakeman not only criticizes the proponents of "non-interpretive" constitutional theory, but stresses the importance of the Justices' frankly acknowledging what it is that they are doing. While stressing the importance of transparency, Drakeman takes a swipe at one of the founders of Critical Legal Studies, now distinguished constitutional scholar and Harvard Law Professor Mark Tushnet, who once wrote that were he a judge he would adopt whatever grand theory of interpretation was then in vogue, but would nevertheless simply seek to render rulings that would advance socialism.[26] This chapter also reviews the arguments that courts lack the resources and the abilities presumably possessed by legislatures, enabling the latter,

21 *Id.* at 94 (noting that the same point has also been made by libertarian constitutional theorist Randy Barnett).

22 At least that's the conclusion I've also come to, after reviewing contemporary materials regarding the framers' intentions, in much the manner Drakeman did. *See* Stephen B. Presser, Recapturing the Constitution: Race, Religion, and Abortion Reconsidered 225-41 (1994) (concluding that the purpose of the First Amendment's Establishment Clause was to leave religious matters to the states and to deny the federal government the power to mandate a national sect).

23 National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012).

24 3 U.S. 171 (1796).

25 *See supra* note 22.

26 Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 Ohio St. L.J. 411, 424 (1981). Tushnet wrote that piece 40 years ago, of course, in the beginning of his academic career, and one wonders if he would take the same position now.

but not the former, more accurately to weigh the costs and benefits of promulgating particular policies.

A final chapter, Drakeman's "Conclusion," realistically reviews this country's judicial history of static and dynamic interpretative behaviors, but once again makes clear Drakeman's position that our constitutional structure of separation of powers means that the only legitimate judicial strategy is to leave law-making to the legislature and the people, and to defer to the intentions of the framers of the Constitution and laws. Once again Drakeman stresses that he (like his predecessor Berger) is following in the steps of Coke and Blackstone. He also repeats an earlier suggestion that even in doing constitutional interpretation, Justices can occasionally follow the English common law tradition of "new thinking in old directions." This is Drakeman's way of suggesting some potential for judicial updating of the Constitution, as in his earlier example of Scalia's Fourth Amendment decisions. Here, of course, though he does not quote it, Drakeman is invoking the old saw about "new wine in old bottles," or to use Coke's phrase, "from the old fields, new corn." Drakeman thus adopts a Burkean perspective on the inevitability of some legitimate change, but not every reader will leave convinced that a clear line has been drawn between illegitimate "non-interpretive" judging and permissible judicial "updating."

III. Pushing Drakeman's Implications Even Further

Drakeman writes with clarity, wit, and power, and if there is a general criticism to be made of his approach, it is probably only that he fails to explore some of the implications of his understanding that there is a judicial obligation to be bound by the framers' intent. I have already indicated some reservations about Drakeman's slighting some matters relating to federalism and the separation of powers, but for a book that brilliantly argues that there is a "hollow core" that needs to be filled by what the framers thought, there is relatively little about that thought itself.[27] In particular, and in contrast to Lee Strang's work,[28] there is very little consideration given to what we might describe as the metaphysical background for the Constitution. In our time, with secular humanism in the saddle in most of the legal academy and on most of the bench, and given Drakeman's expertise in the area,[29] it might have been useful to have some additional reminders that many framers thought their Constitution could not be successfully implemented by any but a moral and a religious people. This might make the misconceived nature of the Court's current Establishment Clause jurisprudence even more manifest.[30]

Nevertheless, Drakeman is clearly onto something with his recognition that the constitutional structure's separation of powers restraint needs more deference from the Court. In this regard, one might quibble with his concession to those who say that no constitutional theory that doesn't approve of *Brown* passes muster. As Drakeman's predecessor intentionalist Raoul Berger dramatically demonstrated, the Warren Court's "equal protection" jurisprudence violated the separation of powers insofar as it was judicial legislation. And for Berger, it was equally concerning that in taking matters such as education (and, as Alexander Bickel argued, many other policy subjects), out of the purview of state and local governments, the Warren Court undermined the vital check on federal power that was reflected in the 10th Amendment: the Constitution's federalist structural safeguard. The work of undermining federalism was almost completed with cases such as *Roe* and *Obergefell*, where the Supreme Court again took upon itself matters intended for the resolution of the governments closest and most responsive to the people. Given the explosive growth of the federal leviathan in our time, and given the possible constitutional betrayal by the "administrative state" that has ensued,[31] perhaps it is more convincing to say that a constitutional jurisprudence that approves of *NFIB v. Sebelius* and that does not challenge *Roe* and *Obergefell* is deficient. Perhaps Drakeman, with his measured, calculated, and careful approach, will illuminate these implications in his next work.

For now, though, we can be grateful that, like Strang, Drakeman has begun to explore the damage the Court has done to our polity by forgetting or disregarding the original intent of the First Amendment's Establishment Clause, and by neglecting the central insight of the importance of the moral and spiritual dimension of temporal existence it was designed to protect.[32] Even Americans do not live by bread alone, and our framers knew that.[33] Further reflection on the federalism and Establishment Clause issues Drakeman explores might even lead to the conclusion that the Warren Court made a fundamental error when, through an ill-conceived First Amendment incorporation doctrine applied in its school prayer and Bible reading decisions, it took away from state and local governments part of the means of ensuring that the American people were the kind of moral and religious citizens who would possess the virtue needed to maintain a republic. A candid observer of current American politics might well worry about whether our republic is now endangered as never before. If it is to survive, and if our constitutional tradition of deference to the framers' structural and spiritual insights are to be preserved, works like Drakeman's are invaluable. Perhaps the most important service of scholars such as Drakeman, Strang, McGinnis, and Rappaport, with their aim to return us to the intentions of the

27 For some sage musings in this regard, see, e.g., The American Founding: Its Intellectual and Moral Framework (Daniel N. Robinson & Richard N. Williams eds., 2012), in particular Chapter Two by Michael Novak, "The Jewish and Christian Principles of the Founders."

28 *See* Strang, *supra* note 15.

29 *See, e.g.*, Donald L. Drakeman, Church, State, and Original Intent (2009).

30 This particular quibble with Drakeman should be taken with a grain of salt, since it is the proverbial and perennial reviewer's gripe that if he were writing the work under review it would have been a different book, and it was. *See generally* Presser, *Recapturing*, *supra* note 22.

31 *See generally* Philip Hamburger, Is Administrative Law Unlawful? (2014).

32 *See* Novak, *supra* note 27. *See also* Philip Hamburger, Separation of Church and State (rev. ed. 2004).

33 The failure to account for a spiritual dimension in human existence, the failure to understand that there are, indeed, timeless universal truths that transcend our temporal experience is a profound failing of our times, and a difficulty that has been with us, off and on, for centuries. *See generally* Richard Weaver, Ideas Have Consequences: Expanded Edition (2013).

framers, would be to produce in our Justices the sort of humility that Chief Justice Roberts called for in *Obergefell* and apparently forgot in *NFIB v. Sebelius*.

At an even deeper level, one can see that the majority that decided *Obergefell* seemed to manifest the sentiment expressed in the infamous "mystery passage" of *Planned Parenthood v. Casey*: "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[34] If the aim of human existence were only the fulfillment of individual desires, and if the Constitution was designed for what some psychologists once called "self-actualization," this stunningly solipsistic perspective might make some sense. There is a rather different view available, to which now-Justice Amy Coney Barrett alluded when she reminded a commencement audience at Notre Dame that it was our purpose here on earth to prepare the way for the Kingdom of God.[35] The ultimate implication of Drakeman's inquiry is to cause us to wonder which view—Kennedy's expressed in the "mystery passage," or Barrett's—is in closer correspondence with the intention of the framers. If we seriously absorb from Drakeman the lesson that we have much to learn from the English common law's method of interpretation as limned by Blackstone, should we also contemplate the implication of Blackstone's view (acknowledged by some of our framers) that the English common law incorporates Christianity?[36]

34 Planned Parenthood v. Casey, 505 U.S. 833, 861 (1991).

35 Amy Coney Barrett, *Associate Professor Amy Coney Barrett, Diploma Ceremony Address*, Commencement Programs (2006), *available at* https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1013&context=commencement_programs.

36 For the details of what he believed to be the common law's incorporation of Christianity, see 4 William Blackstone, Commentaries 41-65 (1769).

The End of Independent Agencies? Restoring Presidential Control of the Executive Branch

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Other Views:

• Leah Litman, *The Supreme Court Chips Away at the CFPB's Independence*, Slate, June 29, 2020, https://slate.com/news-and-politics/2020/06/supreme-court-seila-law-v-cfpb.html.

• Ian Millhiser, *The Supreme Court's big decision on the CFPB and the "unitary executive," explained*, Vox, June 29, 2020, https://www.vox.com/2020/6/29/21307083/supreme-court-cfpb-seila-law-chief-justice-john-roberts-unitary-executive.

• Elliot Mincberg, *Trump Justices Cast Key Votes to Further Weaken Congress' Authority to Insulate Agency Officials from Political Pressure and to Strike Down Law on Housing Finance Agency: Confirmed Judges, Confirmed Fears*, People for the American Way, June 24, 2021, https://www.pfaw.org/blog-posts/trump-justices-cast-key-votes-to-further-weaken-congress-authority-to-insulate-agency-officials-from-political-pressure-and-to-strike-down-law-on-housing-finance-agency-confirmed-judges-co/.

On the day that President Joe Biden took office, among his first official acts was to fire Peter Robb, the General Counsel of the National Labor Relations Board—a Trump Administration appointee with ten months remaining in his term. That was the beginning of a firing spree. President Biden has removed the Social Security Administration Commissioner and members of the Council of the Administrative Conference of the United States, the National Capital Planning Commission, the U.S. Commission for Fine Arts, the Federal Services Impasse Panel, the Presidio Trust, and other agencies. A new President, of course, needs his own personnel in place to carry out his policy agenda. But some of President Biden's personnel moves differed in kind from those of his predecessors going back nearly a century: among those dismissed were officials of agencies typically regarded as "independent" because they stand outside of the usual department structure and, in some instances, are insulated from the President's direct control through statutory restrictions on removal. Removing the SSA Commissioner and NLRB General Counsel, for example, was unprecedented. President Biden's actions find support in a recent line of Supreme Court precedent that has revived the President's inherent removal power as an aspect of "the executive power" vested in him by the Constitution. In deciding these cases, the Court has cast doubt on Congress's power to cut the President out of independent agencies' affairs by constraining his ability to remove, and thereby to control, agency officials.

President Biden's forceful assertion of the removal power—a position heretofore associated with legal conservatives and Republican administrations—may spur the completion of the Court's reform project. Beginning with *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[1] the Court has undercut the constitutional rationales supporting agency independence from the President and narrowed its precedents authorizing Congress to depart from the general rule of presidential control through unfettered removal authority. What remains of those precedents following *Seila Law LLC v. Consumer Financial Protection Bureau*[2] and *Collins v. Yellen*[3] are two narrow exceptions: (1) for multimember bodies of experts, balanced along partisan lines and performing "quasi-judicial" or "quasi-legislative" functions and (2) for inferior officers. Whether or not President Biden's actions provide the direct impetus for the coup de grace to agency independence, they demonstrate that the Executive Branch, across administrations, is also skeptical of Congress's power in this domain.

The purpose of this article is to describe the current state of play on the constitutional status of removal restrictions and, by extension, agency independence from presidential control. To

1 561 U.S. 477 (2010).

2 140 S. Ct. 2183 (2020).

3 141 S. Ct. 1761 (2021).

set the stage, and provide context for what follows, it begins with an abbreviated discussion of the Supreme Court's removal-power precedents in the periods from the Framing to the New Deal and then from the New-Deal era to the 1980s, during which the key precedents supporting agency independence were forged. The focus then shifts to the current era, with an extended discussion of the Court's reinvigoration of the President's removal power, as a matter of doctrine and increasingly practice. The article concludes with an assessment of the staying power of the Court's independent-agency precedents and the authors' prediction that they may soon fall, in large part if not entirely.

I. The First Era: The Framing Through *Myers*

The Constitution does not explicitly mention the removal power. It contains no provision addressing the removal of Executive Branch officials, save for those dealing with impeachment and conviction. But it is not silent on the issue. The Constitution divides powers and responsibilities among the federal government's three branches, and out of that structure an understanding of the removal power takes shape.

Article I vests the legislative power in the Congress.[4] Article III vests the judicial power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[5]

And Article II vests "the executive power"—not "*some* of the executive power, but *all* of the executive power"[6]—in a single President of the United States.[7] This President is responsible to "take care that the Laws be faithfully executed."[8] The decision to vest this power in a single individual was debated at the Constitutional Convention, and the Founders ultimately decided to place this authority in one person "in order to focus, rather than to spread, Executive responsibility," thereby ensuring political accountability.[9] "They also sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many."[10] This was done, in no small part, to bolster the executive against the branch the Founders most feared: the legislative.[11]

The Framers did not specifically consider the removal question at the Constitutional Convention. But "during the Revolution and while the [Articles of Confederation] were given effect, Congress exercised the power of removal," and the Convention "gave to the executive all the executive powers of the Congress under the Confederation"—indeed, all executive power—"which seem therefore to have intended the power of removal."[12]

Of course, "[o]nce an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey."[13] And because the President holds the entirety of the executive power and is responsible for seeing that the laws be faithfully executed, it follows that he holds the sole removal power. As James Madison explained in the First Congress:

> If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.[14]

Prior to the Progressive Era, Congress enacted restrictions on the removal of federal officials on several occasions. But the constitutional question of Congress's power to do so remained largely unsettled. The Supreme Court considered a restriction on the removal of inferior officers by department heads in *United States v. Perkins*.[15] The Court held, with scant reasoning, that Congress "may limit and restrict the power of removal" over inferior officers, while reserving the question of "[w]hether or not Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the President. . . ."[16] The decision does not address the Executive Vesting Clause or the Take Care Clause, and it is unclear whether its holding extends to removal by the President, as opposed to removal by the head of a department.[17]

The President's removal power *was* at issue in *Shurtleff v. United States*, which involved the dismissal of a customs officer, a "general appraiser of merchandise," at the direction of the President.[18] Without mentioning *Perkins*, the Court began with the presumption that an officer serves at the President's pleasure.[19] Relying on that presumption, it declined to interpret a statutory provision specifying certain grounds of removal as denying the President the right to remove the officer for any other cause or no cause in the absence of "very clear and explicit language" to that effect.[20] Although *Shurtleff* did not resolve the question whether such a limitation would be constitutional, it understood

4 U.S. Const., art. I, § 1.

5 U.S. Const., art. III, § 1.

6 Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

7 U.S. Const., art. II, § 1.

8 U.S. Const., art. II, § 3.

9 Clinton v. Jones, 520 U.S. 681, 712 (1997) (Breyer, J., concurring).

10 *Id.*

11 *See* The Federalist No. 51 (Madison) ("As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified.").

12 Myers v. United States, 272 U.S. 52, 110 (1926) (internal quotation marks omitted).

13 Synar v. United States, 626 F. Supp. 1374, 1401 (D.D.C. 1986) (Scalia, Johnson, and Gasch, JJ.)

14 1 Annals of Cong. 499 (1789).

15 116 U.S. 483 (1886).

16 *Id.* at 484–85.

17 *See Myers*, 272 U.S. at 127, 161–62.

18 189 U.S. 311, 312 (1903).

19 *Id.* at 315.

20 *Id.*

the Constitution presumptively to vest removal power in the President and adopted what would now be called a "limiting construction" of the statutory removal restriction so as to avoid constitutional doubt.[21]

There the law stood until *Myers v. United States*.[22] At issue was a statute requiring the President to seek the Senate's advice and consent before removing certain postmasters prior to the end of their four-year term. After President Woodrow Wilson removed a postmaster from office in 1920, the postmaster sued for the salary from the remainder of his term. Accordingly, the Supreme Court was directly presented with the question whether "under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate."[23]

In an opinion by Chief Justice William Howard Taft, the Court recognized the principle that Article II confers on the President "the general administrative control of those executing the laws."[24] The President must therefore have the "power of removing those for whom he cannot continue to be responsible."[25] It follows, then, that Congress may not "draw to itself . . . the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of the [Appointments Clause] and to infringe the constitutional principle of the separation of governmental powers."[26] Instead, as the Court announced as its holding, "[A]rticle 2 grants to the President . . . the power of . . . removal of executive officers" and so "excludes the exercise of legislative power by Congress to provide for . . . removals."[27]

Chief Justice Taft's opinion—subsequently recognized as a landmark in originalist reasoning—relies heavily on Framing-era history and the First Congress's rejection in 1789 of any role in the removal of Executive Branch officials, other than by impeachment.[28] As the opinion details, the First Congress was particularly concerned about the improper blending of executive and legislative functions and recognized that the decision to remove an individual flowed from, but involved a different calculus than, the decision to appoint an individual. The Senate's role in the latter ostensibly involves the weighing of someone's background and personal characteristics and then a determination whether they are suited to the job to which they are being nominated. But the former involves a series of decisions and calculations that are executive in nature and which the President (and his high-ranking aides) are more well-positioned to make: whether the officer's performance is consistent with the President's duty to see that the laws are faithfully executed.

II. The Progressive Turn: *Humphrey's Executor* Through *Morrison v. Olson*

Myers was not the last word on the President's removal power, as the issue would soon arise again due to the explosion of so-called "independent agencies." In the early 20th century, Progressive technocrats sought to remove government administration from the rough and tumble of politics, an aim at odds with the Constitution's vesting of the execution of the laws in a politically accountable President. In their view, economic and social decisionmaking should be entrusted not to politicians, but to experts schooled in the "science of administration."[29]

The Federal Trade Commission was a prime example: it was to "be nonpartisan" and was intended, "from the very nature of its duties"—policing unfair methods of competition—to "act with entire impartiality."[30] Put another way, it was intended to "exercise the trained judgment of a body of experts appointed by law and informed by experience."[31] To that end, Congress provided that Commissioners could be removed by the President only "for inefficiency, neglect of duty, or malfeasance in office."[32]

In *Humphrey's Executor*, the Supreme Court was presented with the question whether that restriction on the President's removal power passed constitutional muster. Despite having decided *Myers* only ten years earlier,[33] the Court upheld the restriction on the President's removal power.[34] Because the job of an FTC Commissioner is "so essentially unlike the office of a postmaster," *Myers* could not be "accepted as controlling [the Court's] decision."[35] The FTC was "created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial

21 *Id.* at 315–18; *see also* Parsons v. United States, 167 U.S. 324, 338–39 (1897) (adopting similar approach).

22 272 U.S. 52.

23 *See id.* at 106.

24 *Id.* at 164.

25 *Id.* at 117.

26 *Id.* at 161.

27 *Id.* at 163–64.

28 As the Court explained, the views of the First Congress are particularly instructive because their decisions on "question[s] of primary importance in the organization of the government" were "made within two years after the Constitutional Convention and within a much shorter time after its ratification, and . . . because that Congress numbered among its leaders those who had been members of the convention." *Id.* at 136; *see also* Marsh v. Chambers, 463 U.S. 703, 790 (1983).

29 *See generally* Daniel A. Crane, *Debunking* Humphrey's Executor, 83 Geo. Wash. L. Rev. 1835, 1844 (2015).

30 *See* Humphrey's Executor v. United States, 295 U.S. 602, 624 (1935).

31 *Id.* (internal quotation omitted).

32 *Id.* at 619.

33 Dissenting in *Morrison v. Olson*, Justice Scalia described the Court's treatment of *Myers* in *Humphrey's Executor* as "gutting, in six quick pages devoid of textual or historical precedent for the novel principle it set forth, a carefully researched and reasoned 70-page opinion." *Morrison*, 487 U.S. at 726.

34 Many at the time viewed this as "the product of an activist, anti-New Deal Court bent on reducing the power of President Franklin Roosevelt." *Id.* at 724. And, indeed, the case was decided on "Black Monday," along with *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (striking down the Frazier-Lemke Farm Bankruptcy Act as violating the Takings Clause) and *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down the National Industrial Recovery Act on non-delegation grounds).

35 *Humphrey's Executor*, 295 U.S. at 627.

aid."[36] So while a postmaster was "an executive officer restricted to the performance of executive functions,"[37] the FTC's "duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative."[38] Indeed, in the Court's view, any "executive function" of the agency was only incidental to carrying out these other powers:

> In making investigations and reports thereon for the information of Congress under § 6 [of the FTC Act], in aid of the legislative power, it acts as a legislative agency. Under § 7 [of the FTC Act], which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.[39]

So viewed, it was then "plain under the Constitution"—at least to the Court—"that illimitable power of removal is not possessed by the President" over members of "quasi-legislative or quasi-judicial agencies."[40]

Next came *Wiener v. United States*.[41] At issue was whether the President had the authority to remove a member of the War Claims Commission where Congress had not addressed the issue. The Court held that he did not, reading a removal restriction into the statute. The Commission, it reasoned, was adjudicatory and "judicial" in nature, rather than "purely executive," because it was established to adjudicate claims for compensation by internees, POWs, and religious organizations injured by the enemy during World War II. Accordingly, the Court assumed that Congress intended the Commission to be free from executive control, and thus held that the President lacked authority to remove its members.[42]

The Court's interest in policing the boundaries of the separation of powers was re-animated in *Bowsher v. Synar*.[43] The Gramm-Rudman-Hollings Act assigned certain functions to the Comptroller General of the United States in pursuit of a balanced budget. The functions were executive in nature because the Comptroller General was "required to exercise judgment concerning facts that affect the application of the Act" and had to "interpret the provisions of the Act to determine precisely what budgetary calculations are required."[44] The Comptroller General, however, was removable only by Congress—either by a joint resolution or by impeachment. Given the influence exercised by whoever has the power to remove, the Court concluded that Congress had improperly arrogated the executive power to itself by making the Comptroller General answerable only to it.[45]

But then the Court decided *Morrison v. Olson*, and that originalist turn seemed a false start.[46] *Morrison* involved the appointment of an Independent Counsel to investigate and prosecute certain high-ranking federal government officials. Congress had enacted an elaborate scheme for the appointment of Independent Counsels, involving the Attorney General and a special court. It also imposed limitations on the removal of the Independent Counsel: she could be removed either by impeachment and conviction by the Congress, or "by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the independent counsel's duties."[47]

The Court upheld the removal restriction, despite the prosecutorial power being a core executive function. In so doing, it jettisoned the rationale of *Humphrey's Executor* that there exists some area of federal power that is not wholly within any branch—and specifically not "executive" in nature—but is instead "quasi-legislative" or "quasi-judicial."[48] The Court recognized that officials exercising this power were executive in nature and that this was also true of the FTC, notwithstanding *Humphrey's Executor*'s insistence to the contrary.[49] Instead, it adopted a new approach and standard that considers whether "removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."[50] Under that standard, the statutory protection of the Independent Counsel was acceptable. The Independent Counsel was an inferior officer exercising "limited jurisdiction and tenure and lacking policymaking or significant administrative authority"; therefore, the role was not "so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President."[51] In addition, under the "good cause" removal provision, "the Executive, through the Attorney General,

36 *Id.* at 628.

37 *Id.* at 627.

38 *Id.* at 624.

39 *Id.* at 628.

40 *Id.* at 629. Justice Robert H. Jackson criticized the *Humphrey's Executor* Court's treatment of the FTC in partial dissent in *Fed. Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 487–88 (1952):

> Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.

41 357 U.S. 349 (1958).

42 *Id.* at 355.

43 478 U.S. 714 (1986).

44 *Id.* at 733.

45 *Id.* at 726.

46 487 U.S. 654.

47 28 U.S.C. § 596(a)(1).

48 *Morrison*, 487 U.S. at 689–91 & nn.28, 30.

49 *Id.* at 689 & n.28, 691.

50 *Id.* at 691.

51 *Id.* at 691–92.

retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities."[52]

Chief Justice William Rehnquist's majority opinion drew a single, and singular, dissent by Justice Antonin Scalia—a landmark that Justice Elena Kagan later called "one of the greatest dissents ever written" that only "gets better" with time.[53] As Justice Scalia saw it, the case was about one thing: "Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish."[54] Writing for himself alone, Justice Scalia began with the proposition that Article II vests in the president not "*some* of the executive power, but *all* of the executive power."[55] And that, in his view, was sufficient to resolve the case, given that the conduct of a criminal prosecution was plainly an exercise of executive power and the removal restriction deprived the President of "exclusive control over the exercise of that power."[56] The majority could hold otherwise only by abandoning *Humphrey's Executor* sole commendable feature—its "decency formally to observe the constitutional principle that the President had to be the repository of *all* executive power"—and erecting in its place a new standard under which "*any* executive officer's removal can be restricted."[57]

The resultant watering down of the separation of powers just in this one instance, he predicted, would subvert the principle that those enforcing the law should be "accountable to the people," undermine uniform application of law, and ultimately threaten "effective government" and the "individual freedom" preserved through the separation of powers.[58] These consequences and worse, he warned, were plain: "Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing . . . . But this wolf comes as a wolf."[59]

III. The Originalist Turn: *Free Enterprise Fund* and Onwards

Morrison was arguably the nadir of the Supreme Court's separation-of-powers jurisprudence, expressly authorizing intrusion by Congress on the President's exercise of purely executive power. Although the question of presidential removal power was not revisited by the Court for some time, Justice Scalia's dissent was vindicated by popular acceptance and experience, as Congress declined to renew the Independent Counsel statute largely on account of the pathologies identified in his dissent.[60] The decision's fame was followed by a sharp turn toward the original meaning championed in it by Justice Scalia.

That began with *Free Enterprise Fund v. Public Company Accounting Oversight Board*. The case was a challenge by a regulated party to a relatively novel agency structure wrought by Congress in the wake of *Morrison*. In response to a series of accounting scandals, the Congress established a new Public Company Accounting Oversight Board to regulate, inspect, investigate, and discipline accounting firms.[61] The Board's members could be removed by the Securities and Exchange Commission only on three narrow grounds: willful violation of the governing statute, willful abuse of authority, and unjustified failure to enforce the law administered by the Board.[62] SEC members, in turn, could not be removed by the President except for "inefficiency, neglect of duty, or malfeasance in office."[63] The result was what the Court called a "dual for-cause limitation" on removal.[64]

The contrast between Chief Justice John Roberts's majority opinion and *Morrison* was apparent from the very first sentence: "Our Constitution divided the 'powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.'"[65] The case, it went on to explain, involved a "new situation not yet encountered by the Court."[66] It framed the question so: "May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?"[67]

That framing followed then-Judge Brett Kavanaugh's dissent in the court below. Whereas the D.C. Circuit majority upheld the dual-restriction structure based on what it considered to be a mundane application of *Humphrey's Executor*, as bolstered and broadened by *Morrison*,[68] Judge Kavanaugh regarded it as novel—not a structure in the mode of *Humphrey's Executor*, but "*Humphrey's Executor* squared."[69] That, he reasoned, was both unsupported by precedent and an excessive limitation on the President's ability to exercise control over core executive functions.[70]

The Supreme Court agreed with Judge Kavanaugh. Because the Board's structure presented a new question—every previous

52 *Id.* at 692.

53 *Justices Kagan and Judges Srinivasan and Kethledge Offer Views from the Bench*, Stanford Lawyer (May 30, 2015), *available at* https://law.stanford.edu/stanford-lawyer/articles/justice-kagan-and-judges-srinivasan-and-kethledge-offer-views-from-the-bench/.

54 *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting).

55 *Id.* at 705.

56 *Id.*

57 *Id.* at 726.

58 *Id.* at 727, 731–32.

59 *Id.* at 699.

60 *See* Helen Dewar, *Independent Counsel Law Is Set to Lapse*, Wash. Post. (June 5, 1999), *available at* https://www.washingtonpost.com/wp-srv/politics/special/counsels/stories/counsel060599.htm.

61 *Free Enterprise Fund*, 561 U.S. at 484–85.

62 *Id.* at 486 (quoting 15 U.S.C. § 7217(d)(3)).

63 *Id.* at 487. Neither the Securities Act, nor the Exchange Act, actually contain such a restriction, but the Court assumed, based on the parties' agreement, that such a restriction applies. *Id.*

64 *Id.* at 492.

65 *Id.* at 483 (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).

66 *Id.*

67 *Id.* at 483–84.

68 *See* 537 F.3d 667, 685 (D.C. Cir. 2008).

69 *Id.* at 686 (Kavanaugh, J., dissenting).

70 *Id.* at 686–87.

case had involved "only one level of protected tenure"[71]—the Court had to begin from constitutional first principles. And the paramount principle was the one that had "prevailed" at the Framing and in the First Congress: "the executive power include[s] a power to oversee executive officers through removal."[72] *Myers*, a "landmark," had been right all along about the President's power: because "[i]t is his responsibility to take care that the laws be faithfully executed," the President must be able to remove officials who may impede him in that duty.[73]

Given this understanding, a second layer of protection from removal was at least a step too far. Because of the second layer limiting the SEC's power to remove Board members, the President "cannot hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does."[74] And "[w]ithout the ability to oversee the Board, or to attribute the Board's failings to those whom he can oversee, the President is no longer the judge of the Board's conduct."[75] That "subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts"[76] —and is, for that reason, "incompatible with the Constitution's separation of powers."[77] It would be difficult to imagine a more thorough repudiation of the mode of analysis carried out in *Morrison*—a decision *Free Enterprise Fund* characterized as addressing merely "the status of inferior officers" and nothing more.[78]

Several other aspects of *Free Enterprise Fund* would later prove important. First is that it accepted a private party's standing to raise the separation-of-powers issue through a claim challenging action by an agency alleged to be unconstitutionally constituted.[79] Second is its refusal to take the statutory out, and thereby duck the constitutional issue, by broadly interpreting the SEC's removal authority over Board members.[80] Third is the professed narrowness of its holding.[81] Fourth is its aggressive severability analysis resulting in a meagre remedy for the challenger, which obtained a declaration that the removal restrictions, but no other portion of the statute, were invalid, such that Board members would be "removable by the Commission at will."[82]

A decade would pass before the Court next considered the President's removal power in *Seila Law LLC v. Consumer Financial Protection Bureau*.[83] The parallels with its predecessor are striking: Chief Justice Roberts's majority opinion relies again on the novelty of a new agency's structure, in an approach that was again prefigured by then-Judge Kavanaugh in a similar case before the D.C. Circuit.[84] Notably, by the time *Seila Law* reached the court, Judge Kavanaugh had become Justice Kavanaugh and joined the Chief's opinion in full.

That opinion opens not with a statement of principle—that's the next paragraph—but with a description of the issue before the Court. In creating the Consumer Financial Protection Bureau, "Congress deviated from the structure of nearly every other independent administrative agency in our history" by providing that the agency "would be led by a single Director, who serves for a longer term than the President and cannot be removed by the President except for inefficiency, neglect, or malfeasance."[85] That single Director, in turn, "wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy."[86] The question, then, was "whether this arrangement violates the Constitution's separation of powers."[87]

Applying the same approach as *Free Enterprise Fund*, the answer was obvious: no. Text, history, and precedent all confirm the President's removal power. And the Court's precedents had recognized only "two exceptions to the President's unrestricted removal power": one for inferior officers, as in *Perkins* and *Morrison*, and one created by *Humphrey's Executor*. The latter, the Court announced, was not quite so broad as had been assumed and did no more than "permit[] Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power."[88] Although an arguable reading of the decision—that is how *Humphrey's Executor* regarded the FTC—this interpretation essentially limited *Humphrey's Executor* to its circumstances, which was just as well given that *Morrison* had already interred its reasoning and rule. So understood, neither *Morrison* nor *Humphrey's Executor* controlled.[89]

From there, the Court made short work of the restriction shielding the CFPB Director from removal. The single-member structure, it observed, was novel, or nearly so until quite recently.[90]

71 *Free Enterprise Fund*, 561 U.S. at 495.

72 *Id.* at 492.

73 *Id.* at 493.

74 *Id.* at 496.

75 *Id.*

76 *Id.* at 498.

77 *Id.*

78 *Id.* at 494.

79 *Id.* at 512 n.12.

80 *Id.* at 502–03.

81 *Id.* at 506 ("We do not decide the status of other Government employees . . . .").

82 *Id.* at 509, 513.

83 140 S. Ct. 2183.

84 PHH Corp. v. Consumer Financial Protection Bureau, 881 F.3d 75, 164 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

85 *Seila Law*, 140 S. Ct. at 2191.

86 *Id.*

87 *Id.*

88 *Id.* at 2199.

89 *Id.* at 2200.

90 *Id.* at 2201–02. Similarly structured agencies included the FHFA and the Social Security Administration. As detailed more fully below, the Court made quick work of the FHFA in *Collins v. Yellen*. And shortly thereafter, the Biden Administration made quick work of the Social Security Administration Commissioner. *Constitutionality of the Commissioner of Social Security's Tenure Protection*, 45 OLC Op. __ (July 8, 2021), *available at* https://www.justice.gov/olc/file/1410736/download.

And the Director exercised substantial executive power, with the ability to "*unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties."[91] Accordingly, "the Director's insulation from removal by an accountable President is enough to render the agency's structure unconstitutional."[92] Once again, there was no statutory fix to avoid the constitutional issue.[93] And once again, the remedy was to sever "the offending tenure restriction," leaving the CFPB as it was but with a Director removable at will by the President.[94]

Seila Law differs from *Free Enterprise Fund* only in that it drops the hedging about the full extent of the President's removal power. "The President's power to remove—and thus supervise—those who wield executive power on his behalf," it proclaims, "follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers*."[95] "[T]he core holding of *Myers*," in turn, is "that the President has unrestrictable power to remove purely executive officers."[96] Moreover, *Humphrey's Executor*'s "conclusion that the FTC did not exercise executive power has not withstood the test of time."[97] There is a reason the Chief Justice felt the need to spell out that the Court's decision "d[id] not revisit *Humphrey's Executor*."[98]

Seila Law pointed the way to *Collins v. Yellen*, a challenge by private parties to the single-director structure of the Federal Housing Finance Agency, which was created around the same time as the CFPB.[99] *Seila Law* had distinguished the FHFA from the CFPB on the ground that the former "regulates primarily Government-sponsored enterprises, not private actors."[100] That observation carried little weight in *Collins*. Per Justice Samuel Alito's majority opinion, "*Seila Law* is all but dispositive."[101]

The Court, however, did not end its analysis there but continued on to address (and reject) a series of contrary arguments and thereby clarify the current state of doctrine. One argument sought to distinguish *Seila Law* based on differences in authority of the two agencies at issue. The Court wasn't having it: although "the FHFA's authority is more limited than that of the CFPB," "the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head."[102] Any rule that required distinguishing among agencies based on scope of authority or importance—the precise approach announced in *Morrison*, never to be seen again—would be unworkable.[103] Nor does it matter whether an agency regulates "ordinary Americans" directly.[104] And is the supposedly "modest" nature of the statute's tenure restriction—the Director may be removed "for cause," without limiting what causes qualify—enough to save it? Of course not: "even modest restrictions" impair the President's authority, as

> [t]he President must be able to remove not just officers who disobey his commands but also those he finds negligent and inefficient, those who exercise their discretion in a way that is not intelligent or wise, those who have different views of policy, those who come from a competing political party . . . , and those in whom he has simply lost confidence.[105]

After *Collins*, the only question left on the table appears to be whether an officer protected by a removal restriction exercises executive power.

Although *Collins* devotes less space than *Free Enterprise Fund* and *Seila Law* to the theory and practice of executive power, it does push meaningfully beyond their reasoning. The removal power, it states, "is essential to subject Executive Branch actions to a degree of electoral accountability," because "the President, unlike agency officials, is elected."[106] Importantly, that principle applies at all levels of the Executive Branch: "At-will removal ensures that the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community."[107] And, as noted, *Collins* finally repudiated *Morrison*'s logic that the nature and breadth of an executive official's authority matters in assessing the constitutionality of restrictions on removal of that official; after *Collins*, those factors appear to be irrelevant. These points in particular drew a sharp response from Justice Kagan, who joined the majority's judgment on stare decisis grounds but refused to join "the majority's political theory" of electoral accountability and its "extension of *Seila Law*'s holding."[108]

The Court's remedial discussion bears special mention. It found the removal restriction severable from the remainder of the statute, naturally enough.[109] But it did not call into question the agency's actions while the offending removal provision was in effect, because "the officers who headed the FHFA during the time in question were properly *appointed*."[110] Still, the Court left

91 *Seila Law*, 140 S. Ct. at 2203–04.

92 *Id*. at 2204.

93 *See id*. at 2206.

94 *Id*. at 2209.

95 *Id*. at 2191–92.

96 *Id*. at 2199 (quotation marks omitted).

97 *Id*. at 2198 n.2.

98 *Id*. at 2206.

99 141 S. Ct. 1761.

100 *Seila Law*, 140 S. Ct. at 2202.

101 *Collins*, 141 S. Ct. at 1783.

102 *Id.* at 1784.

103 *Id.* at 1785.

104 *Id.* at 1786.

105 *Id.* at 1787 (quotation and citations marks omitted).

106 *Id.* at 1784.

107 *Id.* (quotation marks omitted).

108 *Id*. at 1800–01 (Kagan, J., concurring in part and concurring in the judgment in part).

109 *See id.* at 1787–89.

110 *Id.* at 1787.

open the possibility that the removal restriction could have caused "compensable harm" in the unusual circumstances of the case,[111] such as if the President had been prevented or deterred from removing the FHFA Director.[112] But one doubts that this kind of relief would be available at all outside the unusual circumstances of *Collins*, let alone that many private parties could make such a showing or even allege such a ground for relief.

IV. The End of Independence from Presidential Control?

After *Seila Law* and *Collins*, it would be fair to question whether anything remains of *Humphrey's Executor* and the "headless" fourth branch of independent agencies that it enabled. Indeed, a recent opinion of the Office of Legal Counsel recognized that *Seila Law* and *Collins* leave open only "the possibility that certain agencies . . . may constitutionally be led by officials protected from at-will removal by the President."[113] Although *Humphrey's Executor* has not been formally overruled, its reasoning has been repudiated, as has its holding in large part. The stare decisis calculus suggests that it need not be maintained, and *Collins* in particular suggests that it will not be. Its end could come sooner than many expect.

Seila Law and *Collins* leave no doubt that a majority of Justices regard *Humphrey's Executor* and its progeny as wrongly decided. There is no way to reconcile those cases' authorization of restrictions on removal of Executive Branch officials with *Seila Law*'s recognition that the President's removal authority "follows from the text of Article II," and its announcement that "the President has unrestrictable power to remove purely executive officers."[114] The Court now understands, as the *Humphrey's Executor* Court did not, that what Congress considers to be "independent" agencies[115] exercise purely executive power.[116] "That power," in turn, "acquires its legitimacy and accountability to the public through a clear and effective chain of command down from President," who is and must be "ultimately responsible" for its exercise.[117] And that should be the end of the matter, at least so far as the merits of the removal-power question are concerned.

But that leaves stare decisis, the doctrinal concept that the Court "should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."[118] Stare decisis is "not an inexorable command," though, and the Court will overturn its past decisions when it has "strong grounds for doing so."[119] To begin with, it may be that stare decisis is not even applicable in this context; because *Myers* has never been overruled, the Court's precedents on removal power could be viewed as conflicting, requiring the Court to pick one line or the other. It would also be easy to distinguish *Humphrey's Executor* and *Wiener* into oblivion. Both regarded *Myers* as reaching only "purely executive officers" *and* adjudged the two agencies they addressed not to wield executive power at all. Even if the latter point was mistaken, the Court need not overrule it, but may instead limit it to those two agencies as they were constituted and functioned at the time. Today's agencies, by contrast, wield vast power that is indisputably executive in nature and so are subject to the rule of *Myers*. The Court has already gone a long way down this path, particularly in *Seila Law*'s characterization of *Humphrey's Executor*'s holding as reaching only agencies "said not to exercise any executive power."[120] For a next step, the Court need do no more than apply that understanding in a case involving a traditional multimember agency.

If the Court is inclined to take *Humphrey's Executor* head-on, stare decisis should be no barrier to overruling it. The doctrine "is at its weakest when [the Court] interpret[s] the Constitution because [its] interpretation can be altered only by constitutional amendment or by overruling [its] prior decisions."[121] In considering whether to overrule a past decision, the Court often considers such factors as "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision."[122] The Court's recent decisions neatly dispose of the first three: the reasoning of *Humphrey's Executor* has been eviscerated; *Collins* recognizes its rule (or, more accurately, what *Morrison* made of its rule) to be unworkable; and it plainly conflicts with other decisions, from *Myers* through *Collins*, as well as those recognizing independent agencies to wield executive power.

So far as subsequent developments are concerned, "the Court decided [*Humphrey's Executor*] against a very different . . . backdrop" than prevails today.[123] The years since that decision have witnessed the accretion of a "vast and varied federal bureaucracy" that exercises "authority . . . over our economic, social, and political activities."[124] "The collection of agencies housed outside

111 The suit was brought by shareholders in Fannie Mae and Freddie Mac to obtain relief from and compensation for an FHFA action requiring the companies to transfer nearly all of their earnings to Treasury. *Id*. at 1777. By the time the suit reached the Supreme Court, the shareholders' claims for prospective relief had become moot. *Id*. at 1780.

112 *Id.* at 1789.

113 OLC Opinion, *supra* note 90.

114 *Seila Law*, 140 S. Ct. at 2191–92, 2199.

115 *See, e.g.,* 44 U.S.C. § 3502(5) (listing some).

116 *See* City of Arlington, Tex. v. FCC, 569 U.S. 290, 304 n.4 (2013) (rejecting claim that "agencies exercise 'legislative power' and 'judicial power,'" and explaining that all agency activities, no matter their resemblance to legislative or judicial activities, "are exercises of—indeed, under our constitutional structure they *must* be exercises of—the 'executive Power'"); *Morrison*, 487 U.S. at 690 n.28.

117 United States v. Arthrex, Inc., 141 S. Ct. 1970, 1979, 1982 (2021) (quotation marks omitted); *compare* 1 Annals of Cong. 463 (1789) (statement of James Madison on the floor of the First Congress that "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws").

118 The Federalist No. 78 (Hamilton).

119 Janus v. Am. Fed. of St., Cnty., & Muni. Empls., 138 S. Ct. 2448, 2478 (2018).

120 *Seila Law*, 140 S. Ct. at 2199.

121 Agostini v. Felton, 521 U.S. 203, 235 (1997).

122 *Janus*, 138 S. Ct. at 2478–79.

123 *Id*. at 2483.

124 *Arlington*, 569 U.S. at 313 (Roberts, C.J., dissenting) (quotation marks omitted).

the traditional executive departments, including the Federal Communications Commission" and FTC, "is routinely described as the 'headless fourth branch of government,' reflecting not only the scope of their authority but their practical independence."[125] There have also been developments in the law. *Humphrey's Executor* and *Wiener* have become anomalies in the Court's executive-power jurisprudence.

Only reliance interests carry any weight against dispatching *Humphrey's Executor*, but *Collins* takes what otherwise would be the weightiest of them off the table. The key is its holding that an agency's past actions remain valid, notwithstanding any improper statutory removal restriction, so long as its officers "were properly *appointed*."[126] So even an outright overruling of *Humphrey's Executor* and what it came to stand for would upset no one's reliance on the work of independent agencies to date. As for Congress, both *Free Enterprise Fund* and *Seila Law* adopt a strong—perhaps insurmountable—presumption that a removal restriction may be severed from the remainder of a law and an agency's structure and powers thereby left otherwise unchanged. To overcome that presumption requires evidence "that Congress, faced with the limitations imposed by the Constitution, would have preferred no [agency] at all to a[n agency] whose members are removable at will."[127] If that standard was not met for the CFPB—which Congress specifically declared "independent" and accorded an unusual single-member structure precisely to bolster its independence—then it is unlikely ever to be met. So Congress's handiwork (the FTC, the FCC, and the rest) should remain fully intact, but for restrictions on the President's removal power. And Congress's reliance on its ability to enact such provisions is due little weight.[128]

All this suggests that *Collins* will not be the last word on the President's removal power. The next case may reach the Court in one of two ways.

First is an action challenging the lawfulness of a removal, as in *Myers* and *Humphrey's Executor*. To date, at least one of the appointees dismissed by President Biden has filed suit. Roger Severino was removed from his position on the Council of the Administrative Conference of the United States (ACUS), "an independent federal agency charged with convening expert representatives from the public and private sectors to recommend improvements to administrative processes and procedure."[129] President Donald Trump appointed Mr. Severino to a three-year term on the Council on January 16, 2021, and President Biden terminated his service on February 3, 2021. Mr. Severino's suit seeks declaratory and injunctive relief, including restoration of his appointment to the Council.[130] As ACUS is a purely advisory multimember agency comprised of experts on administrative affairs, this action potentially calls into question *Humphrey's Executor*. A sticking point, however, is that the statute contains no express removal restriction; accordingly, the more apt precedent may be *Wiener*, which held a similar statute to imply a restriction on removal. Similarly, Social Security Commissioner Andrew Saul, who disputes his recent removal by President Biden, may seek relief by suing for reinstatement or compensation.[131] Although the Social Security Act does restrict removal of the Commissioner, the agency's single-member structure may not require a court to venture much beyond *Collins*. But even so, the Commissioner's largely adjudicative function provides an opportunity to further erode, or perhaps even revisit, *Humphrey's Executor*.

President Biden's dismissals may also be subject to challenge by private parties whose rights were affected. Such challenges are now pending. President Biden took the unprecedented step of removing Peter Robb from his position as General Counsel of the NLRB on Inauguration Day, despite his four-year term running to November 17, 2021. Parties subject to actions initiated by the NLRB General Counsel have challenged the Acting General Counsel's authority to act in pending cases.[132] A similar challenge might be raised to President Biden's removal of Sharon Gustafson from her position as General Counsel of the Equal Employment Opportunity Commission on March 5, 2021, less than halfway through her four-year term, or to President Biden's removal of Mr. Saul.

The second way the constitutional issue may arise is in a private-party challenge to actions by an official insulated from removal by the President, as in *Free Enterprise Fund*, *Seila Law*, and *Collins*. Although those decisions recognized standing for parties regulated by an independent agency to challenge its structure, *Collins* removes nearly any prospect that a private party will obtain meaningful relief if it prevails. It seems likely, then, that a private-party plaintiff (or defendant in an enforcement action) would need to be in it to change the law governing the Executive

125 *Id.* at 314.

126 *Collins*, 141 S. Ct. at 1787.

127 *Seila Law*, 140 S. Ct. at 2209 (internal quotations omitted).

128 *Cf. Chadha*, 462 U.S. at 945 ("[P]olicy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers"). This logic, in the main, also applies to removal restrictions for inferior officers. The reasoning of *Perkins*, 116 U.S. 483—what little of it there was—is poor. The decision does not address the constitutional provisions underlying the President's removal power—the Executive Vesting Clause and the Take Care Clause—and those provisions do not distinguish between principal and inferior officers. *Cf.* 1 Annals of Cong. 499 (1789) ("If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation," even "the lowest officers, . . . will depend, as they ought, on the President, and the President on the community.") *Morrison*, as well, conflicts with later decisions that have forcefully rejected its uncertain standard of measuring the propriety of a restriction by whether it leaves the President "ample authority," 487 U.S. at 692, whatever that means. As a practical matter, however, there may be little to gain through a challenge to the insulation of an inferior officer, given that such officers are by definition supervised by principal officers and that it is the insulation of agency heads, who are principal officers, that makes an agency independent of the President. *Cf. Arthrex*, 141 S. Ct. 1979. Even so, the issue could arise the same way that it did in *Perkins*—through a challenge to dismissal.

129 "About," acus.gov.

130 Severino v. Biden, No. 21-cv-314 (D.D.C. filed Feb. 3, 2021).

131 *Biden Fires Trump-Nominated Social Security Commissioner*, Reuters (July 12, 2021), *available at* https://www.reuters.com/article/usa-biden-social-security-idTRNIL1N2OO1OK.

132 *E.g.*, In re NABET-CWA and Jeremy Brown, Case Nos. 19-CB-244528, 19-CV-274119 (NLRB).

Branch, rather than to relieve itself of any obligation. And there are organizations interested in doing just that.[133]

Such challenges may arrive sooner rather than later. The FTC, for example, has recently announced "an aggressive new agenda" that includes stepped-up investigatory and enforcement actions—both exercises of quintessentially executive power.[134] An action challenging the FTC's status would provide the Court with a perfect vehicle to revisit *Humphrey's Executor*'s approval of the same agency's structure.[135]

133 *See, e.g.,* Devin Watkins, *Looking Back at the Success of* 'Free Enterprise Fund,' Competitive Enterprise Inst., Aug. 10, 2018 (noting think tank's role in separation-of-powers suit), *available at* https://cei.org/blog/looking-back-at-the-success-of-free-enterprise-fund/.

134 *See* Aaron Nielson, *Is the FTC on a Collison Course With the Unitary Executive?*, Notice & Comment, July 2, 2021, https://www.yalejreg.com/nc/is-the-ftc-on-a-collison-course-with-the-unitary-executive/. (Professor Nielson would know. He had the unenviable task of defending the FHFA's structure before the Court in *Collins*.)

135 *See, e.g.*, Petition for Writ of Certiorari, Axon Enter., Inc., v. Fed. Trade Comm'n, No. 21-86 (S. Ct. July 20, 2021) (asking the court to consider whether "the structure of the Federal Trade Commission . . . is consistent with the Constitution").

Mistaken Heritage: How a Statutory Misreading Has Denied Congress' Intended Beneficiaries Protection for Half a Century

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Other Views:

• LULAC v. Clements, 999 F.2d 831 (5th Cir. 1993), *available at* https://casetext.com/case/league-united-latin-amer-citizens-v-clements.

• Justin Levitt, *Citizenship and the Census*, 119 Colum. L. Rev. 1355 (2019), *available at* https://www.jstor.org/stable/26650741.

• Scotty Schenck, *Why* Bartlett *is not the End of Aggregated Minority Group Claims Under the Voting Rights Act*, 70 Duke L.J. 1883 (2021), *available at* https://dlj.law.duke.edu/article/why-bartlett-is-not-the-end-of-aggregated-minority-group-claims-under-the-voting-rights-act-schenck-vol70-iss8/.

• Meaghan Field, *Voting Equality and Educational Equality: Is the Former Possible Without the Latter and Are Bilingual Ballots a Sensible Response to Education Discrimination*, 17 Wash. & Lee Civil Rts. & Soc. Just. 385 (2011), *available at* https://law2.wlu.edu/deptimages/journal%20of%20civil%20rights%20and%20social%20justice/Field.pdf.

When the Voting Rights Act (VRA) came up for renewal of its pre-clearance mechanism for the second time in 1975, Congress didn't just update its coverage formula and leave the statute in place. It amended the core provisions of the VRA. Previously, the VRA had established that

> in any State or political subdivision [where a] court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, it shall suspend the use of the test and devices . . . as the court shall determine is appropriate and for such period as it deems necessary.[1]

In the 1975 amendments, Congress added provisions guaranteeing the same protections and remedies to members of language minorities.[2] Congress simultaneously defined that term for these purposes: "The term 'language minorities' or 'language minority group' means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage."[3]

This definition is odd. It lists three groups of people described in parallel language emphasizing ethnicity ("persons who are American Indian, Asian American, [or] Alaskan Natives"), and then protects a final group through the roundabout, non-parallel locution "of Spanish heritage."[4] What did that differing word choice signify to the original interpretive community of ordinary speakers of American English in 1975?

This is not a merely academic question. A modern interpreter of this legal text—say, a judge applying it in a voting rights case—should begin her analysis with such a question. And indeed, the question yields a clear answer upon consideration of the historical context, the text itself (supported by contemporaneous usage), Congress's enacted legislative findings, and the relevant legislative history. The law's protection of the voting rights of language minorities—specifically those "of Spanish heritage"—protects those whose native language is Spanish, a disadvantaged group that is not identical with all Hispanics.

And yet, the courts have never applied this clear answer. The statute has never been applied to protect these core, targeted beneficiaries. The population Congress sought to protect through the 1975 amendments still largely suffers from the same problems Congress enacted those amendments to address. Instead, a misreading of the language of the amendments has yielded irrelevant relief to other groups for generations.

1 The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, § 3(b) (1965) (amended 1975) (current version at 52 U.S.C. § 10301).

2 1975 Amendments to the Voting Rights Act of 1965, Pub. L. No. 94-73, 89 Stat. 400, §§ 203, 206 (1975) (current version at 52 U.S.C. § 10301).

3 *Id.* at § 207.

4 *Id.*

I. Historical Context for the 1975 Amendments

When Congress amended the VRA in 1975, there was a lot going on in the voting rights arena of American politics. For one thing, the VRA had been on the books for a decade, and its emergency preclearance mechanism had expired and been renewed once before, in 1970, for five additional years, which meant it was up for renewal again.

President Gerald Ford had been in office for less than a year, and his predecessor Richard Nixon had by then been disgraced by the Watergate scandal. Early in the Nixon presidency, administration officials had essentially conjured the new term "Hispanic" into the English language on the advice of an Ad Hoc Committee.[5] That committee had initially been established by Secretary of Health, Education, and Welfare Caspar Weinberger, before later expanding to include representatives from the Census Bureau and the Office of Management and Budget. At its inception, the new term was applied to all those whose "origin or descent" was "Mexican," "Puerto Rican," "Cuban," "Central or South American," or "Other Spanish."[6] By 1975, the term Hispanic had spread into common usage, with organizations using it in their names cropping up widely.[7] Therefore, at the time of the 1975 amendments, there was an accepted term for those whose "origin or descent" was in or from such Spanish-speaking lands.

The U.S. Commission on Civil Rights had recently released a series of relevant reports and memoranda, including a "Survey of Preliminary Research on the Problems of Participation by Spanish Speaking Voters in the Electoral Process"[8] and *The Excluded Student, Mexican American Education Study, Report III*.[9] These reports identified barriers to voting faced by "non-English speaking persons"[10] and a related "systematic failure of the educational process" that had generated comparatively "high illiteracy rates" and high-school dropout rates above 50% among that population.[11] And contemporaneous research backed up these conclusions: The Lyndon B. Johnson School of Public Affairs spent 1975-1976 investigating conditions in Texas's "colonias," which it defined as "poor, rural unincorporated communit[ies with] no formal ties with the governments of cities and towns," and which therefore lacked "the kinds of services and amenities offered in urban areas such as piped water, treated sewerage [sic], and street maintenance."[12] It concluded that residents were "almost exclusively Mexican-American"[13] and "the poorest of the poor."[14] While the LBJ School appears to have assumed and therefore not mentioned it, in 1975, colonia residents (like the residents of the entire border region) were overwhelmingly Spanish speakers.[15] Recognizing that "the problems facing colonia residents . . . are many," it "focuse[d] on water-related problems, including access to clean drinking water and sanitary sewage disposal," as these were "some of the most immediate, tangible concerns of colonia residents."[16]

The 94th "Watergate" Congress was among the least balanced by party in modern history, with Democratic majorities totaling 61 seats in the Senate and approximately 290 seats in the House (66%).[17] The congressional majority was able to pass anything it could agree on without fear of filibuster; with only a few Republican votes, it could even overcome any potential presidential veto.

It was in this context that the Ford Administration sent Assistant Attorney General Stanley Pottinger to Congress in March 1975 to explain "President Ford's recommended bill[s]," which "propose[d] . . . changes [that] should be made in the Act."[18] When he did so, Pottinger noted expressly that:

> The proponents of additional legislation have suggested two major legislative needs in this area. First, they point

5 VOXXI, *How the Federal Government Settled on Calling Us 'Hispanic*,' The Huffington Post (Sep. 23, 2013), https://www.huffpost.com/entry/latino-or-hispanic_n_3956350.

6 *Measuring Race and Ethnicity Across the Decades: 1790-2010: Mapped to 1997 U.S. Office of Mgt. and Budget Classification Standards*, U.S. Census Bureau (2015), https://www.census.gov/data-tools/demo/race/MREAD_1790_2010.html.

7 *See* Hispanic Scholarship Fund, https://www.hsf.net/about-hsf/; Hispanic Organization of Latin Actors, https://www.holaofficial.org/our-mission/; The Association of Hispanic Arts, https://web.archive.org/web/20051218072115/http://www.latinoarts.org/about_aha.html (all founded in 1975). *See also* The Hispanic Congressional Caucus, https://chc.house.gov/about (founded 1976).

8 S. Rep. No. 94-295, at 26 (1975), *reprinted in* U.S.C.C.A.N. 774, 792 (citing to U.S. Comm'n on C.R. Staff Memorandum, at 997 (Apr. 23, 1975)).

9 *The Excluded Student - Report III: Educational Practices Affecting Mexican Americans in the Southwest*, Dr. Hector P. Garcia papers (1972), *available at* http://archivesspace.tamucc.edu/repositories/4/archival_objects/4917 (Special Collections and Archives, Mary and Jeff Bell Library, Texas A&M University-Corpus Christi) (last accessed July 5, 2021).

10 *Id.* at 26.

11 *Id.* at 28.

12 Mark Estes, Kingsley E. Haynes & Jared E. Hazleton, Colonias in the Lower Rio Grande Valley of South Texas: A Summary Report (1977).

13 *Id.*

14 *Id.*

15 The published data from the 1970 Census obscures this fact by combining "persons of Spanish Language" and those with "Spanish Surnames" into a single reported category. *See Persons of Spanish Language or Spanish Surname* (1970), https://legacy.lib.utexas.edu/maps/atlas_texas/pop_spanish_lang_1970.jpg. But the 1980 Census separately reported the number of respondents speaking Spanish at home, and its data reflects that Cameron County, Hidalgo County, Willacy County, and Starr County—the four counties of the Rio Grande Valley that today participate in the Rio Grande Valley Partnership—were overwhelmingly Spanish speaking five years after 1975. *See Characteristics of the Population: General Social and Economic Characteristics –Texas*, U.S. Department of Commerce, Bureau of the Census (1980), Table 172 "Nativity and Language for Counties: 1980" (showing that 78.85% of these counties' residents aged 5 or above spoke Spanish at home).

16 Estes et al., *supra* note 12.

17 *See Congressional Profiles*, U.S. House of Representatives, https://history.house.gov/Congressional-Overview/Profiles/94th/; *Party Division*, U.S. Senate: Party Division (2021), https://www.senate.gov/history/partydiv.htm. The numbers shifted over the Congress due to deaths, resignations, and one member's change of caucus.

18 *The Extension of the Voting Rights Act: Hearing Before the Subcommittee on Civil Rights and Constitutional Rights of the H. Judiciary Comm.*, 94th Cong. at 1-2 (1975) (statement by J. Stanley Pottinger, Asst. A.G., Civil Rights Division).

> out that some states in which large numbers of non-English speaking Puerto Ricans, Mexican Americans or Native Americans reside conduct English-only elections, despite the existence of some court rulings that such minorities are entitled to bilingual elections. Second, they have alleged that other forms of discrimination against these minorities are sufficiently prevalent in some non-covered states to warrant expanding the special coverage provisions [for pre-clearance] to cover such states.[19]

These bills were eventually incorporated into and enacted as the VRA amendments of 1975.

II. Text: "Persons Who are . . . of Spanish Heritage"

What did the phrase "of Spanish heritage" mean to an ordinary English speaker in 1975?[20] Given that the statute uses the phrase in its definition of "language minority," it seems clear that it must have to do with the use of the Spanish language. In the mid-1970s, "heritage" would have been understood by readers to be that which one received from one's family. Then-current dictionaries defined the word to mean "property that descends to an heir,"[21] "something transmitted by or acquired from a predecessor,"[22] "that which comes or belongs to one by reason of birth,"[23] and, in legal usage, "that which has been or may be inherited by legal descent or succession" or "any property . . . that devolves by right of inheritance."[24] And the inheritance in question is specified in the statute: "Spanish." Given a natural reading and contemporary dictionary evidence, the phrase "persons who are . . . of Spanish heritage" seems to mean those who inherited the Spanish language from their forbearers—those for whom it is a "mother tongue," a native language "learned on a mother's knee."

Notice that for this last sub-category of "language minority," unlike the prior three, the legislative language focuses on linguistic inheritance, not on ethnic descent. Congress's language protects "American Indian[s], Asian American[s], [and] Alaskan Natives" regardless of what language they may speak; for these groups, Congress focused on immutable characteristics of demography. But for the last ("persons who are . . . of Spanish heritage"), Congress avoided this construction, just after the U.S. government had coined an applicable term of art—"Hispanic"—perfectly capturing its content. Instead, Congress chose the enacted phraseology, which focuses protection on those who inherited the Spanish language, rather than those of Hispanic ethnic descent.

III. Clarification Through Whole Enactment: Relevance of Congress's Legislative Findings

Congress's enacted legislative findings both prove that this was the meaning of "persons who are . . . of Spanish heritage" in the statute and explain why it was the congressional focus. Congress found "that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English."[25] It found that English-language-only elections "excluded from participating in the electoral process" "language minority citizens."[26] As codified, the prohibition of denials or abridgements of the right to vote because of language minority group status immediately follows these findings.[27]

Congress's focus in creating a new protected class was entirely on the ability of communities of Americans "from environments in which the dominant language is other than English"[28] to participate in the larger political discussion and electoral process. It was not concerned about English-speaking Hispanics, who by that time had played central roles in American law, politics, and history for generations.[29] Perhaps recognizing this history, and seeing how it differed from the histories of the three other newly protected groups, the findings underscored that the 1975 amendments sought to protect not Hispanics as Hispanics, but only those Hispanics whose linguistic heritage prevented them from participating in politics and society in similar ways, whatever their personal, ethnic background.[30]

IV. Consistency of Legislative History

The legislative history further underscores both the original understanding of the phrase and Congress's reasoning for adopting

19 *Id.* at 45.

20 1975 Amendments, *supra* note 2.

21 Definition of "heritage," *in* Webster's Seventh New Collegiate Dictionary (1967).

22 *Id.*

23 Definition of "heritage," *in* The Random House dictionary of the English language: the unabridged edition (1973).

24 The Oxford English Dictionary further supports this reading, defining "heritage" as having a primary meaning dating back to 1225 of "[t]hat which has been or may be inherited" and related usages as "that which comes from the circumstances of birth; an inherited lot or portion; the condition or state transmitted from ancestors" dating to 1621. *See* Definition of "heritage," *in* Oxford English Dictionary (2019 ed.).

25 1975 Amendments, *supra* note 2, at § 203(f)(1).

26 *Id.*

27 *Id.* at § 203(f)(2).

28 *Id.* at § 203(f)(1).

29 Among other Americans who would have fallen into the Hispanic category coined in the 1970s, who were English-speaking and fully capable of successfully participating in American political life long before enactment of the 1975 Amendment, prominent examples include: Supreme Court Justice Benjamin Cardozo, who proudly traced his family history to Spain, but "confessed in 1937 that his family preserved neither the Spanish language nor Iberian cultural traditions." Aviva Ben-Ur, Sephardic Jews in America: a diasporic history 86 (2012); Senator Charles Dominique Joseph Bouligny, elected from Louisiana in the 1820s; and Octaviano Ambrosio Larrazolo, who was born in Chihuahua, before serving New Mexico as both Governor and Senator in the early 1900s. *Larrazolo, Octaviano Ambrosio*, U.S. House of Representatives: History, Art & Archives, https://history.house.gov/People/Detail/15032401304.

30 This is not to say that English-speaking individuals who are Hispanic are never protected by the VRA. When they are part of a recognized racial group (a minority in a given state or locality), such individuals would be entitled to the same potential protections as any other English-speaking racial minority. *See* Pottinger statement, *supra* note 18, at 2 ("In my view . . . the Voting Rights Act, in its various protections against discrimination on account of race or color, does to some extent already cover Mexican-Americans and Puerto Ricans."); Rice v. Cavetano, 528 U.S. 495, 512 (2000) (holding that the term "race" was expansive and covers each ethnic and racial group, separately); Or v. Mitchell, 400 U.S.

it. The relevant legislative history includes both President Ford's signing statement and the Senate Judiciary Committee's Report on the 1975 amendments.

When President Ford signed the amendments into law on August 6, 1975, he was brief and to the point, and he left no doubt as to the intention of the amendments. "The bill I will sign today . . . broadens the provisions [of the VRA] to bar discrimination against *Spanish-speaking Americans*."[31]

The Senate Report, at far greater length, makes the same point. The Report clarifies that the "focus" of the amendment "is to insure that the Act's special temporary remedies are applicable to states and political subdivisions where (i) there has been evidenced a generally low voting turnout or registration rate and (ii) *significant concentrations of minorities with native languages other than English reside*."[32] Indeed, the Senate Judiciary Committee's Subcommittee on Constitutional Rights crafted the amendment as a result of "7 days of hearings and testimony from 29 witnesses . . . document[ing] a systematic pattern of voting discrimination and exclusion against *minority group citizens who are from environments in which the dominant language is other than English*."[33] The Report went on:

> The definition of those groups included in 'language minorities' was determined on the basis of the evidence of voting discrimination. Persons of Spanish heritage was the group most severely affected by discriminatory practices . . . . No evidence was received concerning the voting difficulties of other language groups. Indeed, the voter registration statistics for the 1972 Presidential election showed a high degree of participation by other language groups: German, 79 percent; Italian, 77.5 percent; French, 72.7 percent; Polish 79.8 percent; and Russian, 85.7 percent.[34]

The Committee even postulated a potential reason for these differences:

> the historical experience of these groups is far different from the European immigrants who came to North American [sic] and eventually became part of the Great Melting Pot. For the most part, the Spanish-heritage, American Indian and Alaskan Native groups were living on territory suddenly annexed by the United States; in most cases their ancestors had been living on the same land for centuries. These groups stayed on their original lands after the annexation, and while mobility certainly existed within their own cultures, opportunity for mobility within the European-dominated American culture was often denied them, most frequently by poor educational institutions and unresponsive political institutions.[35]

Accordingly, the Report reflects that Congress crafted the amended language to directly address "the problems of 'language minority groups,' that is, racial minorities whose dominant language is frequently other than English."[36] The Report diagnoses that "[t]he central problem documented is that of dilution of the vote—arrangements by which the votes of minority electors are made to count less than the votes of the majority."[37] It flatly states that "Language minority group as defined in this title, means minority persons who have a native language other than English,"[38] then it explains that under the amendments, "[a]ll of the special remedies of the Voting Rights Act are extended to citizens of language minority groups" based on Congress's finding "that these minority citizens are from environments in which the dominant language is other than English."[39]

The Report also establishes that Congress chose this language knowing full well that it had other alternatives. It describes one such potential alternative definition in footnote 14, citing a letter from Meyer Zitter, the Population Division Chief at the Census Bureau, to the House Judiciary Committee, dated April 29, 1975, in which he argued for a definition of "Persons of Spanish heritage" encompassing: "(a) 'persons of Spanish language' in 42 States and the District of Columbia; (b) 'persons of Spanish language' as well as 'persons of Spanish surname' in Arizona, California, Colorado, New Mexico and Texas; and (c) 'persons of Puerto Rican birth or parentage in New Jersey, New York and Pennsylvania."[40] But this alternative definition not only didn't make it into the text of the *statute*, it didn't even make it into the text of the *Committee Report*. The footnote definition reflects a road not taken, rather than contradictory evidence.

The legislative history makes plain what the legislative context and legislative findings made nearly certain. Congress knew how to define a protected class by descent, birth, or parentage. It had available the newly coined governmental term "Hispanic" to capture that alternative. And it chose instead to protect "persons who are . . . of Spanish heritage"—not all those

112, 147 (1970) (recognizing before the 1975 Amendments that the VRA protected "not only Negroes but Americans of Mexican ancestry"); Harding v. Co. of Dallas, 948 F.3d 302, 308-15 (5th Cir. 2020) (holding that non-Hispanic whites in a "majority-minority" locality share same protections under the VRA as any other racial minority and applying same legal standards to their Section 2 claim that were developed in cases brought by other racial minorities). However, one cannot conclude from these sources that *all* Hispanics share a race, a facially untrue statement both under the modern usage of the term (compare racial descriptions of a Dominican and a Chilean) and the understanding of race at the 1965 enactment of the original VRA (in 1960, the Census Bureau reclassified perceived Mexican-Americans as "White," but did not do the same for perceived Puerto Ricans).

31 Remarks of the President at the Signing of the Voting Rights Act, The Rose Garden (Aug. 6, 1975) (digitized from Box 14 of the White House Press Releases at the Gerald R. Ford Presidential Library) (emphasis added).

32 S. Rep. No. 94-295, at 9 (1975), *reprinted in* U.S.C.C.A.N. 774, 775 (emphasis added).

33 *Id.* at 24 (emphasis added).

34 *Id.* at 31.

35 *Id.* at 38-39.

36 *Id.* at 38.

37 *Id.* at 27.

38 *Id.* at 46.

39 *Id.*

40 *Id.* at 24.

in the Hispanic minority, but only those "minority persons who have a native language other than English."[41]

V. History of Cases Misapplying This Provision

Despite this evidence for the original meaning of the statutory text, I have found *no* cases litigated under either Section 2 or Section 5 of the Voting Rights Act since 1975 which interpret the protected class of "persons who are . . . of Spanish heritage" to include precisely and only those Hispanics whose native language is Spanish. I have found *no* cases in which any plaintiff (neither a private plaintiff, nor the Department of Justice) has sought relief from any court for, specifically, a population of Spanish-speaking Hispanics *as* Spanish speakers. I have found *no* cases where any state or local government or any public official sued in an official capacity has argued that the phrase protects specifically Spanish-speaking Hispanics, rather than Hispanics in general.

Instead, in case after case spanning 46 years, the voting rights bar has treated the phrase as a synonym for "Hispanic."[42] As a result, no court has yet had the opportunity to consider, specifically, the rights of the Spanish-speaking Hispanic population under the VRA or whether those rights are served by the relief that has typically been sought and obtained by the self-appointed, English-speaking spokespeople for Hispanics as a whole. To date, every redistricting case ostensibly affording relief to "persons who are . . . of Spanish heritage" has instead afforded relief to "Hispanics"—a group Congress chose *not* to protect in the 1975 amendments addressing language minorities.

VI. Status of Protected Class Today

The class of "persons who are of . . . Spanish heritage" does not include all Hispanics, but only those Hispanics "who have a native language other than English."[43] *They* were the American citizens Congress found to have consistently been diluted into districts with a majority they could not understand, who did not know of or care about their specific needs and left them with "poor educational institutions and unresponsive political institutions."[44] Residents of the colonias, living without clean water or sewage services, epitomized the plight of this group.

The difference remains material, as approximately 83% of Hispanic Census respondents now speak English "well" or better.[45] Indeed, today, 46 years later, the conditions of the average Hispanic person in America look markedly different, and better, than they did in 1975. For example, the middle quintile of American Hispanic households has gone from a Census-estimated mean income of $38,222 (in 2019 dollars) to $56,285 in 2019—a 46.9% increase;[46] for comparison, the same period saw the mean income for the middle quintile of White, non-Hispanic Americans go from $53,910 (in 2019 dollars) to $76,252 in 2019—a 37.8% increase.[47] The same period saw the overall Hispanic household median and mean incomes rise from $51,124 and $59,698, respectively, to $68,703 (up 34.4%) and $98,088 (up 64.3%), respectively.[48] Within this period, the twenty years spanning from 2000 to 2020 saw the share of American "Hispanics with a bachelor's degree or higher nearly double."[49]

But it does not appear that the same can be said of America's native-Spanish-speaking citizens. To return to an emblematic example, the colonias still exist. Texas defines a colonia as a

> neighborhood or community [in] a geographic area located within 150 miles of the Texas-Mexico border that has a majority population composed of individuals and families of low and very low income[, who] lack safe, sanitary and sound housing and are without basic services such as potable water, adequate sewage systems, drainage, utilities, and paved roads.[50]

More than 400,000 Americans continue to live in such isolated poverty.[51] "Almost 55 percent of colonia residents do not graduate from high school"[52]—a statistic unmoved from the mid-1970s.

41 *Id.* at 46.

42 There are many precedents following this pattern. Abbott v. Perez, 138 S. Ct. 2305 (2018) (discussing throughout the rights of "Hispanics" and "Latinos" under § 2 of the VRA, without analysis of *which* provision of § 2 was applicable); LULAC v. Perry, 548 U.S. 399, 425, 427 (2006) (describing VRA's requirement that "members of [a racial group not] . . . have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," before then assessing opportunities of "Latinos" through an extensive discussion of Census data on Hispanics); Rodriguez v. Bexar County, 385 F.3d 853, 859-71 (5th Cir. 2004) (describing VRA claims that map "diluted the influence of Hispanic votes" and then addressing the merits by reference to Hispanic Census data); LULAC v. Clements, 999 F.2d 831, 838 (5th Cir. 1993) (describing how "Plaintiffs contend that electing trial judges . . . violates § 2 of the [VRA] by . . . diluting the voting power of Hispanics and blacks" by "proceed[ing] on behalf of language and ethnic minorities in different combinations in different counties"); Rodriguez v. Pataki, 308 F. Supp. 2d 346, 371, 443, 373-74 (S.D.N.Y. 2004) (citing statutory language and definition at n.28 and Supreme Court's "instruct[ion], when voting rights claims are based on a combination of distinct ethnic and language minority groups," but then analyzing "persons of . . . Spanish heritage" entirely by reference to Hispanic Census data).

43 1975 Amendments, *supra* note 2.

44 *Id.*

45 *English proficiency among Hispanics U.S. 2019*, Statista (2021), https://www.statista.com/statistics/639745/us-hispanic-english-proficiency/. This figure is for all Hispanic respondents, including non-citizens. Taking into account that it takes time for immigrants to learn English, it is likely that the figure for American citizens who are Hispanic is considerably higher.

46 *Historical Income Tables: Households*, U.S. Census Bureau (2020), https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-households.html.

47 *Id.*

48 *Id.*

49 Don Beyer, The Economic State of the Hispanic Community in America: Keys to Building a Better Economy after COVID-19 (2020), https://www.jec.senate.gov/public/cache/files/23062796-f531-43cf-bbc1-d68a0e7c3244/hhm2020-economicstateofthehispaniccommunityinamerica-final.pdf.

50 *Background on the Colonias*, Texas Department of Housing & Community Affairs, http://www.tdhca.state.tx.us/oci/background.htm.

51 *Colonias in Texas*, https://people.uwec.edu/ivogeler/w188/border/coloniastx.htm. But note that this source recognizes that at least some colonias have acquired basic services in the interim.

52 Patrick Strickland, *Living on the edges: Life in the colonias of Texas Elections,* Al Jazeera (2016), https://www.aljazeera.com/features/2016/11/5/

More generally, where Spanish-speaking Hispanics comprise the majority, educational institutions consistently underperform as compared to other areas, just as they did in 1975.[53] I invite the reader to draw reasonable inferences on the responsiveness of the relevant political institutions.

VII. Conclusion

For 46 years, courts have compelled the drawing of districts affording America's Hispanic population the opportunity to elect its preferred candidates in nominal reliance on the language of the 1975 VRA amendments. But America's native-Spanish-speaking citizen population has neither disappeared, nor seen the drawing of districts where it comprises a majority. Native-Spanish-speaking Hispanics today remain subject to dilution among a larger, English-speaking population, even if judicial interventions have required that that majority in which they are diluted look slightly more like them.

That was not the end sought by Congress, and it is indefensible under the enacted statute. The native-Spanish-speaking beneficiaries whom Congress sought to protect have yet to even *begin* to receive the protection enacted almost five decades ago. The relief granted in their name has totally missed the mark, instead sweeping into its ambit others whom Congress chose not to include in the new protected class and further racializing America's politics.

Not only have we not completed the work set for us by Congress in 1975; arguably, we have not yet begun it.

living-on-the-edges-life-in-the-colonias-of-texas.

53 For example, drawing from the most recent information made available by the Texas Education Agency, Texas has 10 Independent School Districts whose student populations are at least 80% Hispanic that also have a majority of students enrolled in bilingual or English-language-learner programs. *2018–19 Texas Academic Performance Reports*, Texas Education Agency, https://rptsvr1.tea.texas.gov/perfreport/tapr/2019/index.html. Eight have lower percentages of students registering STAAR scores at grade level than the state average. Excluding the ISD with insufficient test-takers to disclose data, all nine have average ACT scores below the state norm, and six have average SAT scores below the state norm.

Protecting Economic Liberty in the Federal Courts: Theory, Precedent, Practice

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Other Views:

- Amy Coney Barrett, *Originalism and Stare Decisis*, 92 Notre Dame L. Rev. 1921 (2017), *available at* https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4734&context=ndlr.
- Roderick Hills, *Is the Federal Judicial Cure for Protectionism Worse Than the Disease?*, 43 Harv. J.L. & Pub. Pol'y 13 (2020), *available at* https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2020/01/Hills-FINAL.pdf.
- Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955), *available at* https://supreme.justia.com/cases/federal/us/348/483/.
- Tiwari v. Friedlander, No. 3:19-CV-884, 2021 WL 1407953 (W.D. Ky. Apr. 14, 2021), *available* at https://casetext.com/case/tiwari-v-friendlander.

The 14th Amendment meaningfully protects economic liberty. While this protection was originally housed in the Privileges or Immunities Clause, current Supreme Court doctrines of substantive due process and equal protection of the laws can provide substitute protection for this liberty.

Today, Supreme Court precedent subjects economic liberty claims to rational basis review. While the original law of the 14th Amendment would provide economic liberty more protection, judges can still provide modest protection for this right by applying meaningful rational basis review, rather than simply deferring to governments' claims about their interests and the means used to achieve them. *St. Joseph Abbey v. Castille*, a case decided by the Fifth Circuit Court of Appeals, is a model of harmonizing this original law with Supreme Court precedent. Other federal courts considering economic liberty challenges should follow suit.

This article (1) explains how the 14th Amendment protects economic liberty, (2) describes how federal courts employing the rational basis test can protect economic liberty even though they are bound by nonoriginalist precedent, and (3) gives three case illustrations of how this method of judicial review under the 14th Amendment can be applied to protect economic liberty today.

I. The Original Law of the 14th Amendment Protects Economic Liberty

The original law of the 14th Amendment protects economic liberty.[1] Economic liberty—which encompasses the right to earn an honest living—is "the right to acquire, use, and possess private property and the right to enter into private contracts of one's choosing."[2] James Madison called this right an individual's "free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called."[3] And in the words of John Bingham, it was the liberty "to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellow-men, and to be secure in the enjoyment of the fruits of your toil."[4] This

1 This article employs a theory of originalism called original-law originalism. This theory holds that our law is the original law, the founders' law, as it has been lawfully changed. It seeks to ascertain the original legal rule enacted by a particular clause of the Constitution at the time of enactment. Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 Harv. L. Rev. (forthcoming 2022) (manuscript at 46) ("On an original-law approach . . . the key standard for interpreting [a clause] is that it enacts whatever rule of law it enacted at the Founding.").

2 Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 Harv. J.L. & Pub. Pol'y 5, 5 (2012).

3 James Madison, *Property*, National Gazette (March 29, 1792), *in* James Madison's Writings 516 (Jack N. Rakove ed., 1999).

4 Cong. Globe, 42nd Cong., 1st Sess., Appendix 81–86 (Mar. 31, 1871) (speech of John Bingham), *in* 2 The Reconstruction Amendments:

right, also called free labor at the framing of the Reconstruction Amendments, was central to the Second Founders' constitutional vision, and its protection was guaranteed by the 13th and 14th Amendments.[5]

The Privileges or Immunities Clause is the 14th Amendment's primary vehicle for protecting economic liberty. That clause states: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[6] The Privileges or Immunities Clause incorporates by reference a body of rights for federal protection. This body of rights is "a species of general law" recognized in state constitutions, the federal Constitution, and the common law.[7] Senator Jacob Howard recognized that this constellation of rights "cannot be fully defined in their entire extent and precise nature" but identified two textual hooks for identifying some of these rights: the federal Bill of Rights and the rights protected by Article IV, Section 2's Privileges and Immunities Clause.[8] In his concluding remarks presenting the 14th Amendment to the Senate, he stated, "Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution . . . ."[9] The Privileges or Immunities Clause incorporated a preexisting body of rights, and the 14th Amendment provided an express textual ground for protection by federal courts (Section 1) and Congress (Section 5).[10] This would provide the protection for civil rights that the Second Founders argued was always part of the constitutional design, while leaving the structure of federalism intact.

At minimum, the privileges or immunities protected by the 14th Amendment include (1) the rights recognized in the federal Bill of Rights, (2) the rights recognized by each state since the Founding, often in their state constitutions, and (3) the rights protected by Article IV's Privileges and Immunities Clause.[11]

Among the privileges or immunities protected by the clause is the right to earn an honest living. First, the right to ply one's trade was long recognized at common law and inherited by the American states.[12] Second, *Corfield v. Coryell*, the leading case defining the privileges and immunities of citizens under Article IV, included economic liberty among Americans' privileges or immunities. Justice Bushrod Washington wrote,

> the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety . . . . The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . . to take, hold and dispose of property, either real or personal . . . may be mentioned as some of the particular privileges and immunities of citizens . . . .[13]

This reading of the clause is confirmed by antislavery constitutionalism and free-labor ideology, two of the leading strands of thought that animated the Second Founders. For instance, by the time of the 14th Amendment's framing, many antislavery constitutionalists had begun reading Article IV's Privileges and Immunities Clause as a guarantor of rights within states.[14] By contrast, the dominant position to that point had viewed that clause as simply an interstate antidiscrimination provision. The antislavery view that the federal Constitution must protect basic rights within the states ultimately prevailed through the Second Founders' enactment of the Privileges or Immunities Clause.[15]

But this clause was swiftly gutted by the Supreme Court in the *Slaughter-House Cases*. In 1873, a group of butchers challenged a Louisiana state law that closed all slaughterhouses

The Essential Documents 629 (Kurt Lash ed., 2021).

5 James W. Ely, Jr., "*To Pursue Any Lawful Trade or Avocation": The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. Penn. J. Const. L., 917, 932 (2006); *see also* Eric Foner, Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War ix (2d ed. 1995) ("[T]he Republican party before the Civil War was united by a commitment to a 'free labor ideology,' grounded in the precepts that free labor was economically and socially superior to slave labor and that the distinctive quality of Northern society was the opportunity it offered wage earners to rise to property-owning independence."); *see also* Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution xx (2019) ("So profound were these changes that the amendments should be seen not simply as an alteration of an existing structure but as a 'second founding,' a 'constitutional revolution,' in the words of Republican leader Carl Schurz, that created a fundamentally new document with a new definition of both the status of blacks and the rights of all Americans.").

6 U.S. Const. amend. XIV, § 1.

7 Jud Campbell, *Constitutional Rights Before Realism*, 2020 U. Ill. L. Rev. 1433, 1435 (2020) ("The rights mentioned in state declarations and in the federal constitution were often conceptualized as a species of general law, not as a form of enacted law that one would expect to vary from jurisdiction to jurisdiction. State courts could—and often did—refer to the federal constitution and other state constitutions as evidence of the rights that operated against their governments.").

8 Cong. Globe, 39th Cong., 1st Sess., 2764–67 (May 23, 1866) (speech of Jacob Howard), *in* 2 The Reconstruction Amendments: The Essential Documents 187 (Kurt Lash ed., 2021).

9 *Id.* at 188.

10 Campbell, *supra* note 7, at 1435 ("[T]he central controversy in the late nineteenth century was [not which rights were protected but] the extent to which the Fourteenth Amendment added a new way of enforcing these rights.").

11 David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 Hastings Const. L. Q. 213, 223 (2015); *see also* McDonald v. City of Chicago, 561 U.S. 742, 813 (2010) (Thomas, J., concurring) ("At the time of Reconstruction, the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights.' The two words, standing alone or paired together, were used interchangeably with the words 'rights,' 'liberties,' and 'freedoms,' and had been since the time of Blackstone.").

12 Timothy Sandefur, The Right to Earn a Living: Economic Freedom and the Law 18–29 (2010); Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 983, 989–1009 (2013).

13 Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823).

14 Randy E. Barnett & Evan D. Bernick, *The Difference Narrows: A Reply to Kurt Lash*, 95 Notre Dame L. Rev. 679, 688–90 (2019).

15 The original understanding of the clause is best expressed in Senator Jacob Howard's speech introducing the 14th Amendment to the Senate. Randy E. Barnett & Evan Bernick, *The Privileges or Immunities Clause Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 Notre Dame L. Rev. 499, 499–503 (2019); *see also* Barnett & Bernick, *supra* note 13, at 690–92.

in New Orleans and required all slaughtering to be done in one slaughterhouse.[16] The butchers challenged this as an unconstitutional, monopolistic restriction on their economic liberty under the 13th and 14th Amendments.[17] In the Court's first case interpreting these amendments, it adopted a narrow reading of the Privileges or Immunities Clause. The Court's key move was to create a distinction between the privileges or immunities of state citizenship and those of national citizenship, holding that state-citizenship rights were unprotected by the clause.[18] The Court placed economic liberty in the state-citizenship box, outside the 14th Amendment's protection.

The Court was sharply divided over the case. The leading dissents from Justices Stephen Field and Joseph Bradley recognized the broader nature of the 13th and 14th Amendments, particularly their protection of economic liberty. Justice Field wrote, "[t]he privileges and immunities designated are those *which of right belong to the citizens of all free governments*. Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons."[19] And Justice Bradley wrote, "any law which establishes a sheer monopoly, depriving a large class of citizens of the privilege of pursuing a lawful employment, does abridge the privileges of those citizens."[20] But these dissents went unheeded. Instead, *Slaughter-House* laid the foundation of a constricted 14th Amendment jurisprudence, which would ultimately lead to the rise of Jim Crow—an era epitomized by *Plessy v. Ferguson*.[21] Although *Plessy* was largely overruled by *Brown v. Board of Education* and its progeny,[22] *Slaughter-House* still stands.[23]

In the aftermath of the *Slaughter-House Cases*, economic liberty is woefully underprotected by the federal courts. Yet today, similar protections for basic rights like the right to earn an honest living and against discrimination with respect to that right are imperfectly channeled through the Due Process and Equal Protection Clauses.[24] Thus, federal courts can achieve part of the original protections for economic liberty intended under the Privileges or Immunities Clause through substantive due process and equal protection (until the Supreme Court is willing to overturn the *Slaughter-House Cases*). Under both doctrines, the right to earn a living is protected to a degree, but because these doctrines subject this right to rational basis review, it is often given less than a passing glance, even though the original law and modern precedent both require it receive more protection.[25]

II. A More Meaningful—and More Originalist—Rational Basis Test

Today, economic liberty receives minimal protection under the rational basis test. The rational basis test is the lowest tier of protection for constitutional rights. It is a means-ends test "having two parts—is there a legitimate government interest, and is the law at issue rationally related to that interest?"[26] Although the current version of the test is inconsistent with originalism, even under modern rational basis review, economic liberty can, and should, receive more protection than it often does.

Since the Founding, federal courts have engaged in means-ends review to assess the constitutionality of statutes. Chief Justice John Marshall famously phrased it: "Let the end [of a statute] be legitimate, let it be within the scope of the constitution, and

16 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 59–61 (1872).

17 *Id.* at 66–68.

18 *Id.* at 74 ("Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State . . . it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by [the Privileges or Immunities Clause].").

19 *Id.* at 97 (Field, J., dissenting).

20 *Id.* at 122 (Bradley, J., dissenting).

21 *See* Bradwell v. Illinois, 83 U.S. 130 (1872) (depriving woman of equal rights); United States v. Cruikshank, 92 U.S. 542 (1875) (denying African Americans protection of the First and Second Amendments); Civil Rights Cases, 109 U.S. 3 (1883) (invalidating the Civil Rights Act of 1875); Plessy v. Ferguson, 163 U.S. 537 (1896) (enforcing the doctrine of separate but equal).

22 Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).

23 *McDonald*, 561 U.S. at 758 ("We therefore decline to disturb the *Slaughter-House* holding.").

24 *See* Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997) ("The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. . . . The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests."); *see also id.* at 728 (requiring, at minimum, that a regulation infringing liberty "be rationally related to legitimate government interests"). *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."); *see also* Sunday Lake Iron Co. v. Wakefield Township, 247 U.S. 350, 352 (1918) ("The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.").

25 A disagreement on reading protections for fundamental rights under due process or privileges or immunities has made it to the U.S. Supreme Court for rights enumerated in the Bill of Rights. Justice Thomas holds that the Privileges or Immunities Clause and that clause alone protects rights. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1421 (2020) (Thomas, J., concurring) ("I also would make clear that [the Sixth Amendment] right applies against the States through the Privileges or Immunities Clause of the Fourteenth Amendment, not the Due Process Clause."). Justice Gorsuch agrees with Justice Thomas as an original matter. *See* Timbs v. Indiana, 139 S. Ct. 682, 691 (2019) (Gorsuch, J., concurring) ("As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause."). But he holds that protecting rights under the 14th Amendment, whether under due process or privileges or immunities, is appropriate, so long as the right was originally understood to be within the Amendment's sweep. *Ramos*, 140 S. Ct. at 1397 ("This Court has long explained that the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice' and incorporated against the States under the Fourteenth Amendment."). It remains to be seen what these Justices would do if protecting the unenumerated right to economic liberty—which was intended to be protected by the original law of the 14th Amendment—came before the Supreme Court.

26 Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 Geo. J.L. & Pub. Pol'y 373, 376 (2016).

all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[27] This method of judicial review was also used in early America to determine whether a state law was a valid exercise of the police power or a violation of the Commerce or Contract Clause.[28]

During the 19th century, courts enforcing the 14th Amendment also reviewed laws in this manner—by assessing whether a state law was a valid exercise of the police power or an unconstitutional abridgment of a right protected by the 14th Amendment. This form of means-ends review was triggered when a litigant argued a law unconstitutionally abridged his right to earn an honest living or unlawfully discriminated against his exercise of that right. Justice John Marshall Harlan applied this form of judicial review under the 14th Amendment, for example in *Mugler v. Kansas*, but also in his dissent in *Lochner v. New York*. In *Mugler*, Justice Harlan stated that if

> a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.[29]

Judges Steven Menashi and Douglas Ginsburg have identified "a formal continuity between *Mugler* and modern rational basis review."[30] They argue the notorious deference associated with modern rational basis review "results more from the application of the standard than from the standard itself."[31] This method of judicial review is also distinguishable from the majority opinion in *Lochner v. New York* because *Lochner* applied a "presumption in favor of liberty of contract."[32] By contrast, the method of judicial review employed by Justice Harlan applied a rebuttable presumption of constitutionality to the challenged statute. But, if a litigant could prove an infringement of economic liberty without a valid police powers defense, the presumption was overcome, and the statute was declared unconstitutional. This method is directly connected to modern rational basis review and should serve as a guide for courts today.

The rational basis test requires that a law burdening an individual's right be "rationally related to a legitimate state interest" to be constitutional.[33] A law is unconstitutional under this test when (1) the logical connection between its means and ends are too attenuated[34] to be rational, or (2) when the end itself is illegitimate.[35] Economic protectionism is an example of an illegitimate state interest (at least in many circuits).[36] And for state laws regulating entry into a profession, the Supreme Court has stated any such regulation must be rationally related, not merely to a legitimate state interest, but more specifically to "the applicant's fitness or capacity to practice" the profession itself.[37]

Still, the rational basis test builds a high wall of deference shielding statutes from constitutional challenge—a wall difficult to scale but not impossible. The test presumes a statute constitutional and upholds it even in "the absence of any factual foundation" for the statute's validity.[38] The deference afforded to the government under rational basis review reached its zenith in *Williamson v. Lee Optical*, where the Court stated that "the law need not be in every respect logically consistent with its aims to be constitutional. It

27 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421–22 (1819); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173, 176 (1803) (assessing the meaning of a statue, the jurisdiction it grants, and determining that grant violated the Constitution—thus the means were unlawful even if issuing mandamus was a proper end).

28 Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. Chi. L. Rev. 815, 837–47 (2020); *see also* Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 193 (2004) ("In the early years of the Republic, federal courts actively scrutinized state enactments to ensure they did not violate these expressed prohibitions, especially the Contracts Clause.").

29 Mugler v. Kansas, 123 U.S. 623, 661 (1887); *accord* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2463–64 (2019).

30 Steven Menashi & Douglas Ginsburg, *Rational Basis with Economic Bite*, 8 N.Y.U. J.L. & Liberty 1055, 1065 (2014).

31 *Id.*

32 *Id.* at 1064–65.

33 *E.g., City of Cleburne*, 473 U.S. at 440.

34 *See* Quinn v. Millsap, 491 U.S. 95, 108 (1989) (ability to grasp politics not logically connected to land ownership); *City of Cleburne*, 473 U.S. at 449–50 (home being too big not logical basis for permit denial when identical homes routinely granted permits); Williams v. Vermont, 472 U.S. 14, 24–25 (1985) (encouraging Vermont residents to make in-state car purchases not logical basis for tax on car that Vermont resident bought out-of-state before becoming Vermont resident); Zobel v. Williams, 457 U.S. 55, 61–62 (1982) (refusing to fund new Alaska residents not rationally related to encouraging people to move to Alaska); Chappelle v. Greater Baton Rouge Airport Dist., 431 U.S. 159 (1977) (per curiam) (ability to grasp politics not logically connected to land ownership); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (stimulating the agricultural economy not logically connected to whether people in a household are related); Mayer v. City of Chicago, 404 U.S. 189, 196 (1971) (if inability to pay is no basis to deny transcript to felony defendant, then inability to pay no logical basis for denying transcript to misdemeanor defendant); Turner v. Fouche, 396 U.S. 346, 363–64 (1970) (no rational interest underlying property ownership requirement for political office).

35 *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (no legitimate interest in criminalizing consensual adult homosexual acts); Romer v. Evans, 517 U.S. 620, 634–35 (1996) (no legitimate interest in anti-gay animus); Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612, 623 (1985) (no legitimate interest in dividing bona fide state residents into different classes); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 880 (1985) (no legitimate interest in discriminating against out-of-state companies); *City of Cleburne*, 473 U.S. at 448 (no legitimate interest in animus against the mentally disabled); *Zobel*, 457 U.S. at 64 (no legitimate interest in creating permanent classes of bona fide residents); *Moreno*, 413 U.S. at 534 (no legitimate interest in antihippie animus); *id.* at 535 & n.7 (traditional morality rationale constitutionally dubious).

36 Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002) (economic protectionism is not a legitimate state interest); Merrifield v. Lockyer, 547 F.3d 978, 991 n.15 (9th Cir. 2008) (same); St. Joseph Abbey v. Castille, 712 F.3d 215, 222 (5th Cir. 2013) (same); *but see* Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004) (economic protectionism is a legitimate state interest); Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 286 (2d Cir. 2015) (same).

37 Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 239 (1957); *see also* Dittman v. California, 191 F.3d 1020, 1030–31 (9th Cir. 1991).

38 West Coast Hotel Co. v. Parrish, 300 U.S. 379, 397 (1937).

is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[39] Given this heavy presumption, and because courts "never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."[40] Therefore, "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," the courts will uphold it.[41] And "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'"[42] And yet, in spite of these grand statements of judicial deference, many challengers have prevailed on rational basis claims, demonstrating its deference is not bulletproof.[43]

Take for example *St. Joseph Abbey v. Castille*, a case out of the Fifth Circuit which provides a blueprint for how courts, though bound by rational basis precedent, can still protect economic liberty in a manner more consistent with the original law of the 14th Amendment. There, the Fifth Circuit successfully reconciled originalism with precedent—taking the Supreme Court's admonitions about judicial restraint seriously, while still performing meaningful means-ends judicial review. As a result, the court declared unconstitutional certain protectionist Louisiana regulations that granted "funeral homes an exclusive right to sell caskets."[44]

The monks of St. Joseph Abbey make and sell simple wooden caskets.[45] But Louisiana law forbade the monks the rewards of their simple labors. It required intrastate casket retail sales be made only by a state-licensed funeral director at a state-licensed funeral home.[46] Of course, the monks had no licenses and were not funeral directors nor a funeral home. And even if licensed, just to sell their caskets to consumers at retail, the monks would have to equip the Abbey with "a layout parlor for thirty people, a display room for six caskets, an arrangement room, and embalming facilities."[47] The monks would also need to acquire funeral director licenses with apprenticeship and examination requirements. Just to sell a box. But "[n]one of this mandatory training relate[d] to caskets or grief counseling," and "[t]he exam [did] not test Louisiana law or burial practices."[48] "In sum," wrote the court, "the State Board's sole regulation of caskets [was] to restrict their intrastate sales to funeral homes. There [were] no other strictures over their quality or use."[49]

The monks sued, invoking the rational basis test to argue these restrictions violated the 14th Amendment.[50] The monks argued Louisiana's regulation deprived them of their right to earn a living with no rational relation to a legitimate state interest. It was naked economic protectionism. The funeral board responded that (1) economic protectionism was a legitimate state interest, and (2) applying the licensing regulations to the monks advanced Louisiana's interests in consumer protection, public health, and public safety.[51]

The court first rejected economic protectionism as a legitimate state interest. It determined that "neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose." Even *Lee Optical* determined that while protectionism might be supported "by a post hoc perceived rationale," without such a justification, a regulation "is aptly described as a naked transfer of wealth."[52]

The court then assessed Louisiana's police powers justifications. Although the government bore no burden, the monks could "negate a seemingly plausible basis for the law by adducing evidence of irrationality."[53] And while *Lee Optical* requires that the court's means-ends analysis consider post hoc hypothetical justifications, those justifications "cannot be fantasy," and the analysis does "not include post hoc hypothesized facts."[54]

The first justification, consumer protection, was rejected on the facts. Louisiana argued that the regulation protected consumers from predatory sales practices by third-party sellers peddling subpar caskets. That was "a perfectly rational statement of hypothesized footings" for the law, wrote the court, but it was "betrayed by the undisputed facts."[55] Because Louisiana law did not require persons to be buried in a casket, restrict out-of-state casket sales, or impose requirements on casket sellers "regarding casket size, design, material, or price," any "special expertise" funeral directors might have in casket selection was "irrelevant" to their exclusive privilege to sell caskets.[56] Moreover, the court found no evidence of deceptive practices by third-party sellers; instead, it was funeral homes that had more "incentive" to use "deceptive sales tactics."[57] But even assuming a risk of deceptive sales practices by third-party sellers, the court still found "a disconnect between restricting casket sales to funeral homes and

39 Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487–88 (1955).

40 FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

41 *Id.* at 313.

42 *Id.* at 315.

43 *See supra* notes 34–36.

44 *St. Joseph Abbey*, 712 F.3d at 217.

45 *Id.*

46 *Id.* at 218.

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.* at 220.

51 *Id.*

52 *Id.* at 222–23.

53 *Id.* at 223.

54 *Id.*

55 *Id.*

56 *Id.* at 224.

57 *Id.* at 225.

preventing consumer fraud and abuse."[58] Louisiana law already policed "inappropriate sales tactics by all sellers of caskets," making the licensing restriction redundant. Moreover, the grant to funeral directors of an exclusive right to sell caskets premised on protecting consumers from supposed abuses by third-party casket sellers could not be "square[d] with FTC findings or rulemaking [that rested] on the conclusion that third-party sellers do not engage in consumer abuse."[59] As a result, rather than promoting consumer protection, Louisiana's licensing law placed consumers "at a greater risk of abuse including exploitative prices."[60]

The second justification, public health and safety, was likewise incapable of justifying Louisiana's funeral-licensing laws. The court explained that the absence of any health or safety requirements in the licensing law made it impossible to justify on those grounds:

> That Louisiana does not even require a casket for burial, does not impose requirements for their construction or design, does not require a casket to be sealed before burial, and does not require funeral directors to have any special expertise in caskets leads us to conclude that no rational relationship exists between public health and safety and limiting intrastate sales of caskets to funeral establishments.[61]

The inquiry conducted by the court that took real-world facts into account in assessing the validity of each police powers justification is a key feature of its harmonizing the original law of the 14th Amendment with rational basis review. The court's review ensures a statute is a genuine police regulation rather than a law abridging the right to earn a living without justification. And it ensures that economic liberty is protected by assessing the validity of a police powers defense on the basis of the law's application to real-world facts.

The court cast its decision protecting the monks' economic liberty in anti-class legislation language.[62] The court announced that "[t]he principle we protect from the hand of the State today protects an equally vital core principle—the taking of wealth and handing it to others when it comes not as economic protectionism in service of the public good but as 'economic' protection of the rulemakers' pockets" is unconstitutional.[63] The court recognized the "great deference due state economic regulation," and consistent with Justice Harlan-style judicial review rejected the notion that it was engaging in *Lochner*ism.[64] It simply analyzed whether a challenged "measure bears a rational relation to a constitutionally permissible objective," patrolling "the outer-most limits of due process and equal protection" to determine that Louisiana's funeral-licensing law failed even the rational basis test.[65]

Although written in the language of modern rational basis review, the analysis in *St. Joseph Abbey* maps onto the original law of the 14th Amendment. The monks alleged violations of their rights to due process and equal protection that were unsupported by a legitimate state interest—an infringement of their right to earn an honest living and an arbitrary discrimination against their right without a valid police powers justification. Once they stated a claim for a constitutional violation, the government asserted its police powers defense: health, safety, and consumer protection. Then the monks produced evidence and arguments for why those asserted justifications could not possibly support the law. Exercising the judicial power—judgment[66]—the court determined Louisiana's asserted police powers justifications could not in reality, or even hypothetically, support the law. Without a police powers justification, the law was an unconstitutional abridgment of the monks' right to earn an honest living.

Even a noted skeptic of constitutional protections for economic liberty under the federal Constitution, Justice Amy Coney Barrett, has recognized the validity of *St. Joseph Abbey*. In *Countering the Majoritarian Difficulty*, then-Professor Barrett wrote that "modern courts have occasionally stretched even the existing rationality test too far. For example, it is indeed difficult to see the connection between safe casket-making and a funeral home director's license."[67] She opined: "A rational basis test ought not mean that courts are obliged to accept explanations that beggar all belief."[68] *St. Joseph Abbey* demonstrates the original law of the 14th Amendment, adapted and applied by federal courts under modern rational basis precedent, can provide at least a necessary minimum check on government laws that abridge the right to earn an honest living.

III. Three Areas Where Meaningful Rational Basis Review Can Protect Economic Liberty

Today, federal courts continue to face constitutional challenges to statutes infringing the right to earn an honest living. This section will address how federal courts can and should apply the above framework of judicial review to economic liberty suits in three areas: (1) state funeral-licensing statutes, (2) occupational licensing restrictions on ex-criminals' ability to pursue a profession, and (3) certificate-of-need laws. This section provides an example of an active case in each area and discusses how courts can apply the rational basis test as articulated in *St. Joseph Abbey* to review challenges to economic restrictions in these areas and others.

A. Protecting Your Rites

Home funerals are an American tradition and are legal in all fifty states. Until well into the 20th century, American

58 *Id.*

59 *Id.* at 225–26.

60 *Id.* at 226.

61 *Id.*

62 Calabresi & Leibowitz, *supra* note 12, at 1023–1042.

63 *St. Joseph Abbey*, 712 F.3d at 226–27.

64 *Id.*

65 *Id.*; *see also* Ginsburg & Menashi, *supra* note 30, 1064–65.

66 The Federalist No. 78 (Alexander Hamilton) (explaining that the judiciary has "neither FORCE nor WILL, but merely judgment").

67 Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 Const. Comment. 61, 71 (2017).

68 *Id.*

funerals occurred primarily in private homes, with parlors built to fit coffins.[69] Home funerals involve family and friends holding a funeral in a private home to honor their deceased loved one. Usually family members wash and dress the remains, which lie in honor in a home for visitation.

Akhila Murphy and Donna Peizer are end-of-life doulas who assist families conducting lawful home funerals. They perform these services for their shoestring nonprofit, Full Circle of Living and Dying. For years, they have safely provided these services in and around Grass Valley, California. For example, Murphy assisted a member of her community, Pamela Yazell, hold a home funeral for her husband, Bob. They decorated their parlor with Bob's favorite sports team, golf clubs, and memorabilia from his life. His family washed and dressed him in his favorite golf shirt; his granddaughters put on his favorite socks. Murphy and Peizer provide these services to families who wish to hire them because they believe their care eases the pain of loss, affirms the reality of death, and promotes healthier grieving.[70]

But the California Cemetery and Funeral Bureau ordered Murphy and Peizer to cease and desist providing their services. Because Murphy and Peizer are not licensed funeral directors, and Full Circle is not a licensed funeral establishment, the Bureau contends they are forbidden from assisting families perform home funerals. Obtaining these licenses requires not only examinations and inspections, but also building a physical facility equipped to store bodies or embalm.[71]

Refusing to be subjected to licensure, Murphy and Peizer sued, alleging an unconstitutional violation of their right to earn a living as end-of-life doulas. They argue these restrictions violate their 14th Amendment rights under the Supreme Court's and Ninth Circuit's substantive due process jurisprudence.[72]

First, Murphy's and Peizer's right to earn a living as end-of-life doulas is infringed with no police powers justification. Requiring Murphy and Peizer to build a funeral establishment equipped to embalm just to assist families with home funerals is arbitrary and oppressive; Murphy and Peizer do not embalm, store bodies, or even take possession of any bodies, and it would be incredibly costly to build a funeral home they would never use. Thus, the rules requiring these entrepreneurs to have funeral director licenses, a funeral establishment license, and a physical establishment to practice a safe and lawful occupation irrationally violates their 14th Amendment rights.

Second, Murphy and Peizer are being treated like funeral directors and Full Circle like a funeral establishment, even though they are neither, which is an irrational restriction on their economic liberty. This violates due process.[73] When California law treats an end-of-life doula assisting families with simple and legal home funerals *inside* private homes the same as a funeral director operating a funeral home to embalm bodies and manage funerals *outside* of private homes, the Bureau is treating two different things the same. That is an arbitrary and irrational restriction that violates the 14th Amendment.

The Bureau argues that its regulations advance health, safety, and consumer protection because the California legislature has chosen to impose licensure on any third parties supervising and overseeing the final disposition of human remains.

But Murphy and Peizer argue California's funeral licensing statutes cannot survive even rational basis scrutiny as applied to them. Home funerals are legal in all 50 states, and the services Murphy and Peizer provide are all services a family can provide for itself. They argue that nothing is made more harmful by the mere presence and assistance of a doula at a lawful, family-run home funeral. Not only that, these services are all safe and involve ordinary activities like dressing and washing a person, then laying them on a bed in a bedroom or living room for family and friends to pay their respects. Murphy and Peizer do not embalm, and they follow all California health and safety regulations for how long a body can be kept by the family before being buried.[74] As a result, Murphy and Peizer assert that these burdensome licensure requirements achieve no valid health and safety purpose, denying them their right to earn an honest living without justification.

Murphy and Peizer are not alone in challenging state funeral-licensing laws. Other federal courts have determined laws like these violate the 14th Amendment because they lack any police powers justification[75] and are often motivated more by economic protectionism than real health and safety concerns.[76] That happened in *St. Joseph Abbey* as discussed above, and also in *Craigmiles v. Giles*. In *Craigmiles*, the Tennessee state funeral board ordered Pastor Nathaniel Craigmiles to stop selling funeral goods, including caskets, and they padlocked his store.[77] He had started selling caskets when he was assisting his wife bury her mother, and he learned about the exorbitant markups that funeral directors place on caskets.[78] The resistance he received from the funeral board only emboldened him, so he sued. The federal district

69 William Mellor & Dick M. Carpenter II, Bottleneckers: Gaming the Government for Power and Private Profit 22 (2016).

70 The facts of the case are drawn from the complaint in *Full Circle of Living & Dying v. Sanchez*, No. 2:20-CV-01306-KJM-KJN, *available at* https://ij.org/wp-content/uploads/2020/06/Doc.-01-Complaint.pdf. The plaintiffs also bring two First Amendment claims, one for pure speech, providing individualized advice, and another for commercial speech, advertising their services.

71 Cal. Bus. & Prof. Code §§ 7616, 7617.

72 *See, e.g., Merrifield*, 547 F.3d at 986 (explaining that when plaintiffs are "*different* from other groups" but are "treated the *same*," it "is an unconstitutional barrier on [protected] liberty under the Due Process Clause"); *see also id.* at 991 n.15 ("We conclude that mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review.").

73 *Id.* at 986.

74 Cal. Health & Safety Code §§ 7100, 7102, 7103(a) (California law requires the person with legal rights to the deceased's body to legally inter the body within a reasonable time).

75 Peachtree Caskets Direct, Inc. v. State Bd. of Funeral Serv., No. CIV.1:98-CV-3084-MHS, 1999 WL 33651794 (N.D. Ga. Feb. 9, 1999); Casket Royale, Inc. v. Mississippi, 124 F. Supp. 2d 434, 436 (S.D. Miss. 2000); *but see Powers*, 379 F.3d 1208 (upholding Oklahoma's funeral-licensing regulations under the rational basis test).

76 Mellor & Carpenter, *supra* note 69, at 22–23 (explaining the protectionist origins of funeral-licensing laws).

77 *Id.* at 28–29.

78 *Id.* at 27–28.

court ruled unconstitutional Tennessee's restrictions requiring Pastor Craigmiles to obtain a funeral director license to sell funeral supplies because "there is no reason to require someone who sells what is essentially a box [a casket] to undergo the time and expense of training and testing that has nothing to do with the State's asserted goals of consumer protection and health and safety."[79]

And the Sixth Circuit affirmed. In an opinion written by Judge Danny Boggs, the court wrote

> [Today] we invalidate only the General Assembly's naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers. This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review.[80]

In sum, federal courts have repeatedly noted the lack of any legitimate state interest in enforcing funeral-licensing laws against casket sellers. Rather than genuinely protect health and safety, these laws often result in unconstitutional abridgements of the right to earn an honest living. Murphy and Peizer argue that these same licensing laws have no legitimate interest as applied to their work assisting in home funerals at Full Circle either.

B. More Than Your Worst Mistake

We want ex-offenders who have served their time to turn from a life of crime to earning an honest living, not least because it is a leading way to prevent them from re-offending. But occupational licensing laws pose a serious barrier to this rehabilitation. These laws present a general barrier to individuals trying to enter the workforce, whether in an innovative profession like an end-of-life doula or in a traditional one like African hair braiding.[81] But these laws have an especially detrimental impact on ex-offenders trying to earn an honest living.

For instance, California categorically bans two-time felons from becoming full-time firefighters by preventing them from obtaining Emergency Medical Technician (EMT) certification.[82] California trains and uses prisoners to fight wildfires through their Conservation Camp Program, and then, after they have served their sentences, it bars those same people from becoming full-time firefighters because of their criminal histories. It does this even though the state already has express authorization to deny EMT certification to applicants with offenses "substantially related" to the sought-after certification.[83]

Dario Gurrola and Fernando Herrera are two Californians whose rights to earn an honest living as firefighters are abridged by California's categorical ban. As young men, they were each convicted of two felonies. They served their time, and while in jail they also fought fires in California's camp program. But due to California's two-felony ban, they—like many other former inmates—can never practice the profession for which the prison system trained them.[84]

Today, Gurrola is a seasonal firefighter living in Northern California. But in 2003, at age 22, he was convicted for carrying a concealed dagger (a kitchen knife in his jacket pocket). Two years later, he was convicted for assault (a drunken fight with a security guard)—his second felony. As his twenties were ending, he repented and turned his life around. He reconnected with his father, a sheriff, and he joined a church. He dedicated himself to becoming a firefighter—a first responder like his dad. He spent years as a volunteer seasonal firefighter, working as a medical transport, and taking certification classes. Yet even with years of training and documentation of rehabilitation in hand, Gurrola's two felonies prohibit him from acquiring the EMT certification required to achieve his dream job of becoming a full-time firefighter.

Herrera has a similar story. Today he is a supervisor at the California Conservation Corps. But at 14 and 15 years old, he was convicted of assault with a deadly weapon and witness tampering. Two years later, watching his mother cry during a visit, he decided to turn his life around. He has been productively employed since his release and has taken an EMT training course to obtain his certification and become a firefighter. But, like Gurrola, his two juvenile felony convictions prevent him from doing so.

Gurrola and Herrera have challenged California's categorical ban as violating their right to earn an honest living under the Due Process and Equal Protection Clauses of the 14th Amendment.[85] First, they argue, the ban has no rational relation to any health-and-safety police powers justification because California already has the authority to deny individuals certification based on relevant crimes (say, arson). As a result, only individuals convicted of *irrelevant* crimes are affected by the categorical ban. Moreover, California trains inmates to be firefighters while in prison and then denies them the ability to become full-time firefighters once they get out of prison. But if Gurrola and Herrera can fight fires for the state as inmates and as part-time employees, then there is no justification for denying them the opportunity to earn a living fighting fires full time.

Second, they argue that the ban arbitrarily discriminates between two-time ex-felons with irrelevant convictions and persons without any felony convictions. Because the categorical ban does not consider the relevance of a person's convictions to practicing the occupation of a firefighter, it arbitrarily discriminates between felons with two irrelevant conviction, who are not allowed to pursue employment as full-time firefighters, and persons without a felony conviction, who are allowed to pursue the same profession. An irrelevant conviction is the same

79 Craigmiles v. Giles, 110 F. Supp. 2d 658, 665 (E.D. Tenn. 2000).

80 *Craigmiles*, 312 F.3d at 229.

81 *See, e.g.,* Cornwell v. Hamilton, 80 F. Supp. 2d 1101, 1106 (S.D. Cal. 1999) (invalidating California cosmetology regulations as applied to African hair-braiders).

82 Cal. Code Regs. tit. 22, § 100214.3(c)(3). California also bans any person with a single felony from obtaining EMT certification for ten years after release from incarceration for the offense. *Id.* § 100214.3(c)(6).

83 Cal. Health & Safety Code § 1798.200(c)(6), -(8), -(12)(C).

84 The facts of this case are drawn from the complaint in *Gurrola v. Duncan*, No. 2:20-cv-01238-JAM-DMC, *available at* https://ij.org/wp-content/uploads/2020/06/CA_EMT_Complaint-file-stamped.pdf.

85 *See id.* Gurrola and Herrera also argue the categorical ban violates their rights to earn an honest living under the 14th Amendment's Privileges or Immunities Clause directly, but they recognize that argument is foreclosed by the *Slaughter-House Cases* and can only be corrected by the U.S. Supreme Court.

as no conviction for purposes of becoming a full-time firefighter. Thus, California's ban arbitrarily discriminates between these two classes of people.[86]

But the federal district court dismissed Gurrola and Herrera's claims. The court believed "the very act of committing a felony more than once, regardless of the underlying offense, can be relevant" to a person's qualification for EMT certification.[87] That is because the legislature could rationally conclude "individuals with multiple or recent felony convictions are more likely to harm persons than those without" convictions.[88] Given that EMTs provide "basic life support and medical care to vulnerable persons," the court found a rational connection between the ban on two-time felons and a legitimate government interest in public safety.[89] The court acknowledged this connection between the ban and its legitimate ends was "tenuous" but not enough to violate the 14th Amendment.[90]

Gurrola and Herrera appealed. They counter that because in their current part-time firefighting positions they render the same life support and medical care to vulnerable persons that full-time firefighters do, the two-time felony ban does not protect anyone, but only denies them their ability to earn a full-time living helping Californians in need. The ban is simply irrelevant to preventing the harms is purports to curb. If it were categorically dangerous for Gurrola and Herrera to provide life-saving services due to their past convictions, regardless of the relevance of those convictions to EMT certification, then they would not be allowed to provide EMT services as inmates and provide them now as part-time firefighters.

In addition, the ban ignores the facts of individual cases. For instance, the ban ignores age at the time the crimes were committed, even though the law recognizes diminished capacity for youths.[91] And it ignores time since commission of the offenses, disregarding the fact that older convictions are less predictive of recidivism because recidivism decreases with age.[92] As a result, the ban ignores the fact that individuals who committed two irrelevant felonies many years ago, like Gurrola and Herrera, present no unique risk to the public.[93] It also ignores rehabilitation itself, which is a central "ideal" of the criminal justice system,[94] giving a two-time felon no chance of ever becoming a full-time firefighter.[95] Without case-by-case analysis, there is simply no way for judges to review the rational relationship between sweeping bans for convictions and occupational fitness.

Moreover, California does not have a flat ban for many of its most regulated, and often dangerous, professions. For instance, there is no categorical ban for past felons seeking to become doctors, lawyers, and engineers. Even if it is true that EMT-certified workers deal with vulnerable people that California has an interest in protecting, why would that rationale not place a two-time felony ban on doctors and lawyers?[96]

What is more, Gurrola and Herrera's claims are not outliers. Numerous federal courts have ruled unconstitutional categorical bans on former felons' rights to earn a living.[97] For example, in *Barletta v. Rilling*, Michael Barletta challenged a Connecticut law that forbid him from obtaining a license to trade in precious metals because he had previously been convicted of a felony.[98] The Connecticut District Court held this law violated the rational basis test because it lacked any rational connection to the state's goal of preventing fraud in the sale of precious metals. The court stated, "[a] proxy that serves its purpose only by happenstance is arbitrary and fails rational basis review."[99] So too, does California's two-time felony ban on EMT certification fail rational basis review.

C. CONned Out of Your Livelihood

A Certificate of Need (CON) is a government-mandated permission slip to start or expand a business—an expensive admission ticket to the economy.[100] In states that require medical businesses to obtain a CON to operate, the business must prove to the government that its services are "needed" before it can open. In these states, incumbent businesses often claim to have fully satisfied any need to protect themselves from competition. And

86 *See* Cal. Health & Safety Code § 1798.200(c)(6) (permitting the agency to deny applicants with convictions "substantially related to the qualifications, functions, and duties of" emergency personnel). Cases like *St. Joseph Abbey* and *Craigmiles* have recognized that the means-ends fit of a law to its stated police powers justification is strained beyond constitutionality when another law already addresses the claimed state interest. *See St. Joseph Abbey*, 712 F.3d at 225–26; *Craigmiles*, 312 F.3d at 226.

87 Gurrola v. Duncan, No. 2:20-CV-01238-JAM-DMC, 2021 WL 492437, at *7 (E.D. Cal. Feb. 10, 2021).

88 *Id.* at *8.

89 *Id.*

90 *Id.* at *7 ("Because these regulations are rationally related to the government's legitimate interest in ensuring public safety, even if tenuous, it does not violate the Equal Protection Clause.").

91 *See* Miller v. Alabama, 567 U.S. 460, 471 (2012).

92 Secretary of Revenue v. John's Vending Corp., 309 A.2d 358, 362 (Pa. 1973) ("To forever foreclose a permissible means of gainful employment because of an improvident act in the distant past completely loses sight of any concept of forgiveness for prior errant behavior and adds yet another stumbling block along the difficult road of rehabilitation.").

93 Appellant's Opening Br. at 39, *Gurrola v. Duncan*; No. 21-15414 (9th Cir. May 11, 2021) *see also* Complaint, *supra* note 84, at ¶ 160.

94 Graham v. Florida, 560 U.S. 48, 71, 73–74 (2010) (describing rehabilitation as not merely one "of the goals" of the criminal justice system but its "ideal").

95 Fields v. Dep't of Early Learning, 434 P.3d 999, 1005 (Wash. 2019) ("Because Fields's sole disqualifying conviction occurred long ago under circumstances that no longer exist, it is highly likely that her permanent disqualification is erroneously arbitrary.").

96 Cal Bus. & Prof. Code §§ 2236, 2236.1 (doctors); *id.* §§ 6101, 6102 (lawyers).

97 *See, e.g., Fields*, 434 P.3d 999; Chunn v. State ex rel. Miss. Dep't of Ins., 156 So. 3d 884 (Miss. 2015); Furst v. N.Y.C. Transit Auth., 631 F. Supp. 1331 (E.D.N.Y. 1986); Smith v. Fussenich, 440 F. Supp. 1077 (D. Conn. 1977).

98 Barletta v. Rilling, 973 F. Supp. 2d 132, 135 (D. Conn. 2013).

99 *Id.* at 137.

100 *See generally* Jaimie Cavanaugh et al., *Conning the Competition: A Nationwide Survey of Certificate of Need Laws*, Institute for Justice (Aug. 2020), *available at* https://ij.org/wp-content/uploads/2020/08/Conning-the-Competition-WEB-08.11.2020.pdf.

if a new business can't satisfy the government's need projection, it cannot open. Medical providers that have a CON form a class that can compete; those providers without a CON, a class that cannot compete. As a result, CON laws unconstitutionally discriminate between healthcare providers and infringe their rights to earn a living under the 14th Amendment.

Dipendra Tiwari and Kishor Sapkota are Nepali-speaking American immigrants prohibited from opening a home healthcare business by Kentucky's CON law. Both work in the healthcare industry and want to serve Nepali-speaking people in their community who cannot find home health aides who speak their native language. So, Tiwari and Sapkota set out to open a home health agency—Grace Home Care—to serve their community's needs. But when they applied for a CON, an incumbent home health provider, Baptist Healthcare, used the CON application process to oppose their application. In the face of opposition from an incumbent, Kentucky determined there was no "need" for a new home health agency in Louisville, and Grace was denied a CON.[101]

To obtain a CON in Kentucky, the state must determine there is a "need" for a new home health agency's services. If the government projects that a county does not have such a need, then a new company cannot open. As a result, the government chooses who can and cannot enter the healthcare market, insulating incumbents and raising a barrier for newcomers that abridges their economic liberty. Kentucky argues that its CON law is cost-efficient, increases patient access to care, and increases quality of care. But Tiwari and Sapkota argue the CON law does not achieve these ends and instead is motivated solely by economic protectionism of healthcare incumbents.

They argue that Kentucky's CON law violates their right to earn a living under both the Due Process and Equal Protection Clauses.[102] First, Kentucky's CON law restricts Grace Home Care's economic liberty without any police powers justification: It raises costs, decreases access to care, and decreases quality of care, without any health or safety benefit to the public. Second, due to certain statutory exceptions, the CON law discriminates between similarly situated healthcare providers, depriving Grace and other companies of their right to earn an honest living.

Although two federal circuit courts have upheld CON laws (the Fourth and Eighth Circuits),[103] a recent opinion, on a motion to dismiss, by Judge Justin Walker demonstrates how litigants challenging CON laws under the 14th Amendment can prevail. First, the police powers defense relied on by the Fourth and Eighth Circuits is not present in the home healthcare context.[104] Home health agencies don't cost much to start, so "the government doesn't need to guarantee a home health company a monopoly in order to incentivize someone to make the capital investment for it."[105] Second, the state CON laws reviewed by the Fourth and Eighth Circuits allowed "patients [to] travel to another county, or even another state, for innovative care from entrepreneurs providing the medical procedures at issue."[106] By contrast, home healthcare patients cannot travel outside their county for care because home health care is provided inside the patient's home. Without these defenses, Judge Walker determined that Kentucky's CON law increases costs, limits access to care, and decreases quality, only to protect "rent-seeking incumbents." And that form of protectionism is not a legitimate state interest.[107] Thus, Judge Walker held that if the record facts demonstrate these detrimental impacts without any police powers defense, then Kentucky's CON law, and other states' similar CON laws, cannot pass muster under the 14th Amendment.

But at the summary judgment stage, the district court ruled against Grace Home Care. After discarding a wealth of empirical evidence as irrelevant to the CON law's rationality, the court held that the Kentucky legislature could rationally have believed the CON law improved cost-efficiency, increased quality of care, and increased access to care. First, the Court discarded a plethora of evidence based on the mistaken belief that it could not review "evidence that the law did not subsequently work or even that it is counterproductive" because that is not evidence of whether the "legislature rationally could have believed that the CON laws would promote its objective."[108] Without this evidence, the court believed CON laws funnel more patients to home health agencies, giving them more money to afford higher quality goods and services.[109] It held CON laws protect stability because allowing unguarded competition could create disruptions and fluctuations in the market that disrupt care.[110] And it determined CON laws prevent for-profit home health agencies from opening in rural areas and poaching lucrative patients, which would destabilize existing agencies and potentially leave low-income patients without stable access to care.[111]

As an initial matter, the district court should not have refused to consider the overwhelming and uncontradicted

101 The facts of the case are drawn from the complaint in *Tiwari v. Meier*, No. 3:19-CV-884, *available at* https://ij.org/wp-content/uploads/2019/12/ECF-1-Complaint-FILE-STAMPED-12.03.19-IJ109774xA6322.pdf.

102 Tiwari and Sapkota also bring a claim under the Privileges or Immunities Clause, but due to the *Slaughter-House Cases*, that argument is foreclosed unless the U.S. Supreme Court revisits the case.

103 Colon Health Centers of Am., LLC v. Hazel, 733 F.3d 535, 541 (4th Cir. 2013); Birchansky v. Clabaugh, 955 F.3d 751, 754 (8th Cir. 2020).

104 Tiwari v. Friedlander, No. 3:19-CV-884, 2020 WL 4745772, at *13 (W.D. Ky. Aug. 14, 2020).

105 *Id.* at *13–14.

106 *Id.* at *13.

107 *Id.* at *14.

108 Tiwari v. Friedlander, No. 3:19-CV-884, 2021 WL 1407953, at *6 (W.D. Ky. Apr. 14, 2021) (cleaned up).

109 *Id.* at *8 ("Defendants and KHA posit that one example of cost-efficiency resulting from the CON laws is the ability to buy supplies and equipment in bulk at reduced prices due to the increased patient volume funneled to the HHAs.").

110 *Id.* at *9 ("It is entirely plausible for the General Assembly to have believed that leaving HHAs to the fluctuations of the market could lead to disruptions in care when HHAs close or downsize due to expensive quality standards, insufficient profits, or any other similar reason.").

111 *Id.*

evidence that these purported rational bases for the CON law are fictitious. Unrebutted evidence is one of the most common ways that litigants prevail under the rational basis test. The Fifth Circuit in *St. Joseph Abbey* relied on evidence,[112] and so have numerous other federal courts in assessing a law's rationality.[113] Certainly evidence that a law does not in reality accomplish its goal necessarily makes it more probable that a rational legislature could not have believed that the law would accomplish its intended goal.[114] Indeed, at the motion to dismiss stage, Judge Walker relied on this evidence, concluding that "four decades of academic and government studies say[ ] Certificate of Need laws accomplish nothing more than protecting monopolies held by incumbent companies,"[115] and that therefore there is no rational basis for Kentucky's CON law.

Moreover, this evidence merely confirms the common-sense intuition that reducing competition imposes higher costs on patients, reduces patient access to care, and decreases patients' quality of care.[116] By contrast, more home health agencies entering the market increases the supply of services, thereby reducing costs and increasing access.[117] And with lowered costs and increased access, consumers are freer to choose services based on quality, driving up the quality of care to meet consumer demand.[118] Nevertheless, the argument that CON laws improve quality is predicated on the false idea that patients should be prevented from moving to different, better home health agencies because patients making that choice would somehow decrease quality of care. It is simply not rational to believe that is true.

Other courts have made similar findings when invalidating CON laws. For instance, the Supreme Court of North Carolina has held that a CON law for hospitals was irrational.[119] Judge Danny Reeves held Kentucky's CON law for moving companies was irrational.[120] The First and Fourth Circuits have held that CON laws disadvantaging out-of-state companies violated the Dormant Commerce Clause.[121] Given the weight of evidence about CON laws' systemic failure to do anything other than protect incumbent providers, it is simply not rational to believe that Kentucky's CON law decreases cost, improves quality, or increases access. Instead, Kentucky's CON law is motivated solely by economic protectionism and is therefore unconstitutional.

IV. Conclusion

The U.S. Supreme Court should restore the original law of the 14th Amendment by overruling the *Slaughter-House Cases*. The 14th Amendment protects the privilege or immunity of citizens to pursue a lawful calling, and judges are empowered to protect that right. But until the Supreme Court overturns the *Slaughter-House Cases*, Americans must turn to the Due Process and Equal Protection Clauses to protect their economic liberty. Federal courts charged with applying rational basis review to these challenges can do so in a more originalist way, respecting both the original law of the 14th Amendment and Supreme Court precedent. This method for protecting economic liberty in the federal courts can and should become the norm among judges seeking to reconcile originalism with precedent.

112 *St. Joseph Abbey*, 712 F.3d at 223 ("[P]laintiffs may . . . negate a seemingly plausible basis for the law by adducing evidence of irrationality.").

113 United States v. Carolene Prod. Co., 304 U.S. 144, 153 (1938) ("Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) ("parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational"); *see also, e.g.*, Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. Dep't of Health, 64 F. Supp. 3d 1235, 1247–54 (S.D. Ind. 2014) (empirical research contradicted safety justification for medical requirements); Pedersen v. OPM, 881 F. Supp. 2d 294, 342–43 (D. Conn. 2012) (government research refuted hypothesis that benefit denials would preserve funds); Burstyn v. City of Miami Beach, 663 F. Supp. 528, 534 (S.D. Fla. 1987) (expert testimony contradicted hypothesis that zoning would protect tourism).

114 Fed. R. Evid. 401(a) ("Evidence is relevant if[] it has any tendency to make a fact more or less probable than it would be without the evidence.").

115 *Tiwari*, 2020 WL 4745772, at *2.

116 Appellant's Opening Br. at 57, *Tiwari v. Friendlander*, No. 21-5495 (9th Cir. Aug. 12, 2021) ("CON laws have failed to produce cost savings, higher quality healthcare, or greater access to care, whether in underserved communities or in underserved areas.").

117 Medigen of Kentucky, Inc. v. Pub. Serv. Comm'n of W. Va., 985 F.2d 164, 167 (4th Cir. 1993) ("[R]estricting market entry does nothing to insure that services are provided at reasonable prices. Without rate regulation, higher rather than lower prices will more likely result from limiting competition. [The state's] goal of providing universal service at reasonable rates may well be a legitimate state purpose, but restricting market entry does not serve that purpose.").

118 *Craigmiles*, 312 F.3d at 226–29 (holding a law irrational in part because of basic economic arguments).

119 In re Certificate of Need for Aston Park Hosp., Inc., 193 S.E.2d 729, 736 (N.C. 1973) ("The Constitution of this State does not . . . permit the Legislature to grant to the Medical Care Commission authority to exclude Aston Park from this field of service in order to protect existing hospitals from competition otherwise legitimate.").

120 Bruner v. Zawacki, 997 F. Supp. 2d 691, 700 (E.D. Ky. 2014) ("To the extent that the protest and hearing procedure prevents excess entry into the moving business, it does so solely by protecting existing moving companies—regardless of their quality of service—against potential competition.").

121 Walgreen Co. v. Rullan, 405 F.3d 50 (1st Cir. 2005); *Medigen*, 985 F.2d 164.

An Extended Essay on Church Autonomy

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Religious Liberties Practice Group

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• Richard C. Schragger & Micah Schwartzman, *Lost in Translation: A Dilemma for Freedom of the Church*, 21 J. of Contemp. Legal Iss. 15 (2013), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2253891.

• Caroline Mala Corbin, *The Irony of* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 106 Nw. U. L. Rev. 951 (2012), *available at* https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1132&context=nulr.

• Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 Indiana L.J. 981 (2013), *available at* https://scholars.law.unlv.edu/facpub/780/.

• Frederick Mark Gedicks, *Narrative Pluralism and the Doctrine Incoherence in* Hosanna-Tabor, 64 Mercer L. Rev. 405 (2013), *available at* https://digitalcommons.law.byu.edu/faculty_scholarship/288/.

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The doctrine of church autonomy[1] is distinct from the two more familiar lines of cases decided under the Establishment Clause and Free Exercise Clause, respectively. Routine Establishment Clause disputes such as those over religious preferences,[2] government funding for religious entities,[3] and government-

1 The term "church autonomy" was first used by law professor Paul G. Kauper in *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 Sup. Ct. Rev. 347 (1969). However, the concept of church autonomy was pointedly recognized as being lodged in the Court's First Amendment jurisprudence as early as Mark DeWolfe Howe, *Foreward: Political Theory and the Nature of Liberty*, 67 Harv. L. Rev. 91 (1953). Professor Howe's essay remarks on the Court's recent decision in *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). In lieu of church autonomy, some courts use the term "ecclesiastical abstention." But "abstention" suggests that the doctrine is discretionary. It is not. When it applies, church autonomy doctrine is a requirement of the First Amendment.

2 *See, e.g.*, Estate of Thornton v. Caldor, Inc., 474 U.S. 703 (1985) (statute granting to private-sector employees the unyielding right to have Sabbath accommodated was religious preference violative of Establishment Clause). On the other hand, a religious exemption does not violate the Establishment Clause. *See* Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (holding that religious employer exemption to civil rights law did not violate the Establishment Clause).

3 *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (state school voucher plan available to schools, including religious schools, did not

sponsored religious symbols[4] are now resolved by a series of rules (not standards) followed over the last two decades by the High Court.[5] Stand-alone Free Exercise Clause cases are resolved by first sorting those complaints charging that the government has intentionally imposed a burden on a claimant's religious beliefs or practices (they get *Lukumi*-like[6] struct scrutiny) from complaints over laws that impose a religious burden only as a consequence of neutral and generally applicable legislation (they get a pass under *Employment Division v. Smith*,[7] as narrowed by *Fulton v. City of Philadelphia*[8]). The threshold task of sorting the *Lukumi* sheep from the *Smith* goats often presages whether the claim prevails on the merits. Church autonomy has its own exclusive line of precedent running from *Watson v. Jones*,[9] through *Kedroff v. St. Nicholas Cathedral*[10]—where the doctrine was first recognized as having First Amendment stature—and culminating with renewed vigor for religious institutional autonomy in the U.S. Supreme Court's unanimous decision of *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[11]

Stated differently, for some time now—but, one might say, hidden in plain sight—there have been not two, but three different sorts of religious-freedom cases decided under the Religion Clauses of the First Amendment. That explains why the *Smith* case, which is in the Free Exercise Clause line of cases, was said by the Court to be inapplicable in *Hosanna-Tabor*, a church autonomy case.[12] This sidestepping of *Smith* by the *Hosanna-Tabor* Court initially puzzled a lot of legal scholars—and admittedly the Court did not at first explain the distinction well.[13] But now that commentators have tumbled to the fact that there are three lines of cases that cover the range of First Amendment religious-freedom claims, the threshold task of bringing to bear the correct line of precedent is becoming routine. That the two Religion Clauses[14] have given rise to three distinct lines of constitutional precedent is, of course, evidence of far deeper goings on. And this essay will turn very shortly to the juridical and historical rationales that underlie these distinctions.

The church autonomy line of precedent consists of only a dozen Supreme Court cases decided after plenary review.[15] The

violate the Establishment Clause).

4 *See, e.g.*, American Legion v. American Humanist Assoc., 139 S. Ct. 2067 (2019) (plurality opinion, in part) (high visibility World War I memorial featuring a 40-foot high Latin cross that was maintained by a state did not violate Establishment Clause). Religious symbols are upheld if religiously inclusive when first commissioned and the message does not disparage any faith.

5 The earlier period in which courts applied a three-prong standard is long dormant. *Cf.* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (Establishment Clause violated if law's purpose is religious, its substantial effect is to advance religion, or it resulted in excessive entanglement with religion).

6 *See* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) (holding that city ordinances that were gerrymandered to discriminate against church's ritual sacrifice of animals violated Free Exercise Clause).

7 494 U.S. 872 (1990) (holding that generally applicable legislation, neutral as to religion, that has a disparate impact on the religious practices of some does not state a claim under Free Exercise Clause).

8 141 S. Ct. 1868 (2021) (holding that a municipality may not terminate its foster-care services contract with a social service provider on the ground that provider declines, for reasons of religious belief, to certify same-sex couples as foster parents). The contract had a clause prohibiting discrimination on the basis of sexual orientation. It also had a provision permitting individualized exceptions for good cause, yet the city had not exercised its discretion to accommodate the provider's religious beliefs. *Fulton* thus made it clear that a generally applicable law cannot include exemptions or exceptions for secular reasons while denying them for religious reasons. To make an accommodation for some but not for a religious belief or practice is to devalue religion. When the Court gets to applying strict scrutiny, every free-exercise claim becomes an as-applied case. And here the municipality was unable to show any substantial reason not to exempt this religious service provider.

9 80 U.S. (13 Wall.) 679 (1872). There were disputes over the ownership of church property decided by the Supreme Court long before *Watson*, but they were decided on bases wholly other than the First Amendment and church autonomy. These very early cases are collected at Michael W. McConnell, *The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic*, 37 Tulsa L. Rev. 7 (2013).

10 344 U.S. 94.

11 565 U.S. 171 (2012).

12 *Id.* at 189-90.

13 Speaking for the *Hosanna-Tabor* Court, Chief Justice Roberts wrote:

> [A] church's selection of its ministers is unlike an individual's ingestion of peyote [as in *Employment Division v. Smith*]. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. See [*Smith*, 494 U.S.] at 877 (distinguishing the government's regulation of "physical acts" from its "lend[ing] its power to one or the other side in controversies over religious authority or dogma").

565 U.S. at 190. Accordingly, there is a subject-matter class of cases to which the rule in *Smith* does not apply. The Court characterized the firing of a teacher in *Hosanna-Tabor* as an "internal church decision," meaning a decision of self-governance, while characterizing the ingestion of peyote in *Smith* as an "outward physical act." It follows that the firing of the teacher regulated by the Americans with Disability Act was not an "outward physical act" but an "internal church decision." Contrasting "outward physical acts" with "internal decisions" was unhelpful and soon abandoned.

14 U.S. Const., amend. 1, begins "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This is one clause with two participial phrases ("respecting an entablement" and "prohibiting the free exercise"). Nevertheless, the longstanding convention is to refer to them as clauses rather than phrases.

15 In chronological order, the Supreme Court's principal church autonomy cases are: *Watson*, 80 U.S. 679 (involving control over church property disputed by factions within a church); Bouldin v. Alexander, 82 U.S. (15 Wall.) 131, 139-40 (1872) (involving an attempted takeover of a church by rogue elements); Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929) (involving the authority to appoint or remove a church minister); *Kedroff*, 344 U.S. 94 (involving a governmental attempt to alter the polity of a church); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960) (per curiam) (involving a governmental attempt to alter the polity of a church); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Church, 393 U.S. 440 (1969) (involving control over church property disputed by factions within a church); Maryland & Va. Churches of God

line is topped by the Court's 2012 decision in *Hosanna-Tabor*, the importance of which cannot be overstated. The Court's newest pronouncement on church autonomy in *Our Lady of Guadalupe School v. Morrissey-Berru* is but a reaffirmation and clarification (some say a modest expansion) of who is a minister for purposes of the "ministerial exception," a defense available in antidiscrimination litigation.[16] There is this third line of Religion Clause precedent because the doctrine of church autonomy is about something different from a personal right to religious liberty, the right more typically secured by the Free Exercise Clause that shifts to the government the burden of strict-scrutiny balancing. In contrast, the church autonomy doctrine is positioned by the Court to rest on both the Establishment Clause and the Free Exercise Clause.[17] It is not a personal right rooted in an individual's religious beliefs, but a zone of protection for an entity's internal governance that is derived from the organization's religious character. Importantly, once the elements of the ministerial exception are shown by the church or other religious organization to be present, the lawsuit is at an end; there is no plaintiff's rejoinder.[18] The doctrine thus affords the church a defense in the nature of a categorical immunity—something like a government-free zone.[19]

The doctrine of church autonomy protects a relatively discrete field of internal operations performed by religious organizations—a field described in *Hosanna-Tabor* as "the internal governance of the church."[20] But if this zone of government-free operations is relatively compact, these are functions that go to the very heart of a religious entity's ability to maintain control over the organization and command its destiny. Moreover, church autonomy is an exclusive space for internal operations, be they characterized as religious or secular. It is for the church and similar religious entities to occupy this center of authority to the exclusion of other powers. In short, the doctrine of church autonomy is doing different work by a different means.

The scholarly literature on church autonomy is extensive,[21] with the number of articles on the subject nearly outstripping the number of cases of this type reported by the federal courts of appeal. While *Hosanna-Tabor* succinctly defined matters of church autonomy as those actions that involve the "internal

v. Church at Sharpsburg, 396 U.S. 367 (1970) (per curiam) (involving control over church property disputed by factions within a church); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (involving the authority to appoint or remove a church minister and to reorganize the church polity); Jones v. Wolf, 443 U.S. 595 (1979) (involving control over church property disputed by factions within a church); Thomas v. Review Board, 450 U.S. 707 (1981) (involving the rule prohibiting civil authorities from taking up religious questions); *Hosanna-Tabor*, 565 U.S. 171 (involving application of the ministerial exception); Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (involving application of the ministerial exception).

There are additional cases rooted in church autonomy doctrine, but the Court attributed the result to a basis different than the First Amendment. *See, e.g.*, Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867) (holding that priest cannot be deprived of ability to perform ecclesial duties because of failure to take exculpatory oath following Civil War); Rector of Holy Trinity Church v. U.S., 143 U.S. 457 (1892) (refusing to apply to clergy legislation by Congress forbidding aliens to come to U.S. for employment); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (adopting rule of construction that presumes religious organizations are exempt from congressional regulatory statutes that would otherwise entangle government in matters of internal religious governance).

16 140 S. Ct. 2049. On what *Our Lady* adds to *Hosanna-Tabor*, see Helen M. Alvaré, *Church Autonomy After* Our Lady of Guadalupe School*: Too Broad? Or Broad As It Needs To Be?* 25 Tex. Rev. L. & Politics 319 (2021).

17 *Hosanna-Tabor*, 565 U.S. at 184 ("The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."); *id.* at 188-89 ("By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."); *see also Our Lady*, 140 S. Ct. at 2060 ("State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion.").

18 *Hosanna-Tabor*, 565 U.S. at 196 ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us.").

19 *Id.* at 194 ("The EEOC and Perich suggest that Hosanna-Tabor's asserted religious reason for firing Perich . . . was pretextual. That suggestion misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister . . . is the church's alone.") (citations and footnote omitted).

20 *Id.* at 188.

21 For scholars generally supportive of church autonomy, see Richard W. Garnett & John M. Robinson, Hosanna-Tabor, *Religious Freedom, and the Constitutional Structure*, 2011–2012 Cato Sup. Ct. Rev. 307; Richard W. Garnett, *"The Freedom of the Church": (Towards) An Exposition, Translation, and Defense*, 21 J. of Contemp. Legal Iss. 33 (2013); Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 Harv. J. L. & Pub. Pol'y 839 (2012); Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 Harv. J. L. & Pub. Pol'y 821 (2012); Marc O. DeGirolami, *The Two Separations in* The Cambridge Companion to The First Amendment and Religious Liberty 396, 398-413 (Michael D. Breidenbach & Owen Anderson, eds. 2020); Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 Nw. U. L. Rev. 1183 (2014); Steven D. Smith, *Freedom of Religion or Freedom of the Church?, in* Legal Responses to Religious Practices in the United States 267 (Austin Sarat ed., 2012); Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 St. John's J. Legal Comment 515 (2007); Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 179 (2011); Michael P. Moreland, *Religious Free Exercise and Anti-Discrimination Law*, 70 Alb. L. Rev. 1417 (2007). For a positive reception to the idea of church autonomy but with reservations, see Andrew Koppelman, *"Freedom of the Church" and the Authority of the State*, 21 J. of Contemp. Legal Iss. 145 (2013); John D. Inazu, *The Freedom of the Church (New Revised Standard Version)*, 21 J. of Contemp. Legal Iss. 335 (2013). For critics of church autonomy, see Richard C. Schragger & Micah Schwartzman, *Lost in Translation: A Dilemma for Freedom of the Church*, 21 J. of Contemp. Legal Iss. 15 (2013); Richard C. Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 Va. L. Rev. 917 (2013); Frederick Mark Gedicks, *Dignity, History, and Religious-Group Rights*, 21 J. of Contemp. Legal Iss. 273 (2013); Caroline Mala Corbin, *The Irony of* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 106 Nw. U. L. Rev. 951 (2012); Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 Indiana L.J. 981 (2013).

governance" of a religious organization,[22] and *Kedroff* limited the operations to matters "strictly ecclesiastical,"[23] Part I of this article will show that the Supreme Court's church autonomy cases yield five protected areas for religious organizations. These are the formation of religious doctrine and its interpretation; the choice of ecclesiology and organizational polity; the appointment, promotion, training, and removal of clergy, along with other religious functionaries and leaders; the admission and removal of members, as well as determining members and affiliates in good standing; and communication with insiders about the foregoing subjects and activities, because such communications are necessary to the enjoyment of the first four subject areas. As we shall see, claims are being made for church autonomy that are overly broad, and yet other forces are pressuring to unduly constrain the territory set aside by this rule of nonentanglement with the government.

Part II then identifies four sorts of legal claims and defenses that commonly arise in the course of litigation where the doctrine of church autonomy is implicated: the defense known as the "ministerial exception," first raised in employment antidiscrimination claims; the rule prohibiting the resolution of religious questions by civil authorities; the rules for resolving internecine disputes between two factions within a church or denomination; and defamation claims based on communications that arose out of ecclesiastical decisions and events.

The primary work of constitutional structure is keeping in right relationship centers of power, including church and state, in contrast to protecting personal human rights. Part III takes up those features to church autonomy litigation that follow when the principle at work is structural, separating government and church, as opposed to rights-based. That can affect a surprising range of practices and procedures before a court reaches the merits, such as the necessity for the trial court to resolve a church-autonomy defense at the outset of a lawsuit, lest probing discovery and pre-trial motions themselves so entangle the church with civil judicial process as to generate a fresh invasion of the autonomy doctrine.

Finally, Part IV surveys the relevant history from the American founding that speaks to constitutional originalism and the things of a church that are not Caesar's. In Western Civilization, there is a long and rich history of differentiating between the operations of church and those of empire (later "kingdom," and still later "state"), the threads of which can be traced all the way back to the 2nd century.[24] But as the Supreme Court observed first in *Hosanna-Tabor* and again in *Our Lady*, the truly binding historical backdrop to the First Amendment is the colonial and early national story of disestablishment. Revolutionary Americans broke away from the ideas of Christendom that undergirded the Church of England, as headed by the Crown and established by Parliament,[25] and instead adopted the wholly novel principles that drove religious disestablishment as a means of disentangling the church from the corrupting hand of government in the newly forming states.

I. The Five Subject Matters Protected by the Church Autonomy Doctrine

A helpful way of thinking about church-state relations is to envision two different entities with a large territory of overlapping interests, but also with each having its own zone of exclusive authority. Alternatively, a federal circuit court of appeals has suggested that the concept of church autonomy is "best understood" as "marking a boundary between two separate polities, the secular and the religious."[26] These visual pictures raise the questions: What is the zone occupied by the church to the exclusion of the civil authorities? Where is this boundary line that marks off the authority of the church to the exclusion of the state?

The Supreme Court has responded to these inquiries with general language, the most quoted being a passage from *Kedroff* recognizing that the First Amendment grants "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[27] Similarly, *Milivojevich* recited that the First Amendment permits religious organizations "to establish their own rules and regulations for internal discipline and government" and that the civil authorities must defer to the decisions of such organizations "on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law"; these same civil authorities are prohibited from delving into matters of "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them."[28] And *Hosanna-Tabor* recalled the passage in *Watson* which says that "whenever the questions of discipline, or of faith or ecclesiastical rule, custom or law" have been resolved by a church, the matter is closed and not to be relitigated by the civil authorities.[29] An equally general passage appeared in *Our Lady* in explanation of the unanimous result in *Hosanna-Tabor*: "The constitutional foundation for our holding was the general principle of church autonomy to which we have already referred: independence in matters of faith and doctrine and in closely linked matters of internal government."[30]

22 565 U.S. at 188.

23 344 U.S. at 119.

24 *See* Robert Louis Wilken, Liberty in the Things of God: The Christian Origins of Religious Freedom 10-13 (2019).

25 *Our Lady*, 140 S. Ct. at 2061-62, 2065-66; *Hosanna-Tabor*, 565 U.S. at 182-85.

26 Korte v. Sebelius, 735 F.3d 654, 677 (7th Cir. 2013).

27 344 U.S. at 116 (footnote omitted).

28 426 U.S. at 713, 714, 724.

29 565 U.S. at 185 (quoting *Watson*, 80 U.S. at 727).

30 *Our Lady*, 140 S. Ct. at 2061. Also commonly cited is Justice William Brennan's concurring opinion in *Corp. of Presiding Bishop v. Amos*, joined by Justice Thurgood Marshall, which delved into the church autonomy theme:

> [R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions." . . . For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community

Accordingly, the doctrine of church autonomy extends a zone of independence to those relatively few but "core" administrative practices and "key" personnel functions that go to the control and destiny of a religious entity.[31]

While this general language is a helpful starting point, more detail is needed to solve close disputes. From the full range of the High Court's case law, we know that church autonomy has been held to protect five areas of internal governance over which a religious organization is sovereign: (1) the determination and interpretation of religious doctrine;[32] (2) the determination of the organization's polity or governance structure, including its embodiment in canons and bylaws;[33] (3) the hiring, training, supervising, promoting, and removing of clergy, worship leaders, and other leaders and employees with explicitly religious functions;[34] (4) the determination of who is admitted to and expelled from membership, as well as which members and affiliates are in good standing;[35] and (5) internal communications of the religious organization pertaining to the full enjoyment of the prior four subjects.

Bryce v. Episcopal Church in the Diocese of Colorado, is illustrative of the fifth matter concerning internal communications that are instrumental to the enjoyment of the prior four categories.[36] In *Bryce*, an Episcopalian church was sued by the youth minister and her domestic partner. Local church authorities had discovered that the youth minister was in a homosexual relationship. She was promptly transferred to duties that did not entail contact with youth and told she would be dismissed at the end of the year. At follow-on church meetings, the same authorities communicated to parents of the youth that the youth minister's same-sex relationship had caused her reassignment. The minister and her partner were present at and participated in these meetings. Among the various legal claims later brought by the couple was sexual harassment based on exposure of their same-sex relationship during the meetings. The trial and circuit courts held that the church's internal communications were protected by church autonomy.[37] The youth minister herself—as an employee of the defendant—was subject to the third category of church autonomy: the ministerial exception. But the youth minister's partner, though not employed by the church, was still subject to the general doctrine of church autonomy, but under the fifth category which protects internal communications. The communications were relevant to the governance of the church

> represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself.
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> 483 U.S. at 341-42 (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1389 (1981)).

31 140 S. Ct. at 2055 ("core"); *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring) ("key").

32 *See Church at Sharpsburg*, 396 U.S. at 368 (holding that courts cannot adjudicate doctrinal disputes); *Presbyterian Church*, 393 U.S. at 449-51 (refusing to follow a rule that discourages changes in doctrine); *Watson*, 80 U.S. at 725-33 (rejecting implied-trust rule because of its departure-from-doctrine inquiry); *see also Thomas*, 450 U.S. at 715-16 (holding that courts are not arbiters of scriptural interpretation); Order of St. Benedict v. Steinhauser, 234 U.S. 640, 647-51 (1914) (finding that religious practices concerning vow of poverty and communal ownership of property are not violative of individual liberty and will be enforced by the courts).

> Care must be exercised to not confuse the *determination* or *interpretation* of doctrine, which are covered by church autonomy, with the *application* of doctrine. All manner of activities and expressions could sincerely be said to be an application of one's understanding of his religious doctrine, but that does not make them a matter of church autonomy. The application of doctrine, rather, is a matter to be addressed as a straightforward claim under the Free Exercise Clause. The Texas Supreme Court recently confused the determination of doctrine with its application in *In re Diocese of Lubbock*. 624 S.W.3d 506 (Tex. 2021), petition for cert. filed, 2021 WL 4173594 (U.S. Sept. 13, 2021) (No. 21-398). In that case—a claim for defamation—the court mistakenly regarded as a protected determination of doctrine a diocese's decision about releasing to the public a list of clerics credibly accused of having abused a minor. This decision, however, is best understood as a practical application of doctrine, not a determination of doctrine, and thus not protected by the doctrine of church autonomy.

33 *See Milivojevich*, 426 U.S. at 708-24 (civil courts may not probe into church polity); *Presbyterian Church*, 393 U.S. at 451 (civil courts may not interpret and weigh church doctrine); *Kreshik*, 363 U.S. at 191 (First Amendment prevents judiciary, as well as legislature, from interfering in ecclesiastical governance of Russian Orthodox Church); *Kedroff*, 344 U.S. at 119 (same); Shepard v. Barkley, 247 U.S. 1, 2 (1918) (aff'd mem.) (courts may not interfere with merger of two Presbyterian denominations).

34 *See Our Lady*, 140 S. Ct. at 2062; *Hosanna-Tabor*, 565 U.S. at 190-95; *Milivojevich*, 426 U.S. at 708-20 (civil courts may not probe into defrocking of cleric); *Kedroff*, 344 U.S. at 116 (courts may not probe into clerical appointments); *Gonzalez*, 280 U.S. at 16 (declining to intervene on behalf of petitioner who sought order directing archbishop to appoint petitioner to ecclesiastical office). *See also Catholic Bishop*, 440 U.S. at 501-04 (refusal by Court to force collective bargaining on parochial school because of interference with relationship between church superiors and lay teachers); Rector of Holy Trinity Church v. United States, 143 U.S. 457, 472 (1892) (refusing to apply generally applicable law preventing employment of aliens to church's clerical appointment); *Cummings*, 71 U.S. 277 (unconstitutional to prevent priest from assuming his ecclesiastical position because of refusal to take loyalty oath).

35 *See Bouldin*, 82 U.S. at 139-40 ("'This is not a question of membership of the church, nor of the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership. . . . [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off."); *Watson*, 80 U.S. at 733 (court has no jurisdiction over church discipline or the conformity of church members to the standard of morals required of them). *See also Order of St. Benedict*, 234 U.S. at 647-51 (so long as individual voluntarily joined a religious group and is free to leave at any time, religious liberty is not violated and members are bound to prior rules consensually entered into, such as vow of poverty and communal ownership of property). The subject of autonomy does not include the "discipline" of members, which could be quite far reaching. But this point and the next do include the confidential communication to other members concerning the discipline or expulsion of a member.

36 289 F.3d 648 (10th Cir. 2002).

37 *Id.* at 657-59.

in order to explain to the church members and parents the reason for the abrupt reassignment of the youth minister to whom some of the children had become attached. The claim by the minister's partner was also dismissed because her complaint of sexual harassment was derivative of the protected employment decision not to retain the youth minister.[38]

Legal counsel to religious organizations sometimes try to shoehorn a case into a category where it does not belong. Illustrative is an argument made in a brief amici curia filed in support of a petition for writ of certiorari in *Roman Catholic Diocese of Albany v. Lacewell*.[39] The question presented in *Lacewell* concerns New York legislation requiring employers to provide health care benefits to employees that includes coverage for elective abortions. Naturally enough, pro-life religious organizations object to compliance with the law as violating their right to free exercise of religion. Plaintiffs certainly appear to meet the threshold of stating a prima facie claim for relief under the Free Exercise Clause. However, amici argued that the New York abortion mandate violates church autonomy.[40] But this is not so. The New York legislation does not itself seek to regulate a religious organization's internal governance as the U.S. Supreme Court uses that term. True, the state law certainly imposes a substantial burden on such an organization's application of its religious doctrine to the unborn, but it does not determine or interpret that doctrine.[41] A straightforward free-exercise claim is altogether different from a church autonomy claim. The danger of overreach by legal counsel for the church or amici is that the civil courts might not just reject the argument, but they might overshoot and narrow the doctrine of church autonomy.

II. Four Types of Disputes In Which Church Autonomy Applies

What are the common patterns of disputes or the sorts of factual settings where church autonomy has often been implicated? As the case law has unfolded, the doctrine of church autonomy has been frequently invoked in four dispute patterns: (1) a plaintiff sues a religious entity for employment discrimination (or a related common-law claim), and the entity invokes the ministerial exception to block the lawsuit; (2) a lawsuit raises questions that concern the validity, meaning, or importance of religious assertions or disputes, and civil authorities refuse to take up those questions; (3) a disagreement between two factions within a church or denomination is brought before the civil authorities, who then defer to the determination by the highest ecclesial judicatory; and (4) a party sues for defamation based on communications that arose out of a matter of internal governance, and the defendant pleads church autonomy as a defense. As to the third pattern, in lieu of deferring to the proper ecclesial judicatory, the Supreme Court has permitted states the alternative of adopting a rule of decision characterized as "neutral principles of law." Resort to this alternative, however, has been permitted by the Supreme Court only in cases where the two factions have abandoned attempts at resolving their underlying doctrinal differences and decided to go their separate ways, thus the only matter that remains for civil resolution via "neutral principles" is who gets legal title to the church property.

Although most church autonomy cases fall into one of these four patterns, this list is not a closed set. Occasionally there are matters outside these patterns where church autonomy is still applicable. For example, the principles behind the ministerial exception have been found applicable where the disputing parties lack an employment relationship.[42] The exemption was also found to apply when a state university sought to control the moral qualifications of the leaders of student religious organizations on its campus.[43] And on occasion, courts have declined to entertain a lawsuit asserting a right to attain or hold an uncompensated ecclesiastical appointment.[44]

A. The Ministerial Exception

The "ministerial exception" is an affirmative defense in the nature of a categorical immunity enjoyed by churches and similar religious entities that prevents them from being sued by employees whose job descriptions include religious functions.[45] The term ministerial exception is widely acknowledged to be a misnomer,[46] but the courts and the commentators have yet to settle on a more

38 *Id.* at 658-59, 658 n.2.

39 Petition for cert. filed, 2021 WL 1670283 (U.S. Apr. 23, 2021) (No. 20-1501), brief docketed May 7, 2021, *available at* https://www.supremecourt.gov/DocketPDF/20/20-1501/176496/20210423144447105_Roman%20Catholic%20Diocese%20of%20Albany%20v.%20Lacewell%20-%20Cert%20Petition.pdf.

40 Brief of Church of Jesus Christ of Latter-day Saints et al., *Lacewell*, No. 20-1501 (filed May 26, 2021), *available at* https://www.supremecourt.gov/DocketPDF/20/20-1501/180185/20210526121754439_20-1501acTheChurchOfJesusChristOfLatter-DaySaints.pdf.

41 This is why cases like *Jimmy Swaggart Ministries v. Calif. Bd. of Equalization*, 493 U.S. 378 (1990) and *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) are distinguishable from cases involving the church autonomy doctrine. Church autonomy extends to the formation and revision of doctrine, but not the application or practice of doctrine. The argument that a wage and hour law or a use tax imposes a substantial burden on a religious organization is to be taken up as a straightforward claim under the Free Exercise Clause. That was done in both *Jimmy Swaggart* and *Alamo Foundation*, albeit the claims were ultimately unsuccessful.

42 *See, e.g., Bryce*, 289 F.3d at 657-59 (holding that in a lawsuit where there were two plaintiffs and one was not an employee of the church, the church autonomy defense was still applicable to the nonemployee).

43 *See, e.g.,* InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ., 2021 WL 1387787 (E.D. Mich. Apr. 13, 2021) (overturning university regulation barring student religious organizations from having statement of faith and morality code requirements for student leaders).

44 *See, e.g.*, Chavis v. Roe, 93 N.J. 103, 459 A.2d 674 (1983) (involving a claim for damages by a deacon and his wife being defrocked and removed from his post, apparently over a dispute with the pastor; after expressing some doubt as to whether one's status as a deacon entailed a loss for which there could be a remedy, the court dismissed citing First Amendment concerns).

45 *Hosanna-Tabor*, 565 U.S. at 195 n.4 (concluding that the ministerial exception is an affirmative defense). For more discussion on church autonomy as an affirmative defense, see *infra* Part III.B.

46 *Our Lady*, 140 S. Ct. at 2064; *Hosanna-Tabor*, 565 U.S. at 198-99 (Alito, J., concurring).

apt label.[47] For example, the ministerial exception applies to more than just claims brought by clergy, members of a religious order, and other ecclesiastics. Rather, it applies to any executive leader or worship leader of a religious organization, and to any employee of a religious organization with duties some of which are explicitly religious in function.[48] Furthermore, "minister" is largely a Protestant term. Catholic and Orthodox Christians generally do not use the term, nor do Jews, Muslims, and others.[49]

The ministerial exception is a defense to more than just claims by employees of churches and other houses of worship. The defense extends to entities that engage in explicitly religious activities similar to or related to those of a church, such as K-12 religious schools that seek to transmit the faith to the next generation.[50] It makes less sense, however, to allow the defense by an entity that is marginally religious or that is religious in origin but that over time has largely secularized.[51] Simply put, the doctrine seeks to preserve the sovereignty of religious organizations that at least partly and genuinely engage in explicitly religious activities such as prayer, worship, observing sacraments, proselytizing, teaching religion, spiritual formation, or otherwise deepening or expanding the faith. That means entities that fall outside the scope of worship, teaching, propagating the faith, and so on ought not to be able to rely on the immunity.[52]

But how is a civil magistrate to determine that an employer is truly religious so as to benefit from the ministerial exception without violating the rule against civil authorities taking up questions about what is or is not central or important to a religion?[53] The manner by which this is worked out consistent with the First Amendment is illustrated by a recent administrative labor-law ruling. For reasons of church autonomy, lay faculty at a religious college are not permitted to organize a labor union under the National Labor Relations Act.[54] Prior case law had recognized collective bargaining rights for lay faculty unless a college was deemed "substantially religious in character."[55] That put the National Labor Relations Board in the position of making exacting inquiries into the curriculum, faculty tasks, and faith tenor of the student culture on campus, and then probing the religious importance the college puts on these matters. However, judging the degree of religiosity concerning matters of campus life would be unconstitutionally entangling.[56] To avoid transgressing the rule against civil authorities resolving religious questions, the NLRB's new three-part inquiry looks only to whether a college: (1) was formed as a nonprofit religious corporation or similar entity; (2) currently holds itself out to the public as religious; and (3) is affiliated with a church, denomination, or a defined body of creedal or religious teachings.[57] These three findings are mere factual inquiries about a religious institution (i.e., its objective characteristics) and thus can be noted by civil authorities without entangling the state in internal religious disputes.

The ministerial exception was first recognized in the early 1970s by the federal courts of appeal in claims brought by

47 One suggestion is to start referring to the "ministerial exception" as "church autonomy" because the exception is a sub-application of that doctrine. Without any confusion or loss in meaning, Justice Alito did that on one occasion in *Our Lady*, 140 S. Ct. at 2061.

48 *Id.* at 2064 ("[T]he exception should include 'any employee who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or *teacher of its faith*.'") (quoting *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring)). *Our Lady* and *Hosanna-Tabor* involved religious elementary school teachers as ministers. Other cases have found to satisfy the definition of ministers a religious school principal, *Rehfield v. Diocese of Joliet*, 2021 IL 125656 (2021); a church minister of music, *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795 (4th Cir. 2000); an archdiocese's communications manager, *Alicea-Hernandez v. Archdiocese of Chicago*, 2002 WL 598517 (N.D. Ill. Apr. 18, 2002); and the chair of the religion department and campus chaplain at a Catholic college, *Simon v. Saint Dominic Acad.*, 2021 WL 1660851 (D.N.J. Apr. 28, 2021). *See also* Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc., 2021 WL 3669050 (S.D. Ind. Aug. 11, 2021) (guidance counselor and member of faculty administrative team at Catholic high school found to meet the definition of minister); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996) (Catholic University faculty member in the canon law department is minister); EEOC v. Sw. Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981) (faculty and administrators at a seminary are ministers). *Cf.* DeWeese-Boyd v. Gordon College, 163 N.E.3d 1000 (Mass. 2021) (member of faculty teaching social work at Christian college is not a minister for purposes of ministerial exception), petition for cert. filed, 2021 WL 3406193 (U.S. Aug. 3, 2021) (No. 21-145). *See generally* Christopher Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. Rev. 1 (2011) (collecting cases).

49 *Our Lady*, 140 S. Ct. at 2063-64; *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring).

50 In addition to churches and K-12 religious schools, courts have applied the ministerial exception to a religious university and a seminary. *See Catholic Univ. of America*, 83 F.3d 455; *Sw. Baptist Theological Seminary*, 651 F.2d 277. In concept, there is no reason the exception would not be applicable to a religious charity and religious health care provider. *See* Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2007) (church-related hospital). In all instances, however, the employer has to meet the definition of a religious organization that has not secularized, and the employee concerned has to meet the definition of a minister.

51 *See* NLRB v. St. Louis Christian Home, 663 F.2d 60 (8th Cir. 1981) (upholding NLRB jurisdiction because home organized as religious but over the years had secularized); Fike v. United Methodist Children's Home, 547 F. Supp. 286 (E.D. Va. 1982), *aff'd on other grounds*, 709 F.2d 284 (4th Cir. 1983) (children's home that had abandoned its religious purpose lost benefit of ministerial exception).

52 This is somewhat akin to what is done with the religious employer exemption in § 702(a) of Title VII of the Civil Rights Act of 1964. If challenged, the employer needs to convince a court that it is sufficiently religious to invoke the exemption. *See* Spencer v. World Vision, Inc., 633 F.3d 723, 724 (9th Cir. 2011) (per curiam) (developing an approach for determining who is a seriously religious organization and thus able to invoke the religious employer exemption in Title VII); LeBoon v. Lancaster Jewish Community Center, 503 F.3d 217, 226-29 (3d Cir. 2007) (same).

53 The rule against civil authorities taking up religious disputes is discussed *infra* Part II.B.

54 *See* Bethany College and Thomas Jorsch and Lisa Guinn, 369 NLRB 1 (No. 98, June 10, 2020).

55 *Id.* at 2-3.

56 Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1265 (10th Cir. 2008) (ruling that "pervasively religious" test was unconstitutionally entangling); *see* Mitchell v. Helms, 530 U.S. 739, 828 (2000) (plurality op.) (statutory exemption unconstitutionally requires state officials to go illicitly "trolling through a person's or institution's religious beliefs").

57 *Bethany College*, 369 NLRB at 3-4.

clerics alleging employment discrimination by their churches.[58] Because there was no split in the circuits, the U.S. Supreme Court did not get around to affirming the ministerial exception until decades later in *Hosanna-Tabor*.[59] In that case, the Court ultimately determined that an elementary school teacher was a minister for purposes of the exception. However, before taking up that question, Chief Justice John Roberts—writing for the Court—had to distinguish *Employment Division v. Smith*.[60] In *Smith*, the state of Oregon had listed peyote, a hallucinogenic, as one of several controlled substances and criminalized its use. The plaintiffs in *Smith* were Native Americans who had been employed as counselors at a private drug rehabilitation center.[61] They were fired for illegal drug use after supervisors learned they ingested peyote as part of a religious ceremony. They were later denied unemployment compensation by the state because they were dismissed for cause. The *Smith* Court held that the Free Exercise Clause was not implicated when Oregon enacted a generally applicable drug law that was neutral as to religion, even though the law happened to burden the religious use of peyote.

Chief Justice Roberts admitted that the Americans with Disability Act (ADA) was a neutral law of general applicability that happened to have an adverse effect on the Lutheran school's personnel decisions.[62] But he then drew a distinction: "The present case, in contrast [to *Smith*], concerns government interference with an internal church decision that affects the faith and mission of the church itself."[63] A civil court rendering a judgment in such a case would be commanding a church to employ a minister—historically the behavior of a state with an established church. Thus, there is a class of cases to which the rule in *Smith* does not apply: those involving decisions within a church's sphere of internal governance. The Court's putting aside *Smith* as inapplicable confirms that church autonomy doctrine gives rise to a third line of cases separate from the line involving personal religious rights protected by the Free Exercise Clause, as well as the Establishment Clause line of precedents that challenge religious preferences or government funding of faith-related organizations.[64]

A peyote sacrament is obviously an important religious practice, and the *Smith* plaintiffs suffered a material burden on a Native American religious observance that was unrelieved because of the interpretation of the Free Exercise Clause in *Smith*. But the purpose of church autonomy is not to lift personal religious burdens as such. If it were, then *Hosanna-Tabor* would have been directly at odds with *Smith* and thereby overruled it. That did not happen. Rather, *Hosanna-Tabor* distinguished *Smith*. *Hosanna-Tabor* was not about a government regulation that burdened the school's religious practice—a Free Exercise Clause case—but about the government's intrusion into the zone of internal governance of the religious school—a church autonomy case. Moreover, these protected acts of internal self-governance need not be religiously motivated. As the *Hosanna-Tabor* Court observed, "[t]he purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason."[65] Rather, the purpose of church autonomy is to set aside the five subject matters that comprise the zone of internal governance and keep them autonomous from civil government. *Our Lady* presented the same issue. The teachers pointed out that they were not being dismissed for religious reasons. But with the defense of church autonomy, it makes no difference that the reasons are secular, as the Court pointed out with this illustration:

> Think of the quintessential case where a church wants to dismiss the minister for poor performance. The church's objection in that situation is not that the minister has gone over to some other faith but simply that the minister is failing to perform essential functions in a satisfactory manner.[66]

What matters is not religious injury, but that the actions of the employer fall within one of the five subject matters.

The difference in the nature of the injury that flows from rights-based claims as opposed to structural claims can be seen by contrasting the Supreme Court's Free Exercise Clause cases with its Establishment Clause decisions. The Free Exercise Clause is rights-based, and thus the only injury it can remedy is a religious injury. In contrast, the Establishment Clause is structural, separating two centers of authority, and the court in maintaining this church-state structure will redress both religious and nonreligious injuries. Examples of the latter are economic harm in the form of increased labor costs or loss of a liquor license,[67] loss of academic freedom,[68] and freedom of thought for atheists.[69] Because the doctrine of

58 The first federal court of appeals to recognize—as well as name—the ministerial exception was *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972). *See Hosanna-Tabor*, 565 U.S. at 188 n.2 (briefly tracing development of ministerial exception in lower courts).

59 *Hosanna-Tabor*, 565 U.S. at 188.

60 494 U.S. 872. *Smith*'s "generally applicable" test was recently narrowed in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868. *See supra* note 8 and accompanying text. But *Fulton* does not alter the way *Hosanna-Tabor* distinguished the *Smith* line of free-exercise cases and therefore is not applicable to a church autonomy case like *Hosanna-Tabor*.

61 *Smith*, 494 U.S. at 874.

62 *Hosanna-Tabor*, 565 U.S. at 189-90.

63 *Id.* at 190.

64 *See supra* notes 2-11 and accompanying text.

65 565 U.S. at 194.

66 141 S. Ct. at 2068.

67 *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (upholding claim of department store against labor law); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (upholding claim of tavern seeking issuance of a liquor license); *cf.* McGowan v. Maryland, 366 U.S. 420, 430-31 (1961) (permitting claim of economic harm by retail stores to be free of Sunday-closing law, but ultimately ruling against the stores on the merits); Two Guys from Harrison Allentown, Inc. v. McGinley, 366 U.S. 582 (1961) (same).

68 *See* Edwards v. Aguillard, 482 U.S. 578 (1987) (striking down a state law that required teaching of creation in public school science classes if evolution is taught); Epperson v. Arkansas, 393 U.S. 97 (1968) (striking down a state prohibition on teaching evolution in public school science classes).

69 *See* Torcaso v. Watkins, 367 U.S. 488 (1961). In *Torcaso*, an atheist who otherwise qualified for a public office refused to take a required oath that professed belief in God. The Court held the oath requirement violative

church autonomy, like the Establishment Clause, is structural, it should come as no surprise that the doctrine gives redress for both religious and secular injuries. In *Hosanna-Tabor*, immunity from liability for employment discrimination and retaliation was a form of shielding from secular harm.

In *Hosanna-Tabor*, the Equal Employment Opportunity Commission—which intervened on behalf of the teacher—claimed that there was no ministerial exception because the First Amendment did not require one. All that was required, argued the EEOC, was that the government be formally neutral with respect to religion and religious organizations. That was the case here, said the EEOC, because the ADA treats religious organizations just like every other employer when it comes to discrimination on the basis of disability. The agency argued the same was true of federal and state civil rights statutes prohibiting discrimination with respect to other protected classes. The EEOC allowed that religious organizations had freedom of expressive association, but so did labor unions and service clubs, and they were still subject to the ADA.[70] Equality was the only requirement, argued the EEOC. The nondiscrimination statutes could be blind to religion and religious organizations and still not violate the First Amendment. Accordingly, while Congress could choose to accommodate religion when enacting legislation, maintained the EEOC, the First Amendment did not require it to do so.

The Court reacted to the EEOC's argument for a religion-blind Constitution by calling it "remarkable," "untenable," and "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."[71] The text of the First Amendment recognizes the status of organized religion as more than a mere voluntary association vested with the aggregate rights of its individual members. Church autonomy doctrine recognizes that a properly conceived structuring of church and state is to the benefit of both.[72] Accordingly, the *Hosanna-Tabor* Court held that the ministerial exception is an affirmative defense in the nature of an immunity.[73]

Downstream of *Hosanna-Tabor*, a good part of the litigation has focused on the scope of the definition of "minister" for purposes of the immunity. That was the situation in *Our Lady*,[74] where the High Court focused on ensuring that the ministerial exception not be woodenly defined. The Ninth Circuit in *Our Lady* had read narrowly the Supreme Court's holding in *Hosanna-Tabor* concerning who is a minister. *Hosanna-Tabor* had found that a fourth-grade teacher, Cheryl Perich, was a minister, and that for reasons of church autonomy her claim should be dismissed. By taking classes in theology, Perich had earned a lay religious title conferred by her denomination. She went on to hold herself out as a minister in recognition of her completed coursework and lay title, and she claimed an income tax advantage available only to ministers. Perich was not a local church officer, worship leader, or denominational executive, but on the whole her duties reflected a key role in transmitting the Lutheran faith to her students.[75]

When addressing the breadth of the ministerial exception, the Ninth Circuit in *Our Lady* had treated the facts leading to the determination that Perich was a minister as four requirements on a checklist.[76] The High Court reversed. Writing for a 7-2 majority, Justice Samuel Alito began by noting that the ministerial exception is a subpart of the "general principle of church autonomy" that relies on both the Establishment and Free Exercise Clauses.[77] The Court said:

> The independence of religious institutions in matters of faith and doctrine is closely linked to independence in what we have termed "matters of church government." . . . This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission. And a component of this autonomy is the selection of the individuals who play certain key roles.
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> . . . Under this rule, courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions. . . . [A] wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith. The ministerial exception was recognized to preserve a church's independent authority in such matters.[78]

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of the First Amendment without specifying either religion clause. If an individual objects to the oath out of a religious belief that forbids taking oaths, then he has a valid claim under the Free Exercise Clause. As an atheist, however, the claimant in *Torcaso* did not suffer a *religious* injury as he professed to have no religious beliefs. Nevertheless, for a state to mandate taking of the oath would be a violation of the Establishment Clause as to all office seekers, including atheists, because confession of belief in a deity is a subject that remains in the realm of religion.

70 *Hosanna-Tabor*, 565 U.S. at 188-89.

71 *Id.* The Court wrote:

> We find [the EEOC] position [on this point] untenable. The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC's . . . view that the First Amendment analysis should be the same, whether the association in question is the Lutheran church, a labor union or a social club . . . . That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.

Id. at 189.

72 *See, e.g.*, McCollum v. Board of Educ., 333 U.S. 203, 212 (1948) ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."); Engel v. Vitale, 370 U.S. 421, 431 (1962) (The Establishment Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.").

73 *Hosanna-Tabor*, 565 U.S. at 188-90, 195 n.4.

74 140 S. Ct. 2049.

75 *Hosanna-Tabor*, 565 U.S. at 191-94.

76 140 S. Ct. at 2066-67.

77 *Id.* at 2060 (quoting *Hosanna-Tabor*, 565 U.S. at 186).

78 *Id.* at 2060-61 (citations, internal quotations, and footnotes omitted).

The Court went on to find that the two classroom teachers at Catholic elementary schools in California were ministers for purposes of the immunity. Their claims alleged employment discrimination on the basis of age and disability, respectively, when their annual employment contracts were not renewed. The nonrenewal was said by the schools to be based on poor performance and not acquiring new skills—what you might call "secular" reasons.[79] But the application of the ministerial exception did not hinge on the schools having a religious reason for severing the employment. This makes sense because what is protected by church autonomy doctrine is a sphere of "autonomy with respect to internal management decisions that are essential to the institution's central mission" (whether that decision be characterized as secular or religious), not a personal right of religious liberty vested in the employer.[80]

The *Our Lady* Court admitted that it would have been easier to find that the elementary teachers were ministers if they had satisfied all of the four items that had been present in *Hosanna-Tabor*. But *Our Lady* held that none of those items was essential.[81] What matters are the actual job functions of the employee.[82] The two classroom teachers had duties that were explicitly religious. They taught classes in Catholic doctrine, led their students in classroom prayer and recitation of Christian creeds, accompanied the students to a weekly mass, and signed annual employment contracts that set forth the religious mission of the school and required that they pledge to do nothing to undermine it.[83] By the employment contract, the teachers "were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith."[84] Moreover, so long as some of their employment functions were explicitly religious, it did not matter how much clock time the religious functions comprise in the teacher's overall school day.[85] For example, the explicitly religious functions could have comprised only 10 percent of a 40-hour workweek. And the institutions here were K-12 religious schools, which are viewed by the church as integral to passing on the Catholic faith to the next generation.[86] When "a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."[87]

When considering whether the ministerial exception applies in a case, rather than inquiring whether the employee is a minister in the ordinary sense of that term (e.g., pastor, priest, rabbi, imam, and so on), the Court asks one of two questions: (1) At some point in the workweek, does the employee perform some explicitly religious function, as was the case in *Our Lady* and *Hosanna-Tabor*? (2) Does the employee hold a position of executive leadership or have a role in leading worship or ritual?[88] If the answer to either question is in the affirmative, then the immunity applies.

In the fact-finding necessary to determine if an employee meets the definition of a minister, the civil courts cannot get entangled in deciding whether certain employee tasks are religiously important or meaningful as opposed to religiously peripheral or minor.[89] Justice Alito, writing for the Court in *Our Lady*, made a point of warning that this sort of judicial entanglement in religious questions had long been unconstitutional.[90] Justice Clarence Thomas filed a concurring opinion, joined by Justice Neil Gorsuch, stating that the determination as to who is a minister ought to be unilaterally decided by the religious employer to avoid having courts delve into prohibited religious questions.[91] Justice Alito, for the Court, did not go that far. Nevertheless, the Court's approach was highly deferential to the two Catholic schools regarding the employers' view that some of the teachers' job functions were religious.[92] Justice Alito noted the explicitly religious functions of the teachers here: teaching the Catholic religion, leading students in prayer and devotionals, and attending mass with the students. These tasks, of course, are widely recognized to be explicitly religious practices for Christians. As to other religions, as well as other

79 *Id*. at 2058, 2059.

80 *Id.* at 2060.

81 *Id*. at 2062, 2063.

82 *Id*. at 2064.

83 *Id*. at 2056-60.

84 *Id.* at 2066.

85 *Hosanna-Tabor*, 565 U.S. at 193-94 (the question of who is a minister is not resolved by a stopwatch).

86 *Our Lady*, 140 S. Ct. at 2065-66 (noting the importance of religious schools to Puritans, Jews, Muslims, Mormons, and Seventh-day Adventists).

87 *Id*. at 2069.

88 *Hosanna-Tabor*, 565 U.S. at 188, 196.

89 *See infra* Part II.B.

90 *Our Lady*, 140 S. Ct. at 2063 n.10.

91 *Id*. at 2069-71 (Thomas. J., concurring, joined by Justice Gorsuch). Justice Thomas made the same argument in *Hosanna-Tabor*. 565 U.S. at 196-98 (Thomas, J., concurring). There are problems with Justice Thomas' suggestion. He would leave the question of who is a minister to be unilaterally determined by the defendant/employer. The lack of checks and balances invites exaggerated claims with respect to a dispositive defense. Even more fundamentally, church autonomy is ranked by the positive law as a categorical immunity higher than all other defenses. But it is nonetheless a rule subject to the positive law, not above the law.

92 *Our Lady*, 140 S. Ct at 2066-69. There is no attempt in this article to catalogue all of the developing, sometimes contradictory, lower court cases as to who is found to be a "minister" for purposes of the defense. *See, e.g.*, *Sw. Baptist Theological Seminary*, 651 F.2d 277, *cert. denied*, 456 U.S. 905 (1982) (finding faculty and administrators were "ministers" for purposes of the ministerial exception); *InterVarsity Christian Fellowship/USA*, 2021 WL 1387787 (state university cannot control the qualifications of leaders of campus religious student organization because they are "ministers" subject to the ministerial exception); *Simon*, 2021 WL 1660851 (citing ministerial exception as reason to dismiss claims for employment discrimination and whistleblowing brought by individual who was chair of religion department and campus chaplain at Catholic college); Maxon v. Fuller Theological Seminary, 2020 U.S. Dist. Lexis 202309 (C.D. Cal. Oct. 7, 2020) (on appeal to Ninth Circuit) (ministerial exception applies to dismissal of students who filed Title IX claim against seminary for wrongful dismissal on basis of sexual orientation).

types of religious organizations besides churches (e.g., colleges, health care, and social services), Justice Alito appealed to religious employers to make it clear in advance (perhaps in the employment contract or employee handbook) which employees perform what the employer considers to be explicitly religious functions:

> In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution's explanation of the role of such employees in the life of the religion in question is important.[93]

The conundrum over who ultimately decides who is a minister is, as noted by Justice Thomas, not entirely resolved by the Court's opinion in *Our Lady*.

Looking for ways to circumvent *Hosanna-Tabor* and *Our Lady*, counsel for plaintiffs have sought to distinguish claims of discrimination in hiring, promotion, and dismissal from claims of hostile or harassing conditions of employment.[94] Plaintiffs have also resorted to filing claims arising out of the employment relationship that sound in tort or breach of contract.[95] For the most part, claims based on these theories have also been dismissed for reasons of church autonomy.[96] Occasionally added to these unsuccessful common-law actions are a count under a state whistleblower statute, also unsuccessful.[97] The dismissals are proper.[98] What ought to matter concerning the applicability of the ministerial exception is not legal counsel for plaintiffs selecting just the right civil writ to pursue an employment grievance—be it the law of torts, contracts, property, or implied trust. That sort of 19th century, writ-bound thinking has long been abandoned in the law of pleading and preclusion, and it has no place in the First Amendment. As a defense of constitutional scope, church autonomy necessarily bars these tort and contract suits if proving the elements of the prima facie claim (or various expected defenses) would give rise to questions that intrude into the employer's internal governance, including the determination of doctrine or polity, the supervision of ministers, the dismissal of members and affiliates, or internal communications about these matters.

Not every tort, contract, or whistleblower claim arising out of an employment relationship involving a religious employer will be prohibited by church autonomy.[99] Rather, the trial court should make findings concerning whether entertaining a common-law claim will invade one of the five protected subject matters that the Supreme Court has deemed out-of-bounds to civil authorities as a matter of internal governance.

B. "The Law Knows No Heresy": The Rule Against Deciding Religious Questions

Church autonomy doctrine has long entailed the rule that the judiciary must avoid issues that cause it to probe into the religious meaning of religious words, practices, or events,[100]

93 *Our Lady*, 140 S. Ct. at 2066.

94 *See* Demkovich v. Saint Andrew the Apostle Par., Calumet City, 3 F.4th 968 (7th Cir. 2021) (en banc) (holding that the ministerial exception does apply to employment discrimination claim alleging hostile work environment or sexual harassment); Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238 (10th Cir. 2010) (same). A contrary result was reached in *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004).

95 *But see* Sumner v. Simpson Univ., 27 Cal. App. 5th 577 (2018) (holding that claims for torts brought against seminary for dismissal of individual who was dean and member of the faculty were not subject to ministerial exception, but not claims for breach of contract). The dean and member of the faculty was properly regarded as a minister for purposes of the ministerial exception and the Christian college properly regarded as a religious entity. The breach of contract claim was said to entail the litigation of only secular questions. But with defense of church autonomy, the secularity of the tort and contract issues makes no difference. *See supra* notes 79-80, and *infra* notes 193-94, 203-04 and accompanying text. If the subject matter of the dispute falls within one of the five zones of what the Supreme Court has identified as "internal governance," then the claim is barred. Here, the dismissal of the dean of a seminary falls within the subject area of the terms and conditions of the employment of a minister and should be prohibited. And the elements of the torts were part and parcel of the alleged discrimination.

96 *See, e.g.*, Bell v. Presbyterian Church (U.S.A.), 126 F.3d 328 (4th Cir. 1997) (dismissing action by pastor who sued denomination, by which he was not employed, alleging state law tort claims for, among other things, tortious interference and intentional infliction of emotional distress); Hutchison v. Thomas, 789 F.2d 392 (6th Cir. 1986) (rejecting "neutral principles of law" exception to church autonomy doctrine as applied to state law tort claims, including defamation and intentional infliction of emotional distress, against the church in challenge to forced retirement); Kaufman v. Sheehan, 707 F.2d 355 (8th Cir. 1983) (holding that employment suit by priest filed under theory of breach of employment contract was subject to First Amendment ministerial exception); Erdman v. Chapel Hill Presbyterian Church, 286 P.3d 357 (Wash. 2012) (en banc) (rejecting "neutral principles of law" exception to church autonomy in state tort claim related to ministerial employment).

97 *See Rehfield*, 2021 IL 125656 (dismissing whistleblower claim by former ministerial employee filed along with statutory civil rights counts alleging employment discrimination); *Simon*, 2021 WL 1660851 (citing ministerial exception as reason to dismiss claims for employment discrimination and whistleblowing brought by individual who was chair of religion department and campus chaplain at Catholic college).

98 *See generally* Victor E. Schwartz & Christopher E. Appel, *The Church Immunity Doctrine: Where Tort Law Should Step Aside*, 80 U. Cinn. L. Rev. 431 (2011).

99 *Our Lady*, 140 S. Ct. at 2060 ("That does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission."); *Hosanna-Tabor*, 565 U.S. at 196 ("Today we hold only that the ministerial exception bars [antidiscrimination civil rights suits.] We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.").

100 *See, e.g.,* Rosenberger v. Rector & Visitors of UVA, 515 U.S. 819, 843-44 (1995) (state university must avoid distinguishing between evangelism, on the one hand, and the expression of ideas merely approved by a given religion); Bob Jones University v. U.S. 461 U.S. 574, 604 n.30 (1983) (avoiding potentially entangling inquiry into religious practice); Widmar v. Vincent, 454 U.S. 263, 269-70 n.6, 272 n.11 (1981) (holding that inquiries into religious significance of words or events are to be avoided); *Thomas*, 450 U.S. at 715-16 (not within judicial function or competence to resolve religious differences); Gillette v. U.S., 401 U.S. 437, 450 (1971) (Congress permitted to accommodate "all war" but not "just war" pacifists because to broaden the exemption invites increased church-state entanglements and would render almost impossible the fair and uniform administration of selective service system); Walz v. Tax Comm'n, 397

and that it must avoid making determinations concerning the centrality of a religious belief or practice to that religion.[101] Often referred to as the "religious question doctrine," the rule bars the judiciary—indeed all civil officials and authorities—from attempting to resolve disputes over the orthodoxy of what a religious person or organization professes, and from taking up any question as to the validity, meaning, or importance of a religious belief or practice. It makes no difference if a religious liberty claimant is uncertain about or questioning her beliefs, if she is a new convert, or if she is not a part of any organized church or denomination.[102] As the Court pronounced in *Watson*, "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[103] The purpose of the rule is to keep the government from picking sides concerning a religious matter—a purpose rooted in the Establishment Clause—as well as to not deter a person's free exercise of religion.

The most frequently cited case for the rule is *Thomas v. Review Board*.[104] In *Thomas*, a state sought to defeat a former employee's Free Exercise Clause claim challenging the government's denial of unemployment compensation. Thomas was laid off from a factory when he refused to work on parts for military tanks because he was a religious pacifist. By using the testimony of a co-worker, who was also a longtime member of the same religion as Thomas, the state sought to show that Thomas, as a new convert, was misapplying the teachings of his church. The Supreme Court would have none of it, observing that Thomas "drew a line" concerning his beliefs that the state had to accept, lest the civil courts become "arbiters of scriptural interpretation."[105]

Thomas was a cause of action brought by an individual religious claimant rather than a lawsuit attempting to vindicate the autonomy of a church. Thus, it might seem odd to regard the precedent as a leading case for the application of church autonomy. The main underlying cause of action was about whether Thomas had a successful entitlement claim under the Free Exercise Clause, which the Court eventually held that he did. However, application of the church autonomy doctrine in *Thomas* arose out of an ancillary issue—whether the state's expert testimony went to religious questions the Court could not properly consider.

The prohibition on civil courts taking up religious issues or disputes frequently is an important reason for rejecting an argument raised by a party opposing a religious claimant. For example, in *Our Lady*, the teachers in the Catholic elementary schools argued that they could not be ministers for purposes of the ministerial exception unless as a condition of employment they were required to be Catholic, like the sponsoring schools. The Court rejected the suggestion because civil judges cannot determine when an employee is a co-religionist with the employer. Is an Orthodox Jew a co-religionist with a Conservative Jewish employer? Is a Southern Baptist teacher seeking employment at a Primitive Baptist school applying to work for a co-religionist? For a civil magistrate to have the final say as to who is a co-religionist to the employer violates the ban on religious questions.[106] *Our Lady* further rejected the co-religionist criterion because a civil court would have no way of independently determining whether an employee had remained in good standing with her church (thus still a co-religionist) without transgressing the rule against religious questions. Is a teacher who says she is Catholic to be regarded by a court as a Catholic in good standing when she attends mass only on Easter and Christmas and favors women's reproductive rights?[107]

The Court rejected a similar argument in *Burwell v. Hobby Lobby Stores, Inc.*,[108] where the government opposed application of the Religious Freedom Restoration Act[109] to the "contraceptive mandate" for employers subject to the Affordable Care Act. Government lawyers argued that the complicity in evil-doing claimed by Hobby Lobby as a result of the contraceptive mandate was too attenuated to constitute a substantial religious burden.

U.S. 664, 674 (1970) (courts should avoid entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs); Cantwell v. Connecticut, 310 U.S. 296, 305-07 (1940) (ruling that petty officials may not to be given discretion to determine what is a legitimate "religion" for purposes of issuing permit); *see also* Rusk v. Espinosa, 456 U.S. 951 (1982) (aff'd mem.) (striking down charitable solicitation ordinance that required government officials to distinguish between "spiritual" and secular purposes underlying solicitation by religious organizations).

101 *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (rejecting free exercise test that "depend[s] on measuring the effects of a governmental action on a religious objector's spiritual development"); *Amos*, 483 U.S. at 336 (recognizing a problem when government attempts to divine which jobs are sufficiently related to the core of a religious organization so as to merit exemption from statutory duties is desirable); United States v. Lee, 455 U.S. 252, 257 (1982) (rejecting government's argument that free exercise claim does not lie unless "payment of social security taxes will . . . threaten the integrity of the Amish religious belief or observance"); *Smith*, 494 U.S. at 886-87 (same).

102 *See* Frazee v. Illinois Dep't of Empl. Security, 489 U.S. 829 (1989) (state could not withhold unemployment compensation from Sabbath observer because he was not a member of any church).

103 80 U.S. at 728.

104 450 U.S. 707 (1981). For example, *Our Lady* relied on *Thomas*. *Our Lady*, 140 S. Ct. at 2063 n.10. It also relied on *Presbyterian Church*, where the Court said courts must avoid "resolving underlying controversies over religious doctrine," and that "First Amendment values are plainly jeopardized when . . . litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice." *Id.* at 2063 n.10 (citing *Presbyterian Church*, 393 U.S. at 449). It also relied on *Milivojevich*. *Id.* at 2063 n.10 (citing *Milivojevich*, 426 U.S. at 715 n.8) ("It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own.") (citation and internal quotation marks omitted).

105 450 U.S. at 715, 716. Thomas was a Jehovah's Witness. He believed his religion prohibited him from working in a factory on the task of fabricating turrets for military tanks. *Id.* at 710.

106 *Our Lady*, 140 S. Ct. at 2068-69 (quoting petitioners' reply brief).

107 *Id.* at 2069.

108 573 U.S. 682 (2014). *See* Alexander MacDonald, *Religious Schools, Collective Bargaining, & the Constitutional Legacy of* NLRB v. Catholic Bishop, 22 Federalist Soc'y Rev. 134 (2021) (noting that while federal NLRB continues to not organize lay faculty at religious schools, some states have moved into the regulatory vacuum).

109 42 U.S.C. §§ 2000bb-2000bb-4.

The Court rejected the government's attenuation argument because a civil court would have no way of determining if the employer's claim of complicity in evil-doing was central or peripheral to the employer's religious faith without violating the rule prohibiting religious questions.[110]

In *NLRB v. Catholic Bishop of Chicago*,[111] the rule prohibiting religious questions helped to prevent a religious K-12 school from being subjected to mandatory collective bargaining under the National Labor Relations Act.[112] The Court painted a picture of church-state entanglements that could arise if ecclesiastical authorities operating a school were forced to answer to charges of unfair labor practices.[113] The specter was of a bishop or mother superior being harshly examined by an administrative law judge concerning his or her truthfulness when characterizing as religious the educational policy being challenged by the union representing lay teachers. This is another way of saying that government-supervised collective bargaining would frequently call for the administrative resolution of religious disputes. The NLRA had no statutory exemption for religious organizations, including religious schools. Yet by adopting a rule of statutory construction that presumes religious organizations are exempt from congressional regulatory statutes that would otherwise entangle the government in matters of internal religious governance, the Court held that the NLRA did not apply to these schools.[114] This result is best explained by the church autonomy doctrine.

Similarly, some tort claims against a church necessarily raise forbidden religious questions for resolution by the finder of fact, often a jury.[115] Perhaps the most novel line of tort claims to be affected by church autonomy doctrine is the bitter struggle surrounding the theory of clergy malpractice. *Nally v. Grace Community Church of the Valley* concerned the relationship between a local church and one of its members.[116] For several years, Kenneth Nally regularly attended worship services at Grace Community Church, a nondenominational Protestant congregation, and was involved in additional midweek church activities. He willingly sought spiritual counseling by the pastoral staff that was provided at no cost. Kenneth had long suffered from depression, and in 1979, he committed suicide at the age of 24. The following year, his parents filed a wrongful death suit against the church and four members of the pastoral staff. The complaint alleged three theories of relief: clergy malpractice in pastoral counseling and teaching; negligence in the training of the pastoral staff to do the spiritual counseling; and outrageous conduct in allegedly dissuading Kenneth from turning to his family and their Catholic upbringing to address his depression and suicidal tendencies. After protracted discovery and pretrial motions, the case was dismissed by the trial court citing uncontested facts that undermined central allegations in the parents' pleading, but also by relying on First Amendment safeguards for church operations. The California Court of Appeal, in a split decision, reversed and remanded for further discovery and trial.[117]

On remand and three weeks into a trial before a jury, the judge granted defendants' motion for a nonsuit on all three counts in the complaint.[118] The claims were dismissed for both factual and legal reasons, one prominent rationale being the defenses available under the First Amendment.[119] Nally's parents again appealed, and the Court of Appeal again reversed. It held that although the clergy malpractice count failed to state a cause of action separate from the negligence count, both theories could be construed as stating a cause of action for the "negligent failure to prevent suicide" by the church's "non-therapist counselors." The First Amendment defenses were brushed aside.

On review by the California Supreme Court, it was found that the trial court had correctly granted a nonsuit as to all three counts in the complaint.[120] The high court thought that neither the evidence adduced at trial nor well-established principles of tort law supported the Court of Appeal's reversal of the nonsuit. The judgment was based on the facts and state tort law. Accordingly, the California Supreme Court said it need not address the First Amendment issues raised by the church and its four pastors. A final appeal to the U.S. Supreme Court was summarily turned away,[121] a result virtually assured because the final disposition by the state supreme court was grounded in state law, not federal First Amendment issues.

At one level, the church and its pastoral staff were fully vindicated as the dispute ended entirely in their favor. But the basis for that resolution was not entirely satisfactory because the appellate courts lost an opportunity for a valuable teaching on the First Amendment. Nevertheless, the ten-year struggle in California widely exposed and deeply tainted the theory of clergy malpractice. As a consequence, when the theory was tried in other states, the courts rejected it—this time, for the right reason.[122]

110 *Hobby Lobby*, 573 U.S. at 729 n.37.

111 440 U.S. 490.

112 29 U.S.C. §§ 151-69.

113 *Catholic Bishop*, 440 U.S. at 496, 498-99, 501-04.

114 *Id.* at 504-07. *See also* Duquesne Univ. of the Holy Spirit v. NLRB, 947 F.3d 824 (D.C. Cir. 2020); Univ. of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002). These cases are best understood as applications of the rule prohibiting civil authorities taking up religious questions.

115 For a collection of tort claims raising First Amendment defenses, including the defense of church autonomy, see Carl H. Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W.Va. L. Rev. 1, 76-113 (1986).

116 For a fuller account of the *Nally* litigation, see *id.* at 78-84.

117 Nally v. Grace Cmty. Church of the Valley, 157 Cal. App. 3d 912 (1984). Following the Court of Appeal's decision, the defendants petitioned the California Supreme Court for review. Review was denied and the case remanded for further proceedings before the trial court, but the Court of Appeals' opinion was ordered depublished.

118 Memo. op., No. NCC 18668-B (Cal. Super. Ct., Los Angeles County, May 1985). A nonsuit meant that the claim had no legal or factual basis.

119 *Nally*, 157 Cal. App. 3d 912.

120 Nally v. Grace Cmty. Church of the Valley, 763 P.2d 948 (1988).

121 Nally v. Grace Cmty. Church of the Valley, 490 U.S. 1007 (1989).

122 *See, e.g.*, Franco v. The Church of Jesus Christ of Latter-day Saints, 21 P.3d 198 (Utah 2001) (dismissing tort claims including clergy malpractice brought by parishioner and her parents against church for advice given by ecclesiastic); Langford v. Roman Catholic Diocese of Brooklyn, 271 App. Div. 2d 494, 705 N.Y.S.2d 661 (2000) (dismissing various tort claims brought by parishioner against priest and diocese for

A claim for clergy malpractice assumes a uniform and regulated profession with objective, temporal standards of care against which an alleged failure of legal duty can be measured. That is not possible when the offices of clergy are as differentiated as those of rabbi, priest, pastor, and imam. Accordingly, the plaintiffs sought to have the law of torts impose a uniform standard of care on all clergy, as is the case with suits for medical, legal, and other types of malpractice. But for a common-law judge to impose a uniform standard of clerical practice is an obvious form of religious establishment—favoring one set of religious practices over others. The claim of ordinary negligence fares no better. In litigating the duty of due care or what constitutes "the reasonably prudent cleric," a civil court—often with a jury as fact finder—will find itself probing the spiritual duties of an ecclesiastical office and facing differing (sometimes conflicting) interpretations of scripture, doctrine, and religious tradition. This violates the prohibition on civil authorities resolving religious questions. Further, such findings—even assuming they can be established on a case-by-case basis—will yield a standard of care that varies from church to church. To avoid this conclusion, the plaintiffs in *Nally* sought to import secular standards from the profession of clinical licensed counselors. However, not only were these secular standards an alien imposition on the office of clerics attuned to providing spiritual advice, but the secular principles and methods could conflict with the church's teachings—a free exercise burden.

Over time, the rule prohibiting a state from resolving religious disputes has become identified with what judges and lawyers refer to when they caution the government against untoward "entanglements" between church and state. The same concept is behind the judicial praise offered for legislative or regulatory exemptions that thereby successfully avoid such entanglement. It was in *Walz v. Tax Commission of New York* that the Supreme Court first sang the virtues of avoiding entanglement between the institutions of church and state.[123] The *Walz* Court considered a property tax exemption for churches, which it not only found to be compatible with the Establishment Clause,[124] but also praised because it avoided administrative entanglements otherwise present in the property appraisals, tax liens, and tax foreclosures that attend ad valorem statutes.[125] Just one year later, in *Lemon v. Kurtzman*, the Court fashioned a wholly new requirement that governments eschew "excessive entanglement" between church and state to avoid violating the Establishment Clause.[126] However, in a complex society, a certain level of regulatory interaction between church and state is inevitable, even desirable. For example, churches can hardly be exempt from building safety codes or most zoning restrictions. While the three-part *Lemon* test is now in disuse,[127] for a time there were cases where administrative entanglement alone—deemed to be excessive by some measure never quantified—could lead to laws being deemed unconstitutional.[128] That unhappy state of affairs seems to have gotten sorted out, and excessive entanglement is no longer found to be a stand-alone violation of the Establishment Clause.[129] The idea that regulatory entanglements can independently implicate the Establishment Clause has now been narrowed and subsumed into the longstanding rule prohibiting courts from answering religious questions. And it is all to the better that the word "entanglement" has been repurposed in this way. Judges and lawyers can still refer to unconstitutional entanglements (dropping the adjective "excessive") as a descriptor for when a church-state boundary has been crossed, but it is now just a succinct way of describing a failure by civil officials to heed the rule against taking up religious questions.

The rule prohibiting religious questions does not forbid government authorities from inquiring into the *sincerity* of a party asserting a claim or defense of religious freedom.[130] As difficult as it can be to measure what is in the hearts of people with respect to their religious professions, requiring sincerity is a logical necessity. The Religion Clauses must not be allowed to become a refuge for fakers, frauds, and charlatans. That said, sincerity is rarely an issue in First Amendment claims. In most every case, the government tacitly concedes the claimant's sincerity, but then defends the suit on other grounds.

The scope of the religious question rule also leaves room for the government to make limited inquiries *about* a religion. At its most elemental level, this is the government simply taking notice that an entity identifies as Catholic rather than Protestant, or that an entity is a free-standing religious college rather than a subsidiary of a Protestant denomination. These are factual findings that merely take note of a given religion's beliefs or polity. For example, a civil magistrate, following the usual rules of evidence, can determine whether a Jewish community center or a Christian international disaster relief organization is a religious employer such that it qualifies for an exemption from federal employment

sexual relationship that occurred during counselling by priest); Bladen v. First Presbyterian Church of Sallisaw, 857 P.2d 789 (Okla. 1993) (dismissing tort claims including clergy malpractice brought against church by husband who had received marital counseling from his pastor who was at the time having affair with husband's wife).

123 397 U.S. 664.

124 The aspect of the property tax code that was challenged was a religious exemption, not a religious preference. For purposes of the Establishment Clause, statutory exemptions are regarded as the legislature choosing to leave religion unregulated even as its secular counterparts are regulated. And a state does not establish a religion by leaving it alone. *Id.* at 673.

125 *Id.* at 674, 676.

126 403 U.S. at 612-13 ("excessive entanglement" elevated to a third prong of test for measuring Establishment Clause compliance).

127 *See, e.g.,* Williams v. Kingdom Hall of Jehovah's Witnesses, 2021 UT 18 (2021) (noting that the U.S. Supreme Court no longer applies the *Lemon* test).

128 *Lemon* itself held that state programs to aid K-12 religious schools generated excessive entanglement between church and state in violation of the Establishment Clause. 403 U.S. at 617-18.

129 *See, e.g.*, *American Legion*, 139 S. Ct. 2067, where only one of the seven Justices in the majority used the *Lemon* test.

130 The leading case on sincerity as necessary to invoking a religious-freedom claim under the First Amendment is *United States v. Ballard*, 322 U.S. 78 (1944).

antidiscrimination laws.[131] It is no invasion of church autonomy to ask an employer, claiming to be statutorily exempt because it is religious, to demonstrate that it is organized under state law as a religious corporation, that it continues to hold itself out to the public as such, and that it presently engages in religious activities. Such findings of fact are permitted because they are inquiries *about* religion, not about the underlying religion's validity or the religious meaning or importance of its tenets and practices.

C. Internecine Disputes

The third type of frequently occurring litigation implicating the church autonomy doctrine is disputes between two factions within a religious organization as to which is the "true" church.[132] To begin with, the civil courts cannot adjudicate which faction has departed from the "correct" doctrine or polity and thus should be denied the organization's property, for that is a prohibited religious question. This would seem to mean that any dispute over the use or ownership of church property must be left to be resolved by the internal dispute resolution processes of the church. And it remains for the civil authorities only to step back and defer to the final result of those internal processes, assuming the procedures themselves are not contested.[133] That is indeed the general rule as dictated by church autonomy. In a church of hierarchical polity, the officials at the top are likely to prevail, as we see in the leading case of *Serbian Eastern Orthodox Diocese v. Milivojevich*.[134] In contrast, in a church body of congregational polity, the majority of local voting members will decide the matter in question.

In its line of cases involving internecine disputes, however, the Supreme Court has developed an alternative where state authorities resolve the conflict over title to the disputed property through state-fashioned "neutral principles of law." It bears special caution that resorting to a rule of neutral principles has been permitted only where the disputing factions have abandoned any attempt to remain together as a unified religious entity, leaving for resolution only the issue of which faction is to be awarded ownership of the church property. The Court has not overtly announced this limitation on the rule, but it is the most straightforward way to reconcile the cases—and it does the least damage to the doctrine of church autonomy. There will follow more discussion on why the neutral-principles alternative is permitted in these limited circumstances, but we begin with the general rule.

The first in this internecine dispute line of cases is *Watson v. Jones*.[135] The Supreme Court in *Watson* laid down the broad principles that apply when federal courts deal with disputes within a religious body that implicate doctrine, polity, oversight of ecclesiastics, or the discipline of members. To avoid transgressing church autonomy, civil magistrates defer to the dispute resolution judgment reached by the church's highest judicatory:

> [W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.[136]

Watson was a post-Civil War case that involved a struggle in Kentucky between two factions of a local Presbyterian church for control of the church building. Title in the deed to the property was in the name of the trustees of the local church. However, the corporate charter of the local church "subjected both property and trustees alike to the operation of [the general church's] fundamental laws."[137] The general church or denomination was the Presbyterian Church of the United States. Its highest governing body was called the General Assembly. The internal ecclesiastical rules governing the General Assembly stated that it possessed "the power of deciding in all controversies respecting doctrine and discipline."[138]

Following the Civil War, the General Assembly had ordered the members of all local church bodies who believed in a divine basis for slavery to "repent and forsake these sins."[139] In Kentucky, a majority of the local church members were willing to comply with the directive. A minority faction, however, dissented, and it deemed the directive of the Assembly a departure from the doctrine held at the time when the local church body first joined with the general church. The minority's legal theory was that the general church held an interest in the local real estate that was subject to an implied trust. Further, a condition of the trust was that the church adhere to its original doctrines. Any departure by the general church meant a breach of the trust and thus forfeiture of its interest in the property. Accordingly, the minority faction claimed that the majority had relinquished any right to ownership of the property when the general church

131 *See, e.g., Spencer*, 633 F.3d at 724 (developing an approach for determining who is a religious organization and thus able to invoke the religious employer exemption in Title VII of the Civil Rights of 1964); *LeBoon*, 503 F.3d at 226-29 (same).

132 In the rare instance where church property has fallen into the possession of parties falsely representing themselves as officers of the church so as to obtain control of valuable property, a court may probe just far enough to prevent a fraudulent takeover. *See Bouldin*, 82 U.S. 131 (courts will not go behind stated reasons for excommunication of church trustees and members, but a court may determine if their ouster was truly an act of the church or a takeover by confederates claiming to have authority to act).

133 While not common, there are instances where the internal polity of a hierarchical denomination is unclear on what is the ecclesial judicatory with final authority to resolve a given factional dispute. If the ecclesiastical procedures or canons are unclear, a civil court cannot resolve the dispute without violating the rule against religious question. In such a situation, Justice Brennan suggested that the court resort to neutral principles of law. *Church at Sharpsburg*, 396 U.S. at 369 and n.2 (Brennan, J., concurring). This only seems fair. The general church has nobody but itself to blame for its internal dispute resolution system not being deferred to by civil authorities when it holds the primary responsibility for clarifying its polity before such disputes arise. A similar result would seem to be called for if it is not even clear whether the general church is hierarchical.

134 426 U.S. 696.

135 80 U.S. 679.

136 *Id.* at 727.

137 *Id.* at 683.

138 *Id.* at 682.

139 *Id.* at 691.

repudiated the original, proslavery doctrines. Because they were the "true church," members of the minority faction maintained, they should be awarded title to the local real estate.[140]

The Supreme Court began by rejecting the implied-trust theory—which originated in English law with its established Church of England[141]—because the departure-from-doctrine inquiry would require civil adjudication of a religious question. The *Watson* Court gave three reasons for why it did not have authority to pass judgment on that question: (1) civil judges are unschooled in religious doctrine and thereby not competent to resolve disputes concerning religious doctrine nor to properly interpret church documents and canon law;[142] (2) for the civil law to award the property to the faction adhering to original doctrine would entail the government taking sides in a religious dispute, thereby "establishing" one creedal position over another, while also inhibiting forces for reform in religious doctrine;[143] and (3) both clerics and lay members of a church have voluntarily joined the entire church, the general as well as the local body, thus giving implied consent to the polity of the entire church and its canonical administration of disputes.[144] These bases for church autonomy are rooted, said the Court, in the American government system that—unlike the English system—separates the institutions of church and state, thereby sharply limiting the involvement of civil courts in the governance of religious bodies.[145]

The Supreme Court went on to hold that a local member's implied consent to be governed by the church's polity and its officials is sufficient to protect that individual's free-exercise rights, so long as the member has the unilateral right to leave the church at any time.[146] Departing from a church, of course, means a cleric or church member leaving behind his or her work and ministry, both spiritual and material. But being willing to leave behind one's past works is what is impliedly consented to when one voluntarily joins both the church-wide units and a local congregation of a denomination.

Watson was followed by *Gonzalez v. Roman Catholic Archbishop*.[147] The issue in *Gonzalez* arose in the Philippines, a U.S. territory at the time, hence there was federal subject matter jurisdiction. A dispute arose in the Catholic Church over the authority to fill a clerical vacancy. The Supreme Court brushed aside a contrary result based on a rule found in the civil law and instead deferred to the church's power of appointment resting in the archbishop.

The *Watson* and *Gonzalez* principles were elevated to First Amendment stature in *Kedroff v. Saint Nicholas Cathedral*.[148] The Supreme Court in *Kedroff* struck down a New York statute that had recently been adopted to move control of domestic Russian Orthodox Churches from the central governing hierarchy located in the Soviet Union to the Diocese of North America. The state's felt need to transfer control of ecclesiastical authority was linked to the Marxist Revolution of 1917 and subsequent doubt concerning whether there was in the U.S.S.R. "a true central organization of the Russian Orthodox Church capable of functioning as the head of a free international religious body."[149] This was the height of the Cold War, and the state legislature believed that church officials in Moscow had been coopted by the Communist Party. Because the New York statute did more than just "permit the trustees of the Cathedral [in New York City] to use it for services consistent with the desires of the [local] members"—transferring effective control over the denomination's North American churches by legislative fiat[150]—the Supreme Court held that the statute violated the "rule of separation between church and state."[151]

The *Watson* Court had repudiated the English implied-trust rule and its departure-from-doctrine standard in 1872, but only as a matter of federal common law.[152] For well over half a century, a number of American states continued to follow the English implied-trust rule as a matter of their own common law. *Kedroff,* however, clearly foreshadowed the sweeping aside of the common law in those states still following the English rule.[153]

140 *Id.* at 691-94.

141 *Id.* at 727-28.

142 *Id.* at 729, 730, 732.

143 *Id.* at 728, 730, 732.

144 *Id.* at 729.

145 *Id.* at 728-29, 730. The polity of the church in *Watson* was presbyterian, and the General Assembly had the final say as to some questions—including the doctrinal question that was at issue in the case. An episcopal polity is even less democratic, with the final say on most matters lying with the diocesan bishop. In contrast to these hierarchical forms of governance, there is the congregational polity where the central characteristic is autonomy in each local entity. In such a polity, a majority of the local members resolves disputes in accord with a set of bylaws, hence most differences can be settled democratically once a meeting is called, a quorum is present, and bona fide members cast their votes. Congregational churches often cooperate with a convention of likeminded local churches, but each local body retains it autonomy. While it can be modestly helpful to classify the polity of a denomination or convention as episcopal, presbyterian, or congregational, it must be remembered that this typology is an approximation only. In a given case, there are any number of variations along a sliding scale of governance systems. And this is even more so once courts are confronted with religious polities outside of Christianity.

146 *See Order of Saint Benedict*, 234 U.S. at 647-51.

147 280 U.S. 1.

148 344 U.S. 94.

149 *Id.* at 106.

150 *Id.* at 119.

151 *Id.* at 110.

152 In *Watson,* the federal trial court had diversity jurisdiction. The rule of decision was based on federal common law rather than the First Amendment. This is because *Watson* was decided prior to *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). In following the old rule of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), federal courts sitting in diversity could deviate from state substantive law. Moreover, the First Amendment Religion Clauses had not yet been applied to the states through the Fourteenth Amendment.

153 Following *Kedroff*, the New York Court of Appeals sought to resolve the dispute in favor of the local-control faction. But in *Kreshik v. St. Nicholas Cathedral*, the Supreme Court summarily reversed. 363 U.S. 190. The High Court pointed out that a state court could no more disregard the First Amendment than could a state legislature.

In *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church*,[154] the Supreme Court confirmed that *Kedroff* had elevated the principles of church autonomy such that they are required by the First Amendment.[155] *Presbyterian Church* involved a doctrinal dispute between a general church and two of its local Georgia congregations. The congregations sought to leave the denomination and take with them the local property. The locals claimed that the general church had violated the organization's constitution and had departed from original doctrine with respect to biblical teaching on particular social issues.[156] At the time, Georgia still followed the implied-trust rule with its requisite fact-finding into alleged departures from doctrine. This required the state trial court to ask two religious questions: (1) What were the tenets of the general church at the time the local congregations first affiliated? (2) Had the general church departed substantially from one or more of these doctrines? On the basis of a jury finding that the general church had abandoned its original doctrines, the Georgia courts entered judgment awarding the property to the local congregations. On review, the U.S. Supreme Court again held that the First Amendment did not permit a departure-from-doctrine standard as a substantive rule of decision. The "American concept of the relationship between church and state,"[157] the Court said, "leaves the civil court *no* role in determining ecclesiastical questions in the process of resolving property disputes."[158] Justice William Brennan, writing for a unanimous Court, went on to observe in dicta another path forward other than *Watson*'s rule of strict judicial deference. He wrote that civil courts could resolve disputes that concerned title to church property provided they follow "neutral principles of law, developed for use in all property disputes" of this sort.[159] The opinion did not further define or elaborate on what those neutral principles of property law might be. But whatever the principles, they could not displace the rule prohibiting a civil magistrate from taking up religious questions.

The invocation of neutral principles in *Presbyterian Church* unsettled a century of law with its genesis in *Watson*. For some, *Presbyterian Church* was even mistakenly understood as replacing altogether the rule of judicial deference. A year later, the Court granted plenary review in *Maryland & Va. Churches of God v. Church at Sharpsburg*, another case involving a dispute over title—and just over title—to local church property in a dispute between two local churches, on the one hand, and general church authorities on the other.[160] Once again, the local congregations sought to leave altogether the denomination while retaining the local property. In an unsigned opinion, the Supreme Court approved of the State of Maryland courts applying state legislation

> governing the holding of property by religious corporations, upon language in the deeds conveying the properties in question to the local church corporations, upon the terms of the charters of the corporations, and upon provisions in the constitution of the General Eldership pertinent to the ownership and control of church property.[161]

This was the state's version of neutral principles, and the Court held it was an acceptable alternative for resolving the question via what Justice Brennan, concurring, termed the "formal title doctrine."[162] To be "neutral," the alternative to judicial deference had to be applicable to all property disputes of this sort, be the organization secular or religious. Church documents could be examined to a degree,[163] but only through a secular lens: "Only express conditions [in a church document] that may be effected without consideration of [religious] doctrine are civilly enforceable" by a civil magistrate.[164] At the very least, this is a sensitive task in which it is easy to err, a weakness in the neutral-principles approach.

There was a danger that the limited neutral-principles option briefly mentioned in *Presbyterian Church* and applied in *Church at Sharpsburg* would be overread to apply to all religious disputes, not just formal title disputes. Hence, the Supreme Court's ruling seven years later in *Serbian E. Orthodox Diocese v. Milivojevich*[165] was corrective, a return to the basics: the general rule was still judicial deference to internal church authorities, and neutral principles would be permitted only when the sole issue for civil resolution was title to the local property.

In *Milivojevich*, the Court—following the rule of judicial deference—rejected an Illinois bishop's lawsuit challenging a top-down reorganization of the American-Canadian Diocese of the Serbian Eastern Orthodox Church and his removal from office. The Supreme Court determined that this dispute over internal church administration and a clerical appointment were insulated from civil review under the First Amendment.[166] There was no dispute between the parties that the Serbian Eastern Orthodox Church was hierarchical and that the sole power to remove clerics rested with the ecclesiastical body in Belgrade, Yugoslavia, that already had decided the North American bishop's case.[167] Nor was there any question that the

154 393 U.S. 440.

155 *Id.* at 447.

156 *Id.* at 442 n.l.

157 *Id.* at 445-46.

158 *Id.* at 447 (emphasis in original).

159 *Id.* at 449.

160 396 U.S. 367.

161 *Id.* at 367.

162 *Id.* at 370 (Brennan, J., concurring).

163 *Id.* at 369 ("To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine.").

164 *Id.* at 370 n.2.

165 426 U.S. 696 (1976).

166 *Id.* at 709, 713, 720, 721.

167 *Id.* at 715.

matters at issue were at heart a religious dispute.[168] Nevertheless, the state court had decided in favor of the defrocked bishop because, in its view, the church's adjudicatory procedures were applied in an arbitrary manner. On review, the Supreme Court rejected an "arbitrariness" exception to the judicial-deference rule of *Watson* when the question before the civil courts concerned church polity or supervision of a bishop.[169] To accept authority over such a subject matter is not "consistent with the constitutional mandate [that] the civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law."[170] The civil courts may not even examine whether the church judicatory properly followed its own rules of procedure.[171]

Using reasoning similar to that in *Watson,* the *Milivojevich* Court explained that there are three practical bases for the First Amendment prohibition on civil court authority in church matters. First, civil courts cannot delve into ambiguities in canon law or church documents.[172] These matters are too sensitive to permit any civil probing because such inquiries may prove intrusive and entail the court taking sides in a religious dispute.[173] Second, civil judges have no training in canon law and theological interpretation and thus are not competent to judge such matters.[174] Third, the "[c]onstitutional concepts of due process, involving secular notions of 'fundamental fairness,'" cannot be borrowed from American civil law and grafted onto a church's polity to somehow modernize the rules followed by church judicatories.[175] The Supreme Court also reversed the state court's unraveling of the diocesan reorganization, holding that the Illinois court had impermissibly "delved into the various church constitutional provisions" relevant to "a matter of internal church government, an issue at the core of ecclesiastical affairs."[176] The enforcement of church documents, often unclear to a civil judge, cannot be accomplished "without engaging in a searching and therefore impermissible inquiry into church polity."[177]

In *Milivojevich*, there is no mention of neutral principles of law. Going forward, the disputing parties intended to remain as one church. So it appears that in such a circumstance, the rule of judicial deference is the only option. In contrast, in both *Presbyterian Church* and *Church at Sharpsburg*, going forward the disputing parties had no intention to remain as one church. That being so, the sole remaining issue for the civil courts to consider was formal title. In the mind of the Court, only then is neutral principles a workable option.[178]

The next and final case in this line of internecine contests is unlike *Milivojevich* but like *Presbyterian Church* and *Church at Sharpsburg*. In *Jones v. Wolf*, the Supreme Court again said that state courts may, in limited instances, devise neutral principles of law to adjudicate intrachurch disputes over formal title to property.[179] Courts may examine church charters, constitutions, deeds, and trust indentures to resolve property disputes using "objective, well-established concepts of trust and property law familiar to lawyers and judges."[180] Courts can look to state corporation and property laws. To a limited extent, they may even "examine certain religious documents, such as a church constitution, for language of trust in favor of the general church."[181] The method's advantage is that it sometimes "obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes . . . ."[182] It serves the state's interests in providing a forum for peaceful dispute resolution and quieting title to real property.[183] *Wolf* approved of neutral principles of law as a permissible alternative to judicial deference, but *Milivojevich* is still good law. So it would seem *Wolf* is contingent on the sole remaining dispute before the magistrate being formal title. In such cases, it is up to the high court in each state to choose which rule to follow: deference or neutral principles. But the Supreme Court added the following caution to courts using neutral principles:

> [T]here may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. In such a case, if the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer

168 *Id.* at 709.

169 *Id.* at 712-13.

170 *Id.*

171 *Id.* at 713.

172 *Id.*

173 Recall that in *Church at Sharpsburg*, the Court permitted the examination of a church constitution. 396 U.S. at 367-68. But the examination was limited to a reading of the document with a secular eye. And even such a limited reading was permitted only in a circumstance where neutral principles was a permitted option, namely, when the factions have forever parted ways and thus the legal question was solely resolution of title.

174 *Id.* at 714 n.8.

175 *Id.* at 714-15. *See also id.* at 712-13 (the finding that "the decisions of the Mother Church were 'arbitrary' was grounded upon an inquiry that persuaded the Illinois Supreme Court that the Mother Church had not followed its own laws and procedures," and that is an inquiry prohibited by the First Amendment).

176 *Id.* at 721.

177 *Id.* at 723.

178 *See* Hutchison v. Thomas, 789 F.2d 392, 396 (6th Cir. 1986) (neutral-principles rule was "simply not applicable" to religious leadership dispute).

179 443 U.S. at 602-06. The *Wolf* Court made it clear that a neutral-principles approach is not mandated by the First Amendment. Rather, in intrachurch property disputes, the use of neutral principles is a *permissible* alternative to the judicial-deference rule. *Id.* at 602.

180 *Id.* at 602-03.

181 *Id.* at 604.

182 *Id.* at 605.

183 *Id.* at 602 ("The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively.").

> to the resolution of the doctrinal issue by the authoritative ecclesiastical body.[184]

Thus, in applying neutral principles the judge may examine church documents, if at all, only through a secular lens. The documents, if ambiguous or otherwise in need of interpretation, do not authorize the judge to resolve a religious question or dispute.[185]

When a church's polity is hierarchal and the dispute arises where the local church (or the majority faction thereof) wants to leave the general church, a rule of judicial deference will nearly always mean that the general church prevails in the dispute. And if the dispute is over title to property, the general church will likely be awarded title. The rule of deference postulates that this is fair because when the local members first joined the church, they impliedly consented to such top-down rule. In most instances, however, the local members gave the matter no thought. Further, it is the local members who typically donated the money to acquire the local property and maintain it through the years. And it does not help the equities of the case that the officials governing the general church are often located in some other state, whereas the unhappy laity reside in the forum state and are pleading with their state officials to consider what is fair. A rule of neutral principles gives a state court the option to redefine fairness by requiring that title to local church property be treated in the same manner as title to property of other voluntary associations in the state.

The downside to neutral principles is that there is a departure from the doctrine of church autonomy where a general church's hierarchical polity is ignored. But this downside is ameliorated somewhat because the general church administrators of hierarchical polity can arrange in advance the local church's documents so that the general church prevails if a dispute arises. Officials in the general church probably have greater legal sophistication, and they know from experience the sort of things that can go wrong. And it is at this early point in time when the relationship between general and local is most amiable and full of optimism for the future. Further, the Supreme Court has offered neutral principles as an option, rather than requiring it, so the high court in each state may choose to retain the rule of judicial deference across all disputes. Finally, should a state retain the rule of judicial deference in all instances, disappointed members of a rebelling local church always retain their constitutional right of departure. True, in leaving their church, the disgruntled local members leave behind their past material contributions and affections connected to a particular building. But they have a constitutionally protected right to leave and start afresh a new church or join another fellowship across town more compatible with their spiritual beliefs.

As a deviation from church autonomy doctrine, a rule of neutral principles remains questionable. The 5-4 split in *Wolf* is demonstrative. While the rule of neutral principles is supposed to be "neutral," most often it will favor the local church faction. That is the faction likely favored by state officials as they respond to petitions from their local constituents. Importantly, in all other types of internecine disputes, the Court has resolved the matter by following a rule of judicial deference. There can be no resort to neutral principles in cases such as *Milivojevich*, *Kreshik*, *Kedroff*, and *Gonzalez* where the disputes are over doctrine or the selection of clerical leaders, as opposed to merely the monetary value of land and a building where worship takes place.[186]

Any doubt as to whether the U.S. Supreme Court would extend the neutral-principles option beyond property disputes between separating factions was resolved with its unanimous decision in *Hosanna-Tabor*. *Hosanna-Tabor* was about personnel, as was *Our Lady*. When the employer is a church, personnel is policy. There was not a single mention of neutral principles in *Hosanna-Tabor* or *Our Lady*, putting them at odds with any prospect of a wider use of neutral principles.

D. Defamation Claims Against a Church or Its Officials

The Court in *Our Lady* said the ministerial exception "does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission."[187] And in *Hosanna-Tabor*, Chief Justice Roberts wrote for the Court:

> Today we hold only that the ministerial exception bars [antidiscrimination civil rights claims]. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.[188]

A number of such common-law claims have arisen, often brought by plaintiffs seeking to get around the ministerial exception. They urge judges to ask the wrong question: Can neutral principles apply? The results have been conflicting, but the confusion is entirely unnecessary. The proper question to determine whether church autonomy is a valid defense comes right out of *Hosanna-Tabor*: Is this a matter of internal governance? If so, we have a zone free of government interference. Again, the five subjects of internal governance are: (1) the determination of doctrine, including the validity, importance, or meaning of a religious question; (2) the determination of the organization's

184 *Id.* at 604. *See also id.* at 602 ("the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes").

185 *Id.* at 606-09. In *Wolf*, the Court approved the Georgia courts following neutral principles in the dispute between the local church and the general church. However, there was also a dispute between the local factions as to which was the "true local church." Accordingly, the case was remanded back to the state courts to say what neutral principles applied to the dispute between the two local factions. If the state courts presumed the majority of the local voting members were the "true local church," then they had to say how that presumption could be overcome, and to do so without posing religious questions.

186 The neutral-principles approach is well-suited only to religions whose worship is not site-specific, which includes much of Christianity. It does not address difficulties that arise where the property in dispute is itself religiously significant, as is the case for many Native American religions with their sacred sites. This is another weakness in the neutral-principles option.

187 140 S. Ct. at 2060.

188 565 U.S. at 196.

polity; (3) the hiring, training, promotion, or dismissal of clerics, ministers, and other religious functionaries and leaders; (4) the admission and dismissal of members, as well as the determination of whether their affiliation is in good standing; and (5) internal communications by church officials and members concerning these four subject matters. If the claim of defamation falls in one or more of these five zones, the action is categorically barred.

There are more than a few defamation cases in the lower state and federal courts that ask if the matter can be resolved by applying neutral principles.[189] This shows a fundamental misunderstanding of the doctrine of church autonomy. The Supreme Court has allowed neutral principles only in internecine disputes over church property, and only then when the sole disputed issue is formal title. If a plaintiff can prove the elements of defamation without invading any of the five protected areas of internal governance, then church autonomy does not apply.[190] On the other hand, if proving the elements of the tort does invade one or more of the subject areas protected by church autonomy, the claim is categorically barred. Borrowing the rubric of neutral principles from *Church at Sharpsburg* and *Wolf* will surely introduce error. What matters is ensuring that the elements of common-law defamation not prompt a civil court to inquire into the validity, importance, or meaning of a religious question, or otherwise fall within the five topics of internal governance. Some of the cases in the lower courts have gotten this matter correct,[191] but others have missed the mark.[192]

In still other defamation cases, plaintiff's counsel points out that the allegedly libelous statement is on a wholly secular topic, not a religious topic.[193] Once again, this shows a fundamental misunderstanding of church autonomy. As was noted in *Hosanna-Tabor*, church autonomy extends to a religious entity's entire zone of internal governance, to all matters strictly ecclesiastical, whether the act of governance is characterized as religious or secular. Church autonomy is a structural safeguard, not a personal religious right. It creates a government-free zone that no supposedly neutral law can constitutionally invade. In *Hosanna-Tabor*, the protected act of internal governance was to dismiss a teacher-minister for what would normally pass for secular reasons—namely, the school's retaliation for her invoking the Americans with Disability Act. Counsel for the EEOC misunderstood the nature of the doctrine of church autonomy when she told the Court that the school's religious defense was pretextual, that is, not really religious. The Court responded:

> That suggestion misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minster to the faithful—a matter "strictly ecclesiastical," . . . —is the church's alone.[194]

Counsel for the church may have additional defenses to the claim of defamation—such as that the allegedly defamatory remark was true—which in turn may circle us back to the First Amendment problem of whether the alleged truth or falsehood of a defamatory remark is a prohibited religious question.

189 *See Diocese of Lubbock*, 624 S.W.3d at 526-35 (Boyd, J., dissenting) (collecting lower court cases applying neutral principles to adjudicate defamation claims against churches). Many of these collected cases permit a claim to proceed if the allegedly defamatory remark was made to the public and away from church property. These are the wrong parameters. The church autonomy defense applies if proving the elements of a defamation claim entangles the court in one or more of the five subject matters previously identified by the Supreme Court as matters of "internal governance." There is nothing more to the defense. True, in looking into whether proper care was taken to confine any communications about a disciplinary matter to those inside the church, it becomes relevant that the alleged tortious remark got released to the public. But this does not entail applying neutral principles of law as an alternative to the doctrine of church autonomy; this is a simple application of the fifth subject matter protected by the doctrine of church autonomy.

190 As an example of a defamation claim that did not transgress the doctrine of church autonomy, see *Ogle v. Hocker*, 279 Fed. Appx. 391 (6th Cir. 2008). Ogle, an evangelist and ordained cleric in a Protestant denomination, brought claims of defamation and intentional infliction of emotional distress against Hocker, another ordained cleric in the same denomination. Hocker was the pastor of a local church in the denomination, but Ogle was not on the ministerial staff of that church or otherwise connected to it. The alleged torts arose from a Sunday sermon illustration and later one-on-one conversations by Hocker in which he accused Ogle of homosexual advances toward him when the two were on an overseas mission trip. Hocker raised the defense of church autonomy. The tort claims did not involve a determination of doctrine or polity, nor were the remarks part of the denomination's selection or supervision of Ogle as a cleric. There were disciplinary proceedings by the denomination against Ogle. However, Hocker's local church had no jurisdiction as to the disciplinary actions involving Ogle, thus the remarks in Hocker's sermon had no part in Ogle's discipline. Finally, the lawsuit was not based on a matter involving any internal communications by officials in the denomination in the course of the disciplinary proceeding involving the Ogle. Because a pursuit of the tort claims fell outside the five subject areas protected by church autonomy, the appeals court was right to deny Hocker's resort to the defense.

191 *See, e.g.*, Ex parte Bole, 103 S.3d 40 (Ala. 2021) (statement during investigation into and removal of pastor); In re Alief Vietnamese All. Church, 576 S.W.3d 421 (Tex. App. 2019) (statement about deacon during internal dispute over governance); *Sumner*, 27 Cal. App. 5th 577 (statement during termination of dean of seminary who was regarded as "minister"); Orr v. Fourth Episcopal Dist. African Methodist Episcopal Church, 111 N.E.3d 181 (Ill. App. Ct. 2018) (statement during termination of minister); Pfeil v. St. Matthews Evangelical Lutheran Church, 877 N.W.2d 528 (Minn. 2016) (statement during church meeting to consider excommunication); Heard v. Johnson, 810 A.2d 871 (D.C. 2002) (statement during termination of pastor); Hiles v. Episcopal Diocese, 773 N.E.2d 929 (Mass. 2002) (statement during disciplinary proceeding against priest); Hadnot v. Shaw, 826 P.2d 978 (Okla. 1992) (statement during excommunication of two members); Hutchison v. Thomas, 789 F.2d 392 (6th Cir. 1986) (statement during disciplinary proceeding against pastor).

192 *See, e.g.*, Galetti v. Reeve, 331 P.3d 997 (N.M. Ct. App. 2017) (statement during proceedings to terminate minister); Banks v. St. Matthew Baptist Church, 750 S.E.2d 605 (S.C. 2013) (statement by pastor during congregational meeting to remove three church trustees); Tubra v. Cooke, 225 P.3d 862 (Or. Ct. App. 2010) (statement during hearing over pastor's misconduct); Bowie v. Murphy, 624 S.E.2d 74 (Va. 2006) (statement during church meeting to remove deacon); Marshall v. Munro, 845 P.2d 424 (Alaska 1993) (statement by church official in letter of reference about former pastor seeking new employment).

193 *See, e.g.*, *Sumner*, 27 Cal. App. 5th at 589, 593-94, 596 (statement during termination of dean of seminary who was regarded as "minister").

194 565 U.S. at 194-95.

III. Practice and Procedure to Properly Order The Two Centers of Authority

The dichotomy between free-exercise rights and the doctrine of church autonomy has many parallels to the dichotomy between constitutional rights and constitutional structure, and these parallels illuminate the special procedures used in these cases that may otherwise be puzzling. One such special procedure is the initial limitation on discovery into the inner workings of a religious organization lest the civil court's entanglement with the entity's internal affairs via document demands, depositions, and the like generate a new violation of church autonomy. There is also the collateral-order doctrine permitting an interlocutory appeal from a denial of a motion to dismiss or for summary judgment when a trial court rebuffs a ministerial exception defense. And when the matter before the court is a church autonomy case, there is no balancing against the government's interests. Rather, there is an immediate dismissal, and the case is at an end.

The need for these special procedures comes about because the doctrine of church autonomy involves a discrete zone of freedom for churches and other religious organizations. As such, church autonomy is a structural restraint on the government's power that creates breathing space for religious organizations to go about matters of internal governance, whether those governance decisions are religiously motivated or secular. This is a carveout of a distinct area of operations touching on doctrine, polity, and membership, as well as the selection, training, or removal of the ministers that carry out central religious functions.

A. The Ministerial Exception: A Defense in the Nature of a Categorical Immunity

As with most matters concerning church autonomy, the best place to start is with the Supreme Court's 2012 decision in *Hosanna-Tabor*. This was the Supreme Court's first church autonomy case since *Wolf* was decided in 1979, breaking a silence spanning a third of a century. As discussed earlier, *Hosanna-Tabor* involved a fourth-grade teacher who sued her employer, a church-related school, alleging retaliation for having asserted antidiscrimination rights under the ADA.[195] The school timely raised as a defense the ministerial exception. The exception recognizes that religious organizations have exclusive authority to select their own ministers—which necessarily entails not just initial hiring but also promotion, training, supervision, retention, and other terms and conditions of employment.[196] As a matter of First Amendment church autonomy, the ministerial exception overrides not just the ADA, but a number of venerable employment antidiscrimination statutes.[197]

The Supreme Court observed that:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.[198]

The Court said that although "the interest of society in the enforcement of employment discrimination statutes is undoubtedly important . . . [,] so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission."[199] Accordingly, in a lawsuit that strikes at the ability of the church to determine its leaders and teachers, any balancing of interests between a vigorous eradication of employment discrimination, on the one hand, and institutional freedom, on the other hand, is a balance already struck by the First Amendment on the side of church autonomy.[200]

Church autonomy cases have been relatively few on the Court's docket. But they are important because once it is determined that the doctrine applies, no rejoinder is permitted by the opposing party. That is, once it is determined that a lawsuit falls within one of the five subject matters of internal church governance, there is no follow-on judicial balancing. The case is at an end, and it remains only for a final judgment to be entered.[201] There is no balancing because there can be no legally sufficient governmental interest to justify interfering in the internal governance of a church. As the Court in *Hosanna-Tabor* intoned, the First Amendment has already struck the balance.[202] In this regard, the Court criticized the EEOC's rejoinder to the Court's case-ending conclusion that the ministerial exception applied. The EEOC asserted that the school's religious reason for firing Perich was pretextual.[203] "This suggestion misses the point of the ministerial exception," wrote the Chief Justice:

> The purpose of the [ministerial] exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter "strictly ecclesiastical," . . . is the church's alone.[204]

Lower courts applying *Hosanna-Tabor* have rightly interpreted the ministerial exception not as a personal religious

195 42 U.S.C. §§ 12101 et seq.

196 *See Demkovich*, 3 F.4th 968 (holding that ministerial exception applied to claims of employment discrimination that alleged a hostile environment as a result of harassment during supervision).

197 *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq.; The Equal Pay Act of 1963, 29 U.S.C. § 206(d); Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq.

198 *Hosanna-Tabor*, 565 U.S. at 188.

199 *Id.* at 196.

200 *Id.* ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us.").

201 *Id.* at 194 ("Because Perich was a minister within the meaning of the exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer.").

202 *Id.* at 196 ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us.").

203 *Id.* at 194.

204 *Id.* at 194-95 (internal citation omitted).

liberty, but as a structural limitation on governmental action.[205] These cases are in large part rooted in the Establishment Clause, the text of which bespeaks a structural negation of the government's delegated powers: "Congress shall make no law" about a discrete subject described as "an establishment of religion." In disestablishing a church, the state begins to separate and properly order relations between church and state. As Chief Justice Roberts wrote, "the Free Exercise Clause . . . protects a religious group's right to shape its own faith and mission" by controlling who are its ministers. A personal right of the church is burdened when it is coerced to employ an unwanted minister. But "the Establishment Clause . . . prohibits government involvement in such ecclesiastical decisions."[206] Here enters the prohibition on the civil courts answering religious questions. The government acts beyond its limited, delegated powers when it transgresses on the prerogative of a church which alone should control the employment of its ministers. The Chief Justice gave examples of the English Crown interfering with the appointment of clergy in the established Church of England.[207] He wrote that the Establishment Clause was adopted in America over against the Church of England model and to flatly deny such power to our newly formed national government.[208]

There is a welcome absence of interest balancing in *Hosanna-Tabor*. Balancing tests are still valid under the Free Exercise Clause when religion is targeted[209] or discriminated against.[210] But that is not the case when the subject matter warrants the categorical protection of what Justice Alito in *Our Lady* called "religious autonomy."[211] In the latter instance, the First Amendment (understood against the backdrop of America's state-by-state disestablishments that broke with the Church of England model[212]) has determined that hiring, promoting, supervising, and dismissing ministers is a power reserved to the church alone—a power within the zone of internal governance denied to Caesar.

B. Affirmative Defenses and Waivability

With reference to the ministerial exception, footnote 4 in *Hosanna-Tabor* noted that the lower courts were divided over whether the exception is an affirmative defense or a matter that goes to the court's subject matter jurisdiction. The issue had not been briefed or argued by the parties, but amici had touched on it. Without any analysis, the Supreme Court said in the footnote that the ministerial exception was to be regarded as an affirmative defense.[213]

One way to understand the footnote is that the Chief Justice was passing judgment on nothing more than a matter of civil pleading and practice. Hence, when there is a lawsuit that might implicate the ministerial exception, as with any affirmative defense, it is the responsibility of the defendant to raise it in a pleading.[214] Because the allowance for amending a pleading is quite liberal,[215] a waiver for failure to timely plead the defense will rarely occur. In lieu of a responsive pleading, the defendant-church may raise the affirmative defense initially by a motion to dismiss for failure to state a claim.[216] If additional materials are submitted in support of the Rule 12(b)(6) motion to dismiss, it becomes a motion for summary judgment.[217]

The immediate difference as a result of the ruling in footnote 4 is slight. In motions under Rule 12(b)(6), the defendant-church carries the burden of proof, whereas under Rule 12(b)(1), the plaintiff has the burden of convincing the court that it has subject matter jurisdiction. As an evidentiary matter, this allocation of burdens makes sense. When the key issue is whether the plaintiff in an employment discrimination suit is a minister and works for an entity that is religious, much of the relevant information is in the hands of the church. Thus, the church reasonably may be allocated the initial burden of producing the evidence. And should the evidence show that the plaintiff is a minister and works for an entity that is religious, then the First Amendment requires that the trial court enter summary judgment for the church and end the lawsuit. Any such judgment would be on the merits and grounded in the First Amendment, not a dismissal for lack of jurisdiction under Article III of the U.S. Constitution or the jurisdictional granting statutes in title 28 of the U.S. Code.[218] It follows that footnote 4 is not problematic if it is only about civil procedure. To be sure, sometimes buried in the interstices of civil pleading and practice are deeper matters of consequence.[219] But it overreads footnote 4 to make this one such instance.[220]

205 *See* Lee v. Sixth Mount Zion Baptist Church of Pittsburgh, 903 F.3d 113, 118 n.4 (3d Cir. 2018) (recognizing that the ministerial exception is a structural restraint "rooted in constitutional limits on judicial authority"); Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829, 836 (6th Cir. 2015) ("The ministerial exception is a structural limitation imposed on the government by the Religion Clauses.").

206 *Hosanna-Tabor*, 565 U.S. at 188-89.

207 *Id.* at 182-85.

208 *Id.* at 183-85.

209 *Church of Lukumi*, 508 U.S. 520.

210 *Fulton*, 141 S. Ct. 1868.

211 *Hosanna-Tabor,* 565 U.S. at 198. Many have observed that "ministerial exception" is not an apt label for the rule. *See supra* notes 46-49 and accompanying text. After *Our Lady*, "religious functionaries" would be a better term; but it omits the top administrators to which the rule also applies.

212 *Our Lady*, 140 S. Ct. at 2061-62; *Hosanna-Tabor*, 565 U.S. at 183-85.

213 *Hosanna-Tabo*r, 565 U.S. at 195 n.4.

214 *See* Fed. R. Civ. P. 8(c).

215 *See* Fed. R. Civ. P. 15(a)(2).

216 *See* Fed. R. Civ. P. 12(b)(6). Because of the ruling in footnote 4, the defendant-church may not raise the ministerial exception by motion to dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1).

217 *See* Fed. R. Civ. P. 12(d) and 56.

218 It bears noting that nothing in the Federal Rules of Civil Procedure can expand or contract the subject matter jurisdiction of the federal courts. *See* Fed. R. Civ. P. 82.

219 *See* Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 Wm & Mary Bill of Rts. J. 43 (2008). Professor Kalscheur comments favorably in regarding the church autonomy defense as structural. *Id.* at 63-68.

220 *Cf.* Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 Minn. L. Rev. 1891 (2013).

A difficulty arises in that in principle an affirmative defense can be waived if not timely raised by a defendant.[221] But the nature of the church autonomy doctrine is that it can never be waived. This is because church autonomy is not a personal right, but is structural in nature, keeping two centers of authority, church and state, in their right order. For government to avoid violating an individual right is a matter of constitutional duty owed to each person. On the other hand, for government to avoid exceeding a restraint imposed by the U.S. Constitution's structure is a duty owed to the entire body politic. Rights, because they are personal, can be waived by the rights holder, whereas structure, because it is there to benefit the entire body politic, cannot be waived.

When constitutional structure delegates, separates, and limits governmental power, one happy but indirect consequence of fidelity to that prescribed structure is the preservation of individual liberty by avoiding concentrations of power. Church autonomy doctrine separates the power of government and the authority of organized religion. And when the government cannot invade a church's zone of autonomy, individuals and the organizations they form might experience a consequential increase in personal religious liberty. It is for this reason that the doctrine of church autonomy registers in both the proper structuring of church-state relations to protect the church with respect to its internal governance (the Establishment Clause), and also in the safeguarding of the free exercise of the church (the Free Exercise Clause).[222] We need not be puzzled that church autonomy is rooted in both Religion Clauses.

Notwithstanding footnote 4, the idea that church autonomy is "jurisdictional" goes all the way back to *Watson v. Jones*,[223] and the confusion of church autonomy being jurisdictional rather than structural carries forward in the Court's later cases.[224] While church autonomy is structural, subject matter jurisdiction is also a matter of constitutional structure. This is where the confusion may have started.

Watson is not cited in *Hosanna-Tabor* footnote 4, thus no one can claim that the Chief Justice was overruling the Court's discussion of jurisdiction in *Watson* and later cases. *Watson* was in federal court based on diversity jurisdiction, and the substantive law applied in the ruling was federal general common law per *Swift v. Tyson*.[225] When *Watson* referred to "jurisdiction," it was likely not jurisdiction in the sense of the judicial authority conferred by Article III, clause 2 of the U.S. Constitution. Rather, the reference to jurisdiction was in the sense that the federal government is one of limited, delegated powers, with the Religion Clauses negating any power in Congress to make a law that regulates the church with respect to matters of internal governance. That negation of power is structural with regard to church-government relations and thus cannot be waived.[226] True, when the Court decided *Watson*—a diversity case originating in Kentucky—the First Amendment did not apply to the states. But federal general common law was about applying the better rule to a diversity case in federal court, and the better rule was the one that acknowledged that the U.S. is a federalist republic of states with no established religion, a nation that recognizes the mutually beneficial separation between organized religion and government. That assessment was confirmed in *Kedroff* when the doctrine of church autonomy, via the First and Fourteenth Amendments, was explicitly applied to the states.[227] Because church autonomy is derived from both Religion Clauses, and aspects of those clauses are structural, church autonomy cannot be waived. This is what *Kedroff* accomplished, and *Hosanna-Tabor*'s footnote 4 did not reverse *Kedroff*.

C. Limiting Discovery and Permitting Interlocutory Appeals

NLRB v. Catholic Bishop of Chicago was the first occasion for the Supreme Court to note that the ministerial exception defense may call for limitations on civil discovery into the operations of a church or similar religious organization.[228] Facing the prospect of federal officers probing into allegations of unfair labor practices by religious officials at a primary and secondary Catholic school, the Justices warned, "It is not only the conclusions that may be reached . . . which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."[229] Concurring in *Hosanna-Tabor*, Justices Alito and Elena Kagan explained that "the mere adjudication of [religious] questions would pose grave problems

221 *See* Fed. R. Civ. P. 8(c)(1).

222 *Hosanna-Tabor*, 565 U.S. at 184 ("The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."); *id.* at 188-89 ("By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."); *Our Lady*, 140 S. Ct. at 2060 ("State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion.").

223 80 U.S. at 732-34 (holding that courts have no jurisdiction to decide ecclesiastical issues).

224 *See Milivojevich*, 426 U.S. at 713-14 (holding that courts have no authority to decide ecclesiastical issues). The Court does not always use the word "jurisdiction" in its rationale, but its language of dismissal is easily read to carry the same meaning. *See Presbyterian Church*, 393 U.S. at 445-47 ("[It is] wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions," hence the First Amendment's "language leaves the civil courts *no* role in determining ecclesiastical questions in the process of resolving property disputes."); *Bouldin*, 82 U.S. at 139 ("This is not a question of membership of the church, nor of the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership.").

225 *See supra* note 152 (explaining the rulings of *Erie* and *Swift*).

226 Several courts have held that because the ministerial exception is structural, it cannot be waived. *See Conlon*, 777 F.3d at 836; *Sixth Mount Zion*, 903 F.3d at 118 n.4; Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006).

227 *See supra* note 148-51 and accompanying text.

228 440 U.S. 490.

229 *Id.* at 502. *See supra* notes 111-14 and accompanying text for additional discussion of *Catholic Bishop*.

for religious autonomy."[230] The lower courts have followed suit. For example, in *Whole Woman's Health v. Smith*, a trial court's pretrial order compelling a faith-based crisis pregnancy center to respond to discovery was reversed on appeal in part because discovery would have revealed internal communications and otherwise interfered with the internal decision-making processes of the ministry.[231] An interlocutory appeal was allowed on the discovery issue because of the structural nature of the defense.[232] While merits discovery should be delayed in such cases, discovery concerning the affirmative defense itself is proper (e.g., does plaintiff meet the definition of "minister"?). This is not to say that all merits discovery should be limited in every church autonomy case. Rather, the purpose of the limitation is to keep the intrusion by civil discovery from generating a new invasion of the autonomy of the defendant religious organization. Accordingly, the scope of the Rule 26(c) protective order should pertain to the subject matters that concern the immunity: determinations of doctrine and polity; the admission and removal of members; the hiring, training, and removal of ministers and other church leaders; and internal communications about all of the foregoing.[233]

When a church has timely raised the ministerial exception by pleading or motion and the affirmative defense has been denied by the trial court, the structural nature of church autonomy calls for an interlocutory appeal. The requisites for interlocutory appeal under the collateral-order doctrine are that an immediate appeal will conclusively settle the disputed issue, the appeal resolves an important issue separate from the merits, and the issue is effectively unreviewable if the case is allowed to proceed to final judgment.[234] If the trial court is mistaken in its ministerial exception ruling, to allow the case to continue to be prepared for trial and fully tried on the merits is to reoffend the First Amendment with new church-state entanglements, and to do so in a manner that can never be corrected on appeal. In other words, if the merits discovery goes forward, the new harm of invading a church's internal governance is at the hands of the trial court. And once that new harm is incurred under the coercion of a discovery order, it cannot be redressed by the payment of monetary damages (the court has absolute immunity) or otherwise undone by later equitable relief.[235] Thus, an interlocutory appeal should be allowed under the collateral-order doctrine.

230 565 U.S. at 205.

231 896 F.3d 362, 373-74 (5th Cir. 2018).

232 *Id.* at 367-68, 373. *See* McCarthy v. Fuller, 714 F.3d 971, 976 (7th Cir. 2013) (interlocutory appeal allowed because harm from government intrusion irreparable).

233 *See* Peter J. Smith and Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1876-78 (2018); *id.* at 1878 n.232 (collecting cases) [hereafter "Smith and Tuttle"]; Mark E. Chopko and Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Past* Hosanna-Tabor, 10 First Amend. L. Rev. 233, 293 (2012) [hereafter "Chopko and Parker"].

234 Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).

235 *See* Smith and Tuttle at 1878-81; Chopko and Parker at 289-98.

IV. Text, History, & the Church Autonomy Doctrine

A. Reading the First Amendment Text

When the plain text is definitive, the courts need not resort to an interpretive rule, be it originalist or otherwise. The First Amendment reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Although it ends with a semicolon, the first clause would stand alone as a complete sentence. And while there is but one clause addressing religious freedom, there are two participial phrases ("respecting an establishment" and "prohibiting the free exercise") modifying the object ("no law") of the verb ("shall make"). It is therefore entirely proper to think in terms of two separate disempowerments on the sentence's subject ("Congress"). This is not to say that the two restraints on power can never overlap. The government might transgress both participial phrases—much like a single law might violate a person's right to both free speech and due process. However, notwithstanding an occasional overlap, the nonestablishment restraint and the free-exercise restraint give rise to separate causes of action.

In closely observing the text, we see that the first participial phrase ("respecting an establishment") is different in nature from the amendment's rights-based participial phrases ("prohibiting the free exercise" and "abridging the freedom of speech, or of the press"). The latter two forbid "prohibiting" and "abridging" and thus restrain the government with respect to a person's free exercise or free expression. These two phrases can be understood to acknowledge that people have unalienable or natural rights to free exercise and free expression. They imply a moral autonomy in each individual rights holder that the government should not have the authority to easily overcome. On the other hand, the participial phrase "respecting an establishment" is not about acknowledging an intrinsic right because of one's humanity, but is a reference to a discrete subject matter ("an establishment of religion") that is being placed outside ("no law") of the government's authority. This difference in participial phrases bespeaks a difference in their function: acknowledging an intrinsic human right versus prohibiting government involvement in a discrete zone of activity.

As a matter of legal processes, a restraint on government involvement in a particular subject matter requires structure. The Establishment Clause operates like a structural distancing of two centers of authority: government and religion. Constitutional structure delegates, separates, and limits power. A happy consequence of well-maintained constitutional structure is the prevention of concentrations of power that can in turn lead to losses of personal liberty. In the text of the Establishment Clause, we have a separation of the authority of government and the authority of organized religion. All persons in a republic indirectly benefit when the government cannot exercise power respecting "an establishment of religion." An individual complainant cannot waive this separation of powers any more than she can waive a federal court's lack of subject matter jurisdiction (also a structural

bar). Rather, the structural separation is there to benefit more than just the complainant before the court. This is much like the three-branch structuring we call "separation of powers"; the separation of the branches is there not just for the benefit of an individual complainant, but for all persons subject to the constitutional framework.

Given the different natures of the Establishment Clause (structural) and the Free Exercise and Free Speech Clauses (rights-based), the modern Supreme Court is correct when it applies the Establishment Clause as a structural restraint that properly separates the two centers of authority we call church and government. Stated differently, the Court envisions the Establishment Clause as policing the boundary between church and government. It understands its judicial task as keeping governmental power from entering a zone the subject matter of which is defined as "an establishment of religion." This is for the mutual good of the two things separated, church and government.[236]

The separation should not be exaggerated. This is a separation of the institutions of religion from the institutions of the republic. While the institutions of church and government can be separated, religion and politics cannot. Such a disjunction would rob believers and the organizations they form of the right enjoyed by all others. Churches and other houses of worship appropriately speak to how their teachings bear on social and political issues, all consistent with their right to freedom of speech.[237]

Regarding the Establishment Clause as structural explains several features in the case law.[238] For example, there are relaxed rules concerning standing to sue because in lawsuits over structure there are often no parties with individualized harm.[239] Further, in contrast to free-exercise claims that remedy only religious injuries, the Establishment Clause provides a remedy for nonreligious harms such as economic damages and loss of academic freedom.[240] This also accounts for why federal courts sometimes frame the operation of the Establishment Clause as a limit on their subject matter jurisdiction.[241] Whereas free-exercise lawsuits seek to yield a personal right that is subject to strict scrutiny, a prima facie Establishment Clause claim is not subject to a balancing test that weighs governmental interests against a claimant's right. Either the Establishment Clause is violated or it is not—no balancing. This begins to explain why both the prohibition on courts answering religious questions and the ministerial exception are substantially rooted in the no-establishment principle, as befits rules that derive from church autonomy.

The plain text of the First Amendment takes us a long way toward explaining the reach and limits of the doctrine of church autonomy. But it can take us only so far. The text does not tell us what the founders meant by "an establishment of religion." *Hosanna-Tabor* and *Our Lady* teach us that this calls for a turn to history, in particular the Church of England at the time of America's founding.

B. History as a Backdrop to Church Autonomy

Constantine converted to Christianity in 312 A.D. while commanding a Roman army in a complex series of civil wars. As Western Emperor, he joined in promulgating the Edict of Milan in 313 A.D., which legalized Christianity in the Roman Empire and restored property taken during persecution. By late in the 4th century, Christianity had slowly but surely become the official religion of the empire. While the resulting church and empire were organizationally distinct, they formed two aspects of a single whole that we now call Christendom. It was understood that these two centers of authority would, on the one hand, cooperate in upholding and defending the church and, on the other, cooperate in unifying citizens around a common creed thereby giving legitimacy to the empire.

In 1054 A.D., a dispute over polity ripened into a schism that severed the eastern church in Constantinople from the western church centered at Rome. Unlike the eastern rite, the church at Rome remained a coequal power, at times dominating monarchs and at times being dominated by them. The Papal Revolution of 1050-1080 was a series of reforms initiated under Pope Gregory VII that dealt with the independence of the church and moral conduct of the clergy.[242] The reforms are codified in two major documents: dictatus papae, which centralizes authority in the papacy, and the libertas ecclesiae papal bull, which is about the freedom of church from temporal rulers.[243] The reforms required clerical celibacy, did away with simony (the sale of ecclesiastical offices and sacred things), and denied civil authorities the power to appoint church officials. Going forward, the Roman Church wielded its control over sacraments to visit deprivations upon civil rulers, and those same rulers used their superior military power to force the church to conform to the wishes of the monarch. It is also fair to say that through all these back and forth struggles, the church preserved classical culture and nurtured the arts, as well as ameliorated the harshness of peasant life.

In 1517, the German priest Martin Luther is reputed to have nailed his 95 Theses to the door of Wittenberg's Castle Church. The resulting Reformation shattered the unity of Western Catholic Christianity. The conflagration that ensued lasted for over 130 years, a period that today we refer to as the "religious wars." But

236 *See supra* note 72 and accompanying text.

237 On the free speech right of clergy and churches to speak on political matters, see Justice Brennan's concurring opinion in *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (plurality opinion) (striking down law disqualifying clergy from holding public office).

238 *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J. L. & Politics (UVA) 445 (2002).

239 *Id.* at 456-58 (collecting cases where the Court has fashioned special rules of standing just for the Establishment Clause).

240 *See Caldor*, 472 U.S. 703 (the harm done by an Establishment Clause violation is increased labor costs); *Epperson*, 393 U.S. 97 (the harm done by an Establishment Clause violation is loss of academic freedom). *See also supra* notes 67-69 and accompanying text.

241 *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1, 42–51 (1998) (collecting cases where the Court dismissed for lack of subject matter jurisdiction).

242 *See generally* Brian Tierney, The Crisis of Church and State 1050–1300 (1988); Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition (1983).

243 Berman at 2, 88-115.

that is imposing a modern construct on the conflict. For the combatants, there was no pronounced demarcation between the civil and the religious. Rather, what unified the political core of each state was its religious worldview. An interim settlement was reached at the Peace of Augsburg in 1555, with the adoption of the simple, if crude, principle of cuios regio, eius religio (whose region, his religion). The Treaty of Westphalia in 1648, ending the Thirty Years' War, left Catholics in control of the continental south and Protestants established in the north. The horror and dissipation of the wars strengthened the hand of the secular rulers at the expense of the churches, and this was especially so in the case of Protestants because of their internal division and their greater dependence on the military protection of the princes.

The Westphalian settlement that emerged entailed sovereign nation-states with marked borders at which access could be controlled, an established church, and religious dissenters. Dissenters were often persecuted or driven into exile, in large measure because the presence of nonconformists within the political polity was thought to destabilize the state. The persecution was always at the hands of the state, but the churches were often complicit. Growing abhorrence at the violence wrought by religious persecution, the stubbornness of dissenters even unto death, and the emerging influence of the Enlightenment caused the pattern to evolve yet again in the direction of sovereign states, established churches, and juridicial toleration of nonconforming sects.

The English Reformation was different from that on the continent. It began with Henry VIII's desire to annul his marriage to Catherine whom he thought unable to bear him a male heir. When the Pope refused, Henry, with the complicity of Parliament, passed the 1534 Act of Supremacy establishing the Church of England with himself as its supreme head.[244] This set in motion a long series of attempts to reclaim Great Britain for the Roman Church, which in turn worked to generate deep-seated anti-Catholicism among a majority of the English and Scots-Irish. This antipathy toward Catholics would later be carried overseas by those leaving for the British colonies in North America. During the century-and-a-half from Luther to the 1688-89 Glorious Revolution and coronation of William and Mary, England experienced a Calvinist Reformation under the child-king Edward VI, a Golden Age under Elizabeth I (who backed the Church of England to compel religious unity), a civil war between Anglo-Catholic royalists and Calvinist parliamentarians won by the latter, the Puritan Protectorate of Oliver Cromwell, Restoration under Charles II, and the forced abdication of the Catholic James II in favor of the Dutch Protestant William of Orange. The 1689 British Act of Toleration was adopted at the time of the Glorious Revolution; it extended legal protection to non-Anglican Protestants (but not Catholics).

Such were the church-state relationships and tolerations brought to the British colonies in North America, in variations both strong and weak. Many of the ancestors of the American revolutionary generation had come to these shores to escape the religious persecution and tumult associated with these Old World events. In America, the pressing religious dynamic was not Anglicanism versus Catholicism, but Anglicanism versus Congregationalism versus other Protestants. Yet Old World church-state establishments obtained in the New World early on except for the special cases of Rhode Island and, partly at least, the Quaker settlement of Pennsylvania.[245] Maryland was chartered in 1632 as a colony where Catholics were fully welcome and equal to Protestants, but the colony was taken over by force in 1689 by Anglican arms.[246]

The Church of England was an agency of the Crown and seen as projecting British policy into revolutionary America. Over time, American patriots (not the Tories) came to view the Church of England as tyrannical, which was also the view held by the Congregationalists, the established church in much of New England. American dissenters and Enlightenment statesmen went a step further and held the view that established churches of any denomination—in their willingness to do the bidding of the state in service of the state—had corrupted Christianity.[247] This is seen, for example, in James Madison's *Memorial and Remonstrance*,[248] as well as the writings of Baptist ministers Isaac Backus and John Leland.[249] The spiritual corruption was perceived as both external and internal. The external was the established church imposing burdens of conscience on nonconforming religions, and the internal was the government entangling itself in the operations of the established church. The solution, these dissenters and statemen maintained, was disestablishment. Disestablishment, or the deregulation of religion, would both liberate the church and enlighten governance by the new republican states.

The Court in *Hosanna-Tabor* did not even acknowledge—let alone rely on—an account of the events on the European continent, with the church's fluctuating bids for power and independence from the government from Constantine through Gregory VII and eventually to the Westphalian states.[250] Instead, in the view of the Supreme Court, the proper historical framework

244 *Id.* at 267, 269.

245 *See* Wilken, *supra* note 24, at 134-54.

246 There were few Catholics in colonial America, and almost all were in the colony of Maryland. But even in Maryland, Catholics were a minority. *See* Michael D. Breidenbach, *Church and State in Maryland: Religious Liberty, Religious Tests, and Church Disestablishment* 309, *in* Disestablishment and Religious Dissent: Church-State Relations in the New American States, 1776 – 1833 (Carl H. Esbeck & Jonathan J. Den Hartog eds. 2019).

247 *See* Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 Wm. & Mary L. Rev. 1831 (2009).

248 The *Memorial and Remonstrance* is available in 8 The Papers of James Madison 295-306 (William T. Hutchinson & William M. E. Rachael eds. 1973). For example, Paragraph 7 of the *Memorial* asks what have been the fruits of religious establishment, and answers: "More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution." Paragraph 5 of the *Memorial* points out that the state inevitably will use the church as an "engine of Social Policy" to accomplish its political ends, which is an "unhallowed perversion of the means of salvation."

249 *See* 2 William G. McLoughlin, New England Dissent, 1630–1833: The Baptists and the Separation of Church and State (1971).

250 565 U.S. at 182-85. Chief Justice Roberts did acknowledge that the Magna Carta of 1215 promised independence for the Church, but quickly acknowledged that the promise was not kept. *Id.* at 182.

for understanding the First Amendment's doctrine of church autonomy was nearer in time and closer to home. Under the guiding principle of originalism (although originalism was not expressly mentioned in *Hosanna-Tabor*), that meant looking to what motivated revolutionary Americans on this side of the Atlantic: war with Great Britain, including rejection of its Church of England model. The opinion's history begins in earnest with the English Reformation and the establishment of the Church of England in 1534,[251] moves forward to the religious struggles in England and resulting immigration to these shores, then discusses the First Federal Congress and the adoption of the First Amendment,[252] and finally relates two incidents involving James Madison and his part in early applications of the Religion Clauses.[253] The legal principles on display in this historical account were then brought to bear on the case at bar concerning the entanglement of federal nondiscrimination law with the dismissal by a religious school of one of its teachers who had religious duties. Similarly, in *Our Lady*, the High Court considered the 16th and 17th century English religious conflicts to have influenced British emigrants to seek religious freedom in the American colonies.[254] The Court also acknowledged that the Church of England's oppressive policies in colonies such as Maryland and New York were a prelude to the revolution here.[255]

The Supreme Court in *Hosanna-Tabor* and *Our Lady* showed no interest in the Papal Revolution of the 11th century out of which Catholic scholars derive freedom of the church (libertas ecclesiae). This deprives the Court of some distant principles to undergird the doctrine of church autonomy, but it also frees it from arguing that the Papal Revolution is a suitable undergirding for church autonomy as embedded in our late 18th century Constitution.

As noted above, James Madison played a central role in the history that was relied on in *Hosanna-Tabor*. Chief Justice Roberts noted the Virginia representative's central role in drafting the Religion Clauses in the First Federal Congress,[256] and he also relied on two episodes involving Madison and early applications of those clauses. In the first, Madison as Secretary of State under Thomas Jefferson declined to involve the U.S. in the appointment of a Catholic bishop in the Louisiana Territory.[257] The second episode had Madison as President vetoing a bill to incorporate an Episcopal church in the District of Columbia. In Madison's veto message, he did not say the bill was unconstitutional because incorporating a church created a prohibited establishment. Indeed, it was becoming common at the time for churches to incorporate under state corporation laws to ease the acquisition and transfer of real property, to limit liability, to allow lawsuits in the corporate name, and to secure corporate life in perpetuity. Rather, according to Madison, the particular corporate articles set out in the bill would have deeply entangled federal officers in the details of removal and appointment of clergy in this particular church, and that was a constitutional defect.[258]

There are additional episodes that buttress the interpretive point made by Chief Justice Roberts. For example, at a time when military hostilities had ceased with victory at Yorktown in October 1781, and the states still remained loosely united under the Articles of Confederation, a well-documented incident occurred that illustrates how profoundly relations between church and government had shifted in the minds of continental officials in America. At the beginning of the revolution, the Roman Catholic Church in British North America was under the governance of Thomas Talbot, Bishop of London. This proved difficult when the colonies declared their independence and the ensuing war dragged on for seven years. Contact with the church in London was cut off, making the consecration of priests, the confirmation of young parishioners, and other episcopal functions unavailable to the faithful in America. Upon the signing of the Treaty of Paris in 1783, Talbot declared that he no longer exercised ecclesial jurisdiction in the United States.[259]

In response to these difficulties, Catholics in Maryland and Pennsylvania gathered to devise a solution. The Rev. John Lewis had been appointed as vicar for the American churches by Talbot's predecessor. Because of Talbot's difficulty in communicating with America, Lewis had been exercising more supervisory authority. The American clergy were pleased with Lewis' oversight, and in June 1783, they drew up a petition to the Pope requesting that Lewis be made both Superior and Bishop over the Church in the United States. In the petition, The Rev. John Carroll of Maryland provides intriguing commentary on the American Catholic view of church-state relations under the Confederation:

> You are not ignorant that in these United States our religious system has undergone a revolution, if possible, more extraordinary than our political one. In all of them free toleration is allowed to Christians of every denomination;

251 *Id.* at 182.

252 *Id.* at 183 ("It was against this background that the First Amendment was adopted. Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church.").

253 *Id.* at 184-85.

254 As was common in the 18th century, American patriots blamed the Thirty Years' War on religion. More recent scholarship suggests that this belief was in error, or at least greatly oversimplified. *See, e.g.*, Peter H. Wilson, The Thirty Years' War: Europe's Tragedy (2009) (challenging interpretations of the Thirty Years' War as primarily religious, Wilson explores the political, social, and economic forces that accompanied religious motivations behind the conflict, and he points out that battle lines often did not align with Protestant/Catholic divisions).

255 140 S. Ct. at 2061-62.

256 *Hosanna-Tabor*, 565 U.S. at 184 (stating that the form of the no-establishment text then being considered addressed the fear that, "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform").

257 *Id.* A full account of the episode appears in Kevin Pybas, *Disestablishment in the Louisiana and Missouri Territories* 273, 283-85, *in* Disestablishment and Religious Dissent: Church-State Relations in the New American States, 1776 – 1833 (Carl H. Esbeck & Jonathan J. Den Hartog eds. 2019) [hereafter "Pybas"].

258 *Hosanna-Tabor*, 565 U.S. at 184-85.

259 2 John G. Shea, Life and Times of the Most Rev. John Carroll, Bishop and First Archbishop of Baltimore: Embracing the History of the Catholic Church in the United States, 1763-1815 204-18, 223-25 (1888).

> and particularly in the States of Pennsylvania, Delaware, Maryland, and Virginia, a communication of all civil rights, without distinction or diminution, is extended to those of our religion. This is a blessing and advantage which it is our duty to preserve and improve, with the utmost prudence, by demeaning ourselves on all occasions as subjects zealously attached to our government and avoiding to give any jealousies on account of any dependence on foreign jurisdictions more than that which is essential to our religion, an acknowledgment of the Pope's spiritual supremacy over the whole Christian world.[260]

Meanwhile, the Catholic clergy in France had plans of their own for the American Church. The Jesuits had flourished in America during the time of the London Bishop's oversight, Talbot having been friendly to that order. However, clergy aligned with the Bourbon monarchs had urged Pope Clement XIV to dissolve the Society of Jesus, and they succeeded. The French clergy now sought to undermine the influence of the Jesuits in the infant United States.[261] A plan, apparently originating with Barbe Marbois, French Minister to the United States, received initial support from the Papal Nuncio in Paris. The Nuncio sent instructions to Marbois in Philadelphia, directing him to petition Congress for authority to appoint a Catholic bishop in the United States. That would have caused the new American Bishop to receive his instructions via church authorities in Paris. When Marbois sent the petition to Congress, he received an unexpected response, yet one that was revealing of American sentiments on relations between church and government. On May 11, 1784, the congressional journal records the following resolution:

> Resolved, That doctor [Benjamin] Franklin [U.S. Minister to France] be desired to notify to the apostolical nuncio at Versailles, that Congress will always be pleased to testify their respect to his sovereign and state; but that the subject of his application to doctor Franklin, being purely spiritual, it is without the jurisdiction and powers of Congress, who have no authority to permit or refuse it, these powers being reserved to the several states individually.[262]

Marbois' petition was the sort of Old World religious intrigue that Americans abjured. When the French intentions became public, American Catholics reacted quickly with communications to Rome to counter the power play and prevent French interference. Pope Pius VI ordered that John Carroll be appointed Superior for the American clergy with the intent of consecrating him bishop within the year. A decree dated June 9, 1784, announcing this decision was sent to the American Catholic Church. In this way, the first American Catholic bishopric was formed, with The Most Rev. Carroll as bishop answering directly to the Pope. The incident confirms that in the new United States, any ecclesiastical jurisdictional disputes were outside the authority of the government.[263]

The Louisiana Purchase of 1803 required early applications of the Religion Clauses. This vast land west of the Mississippi River held a French Catholic establishment which was later maintained by the Spanish. The new treaty and purchase agreement with France guaranteed the inhabitants their religious liberty—no small matter as the United States was perceived by the French inhabitants to be Protestant. The Catholic establishment in Louisiana quietly ceased to exist as the Spanish Crown no longer paid the priests and Spanish law no longer operated to support the church. For purposes of the incoming American federal administration, the land was divided into Orleans Territory, which would largely become the State of Louisiana, and the District of Louisiana (soon renamed the Missouri Territory), consisting of the rest of the purchase. In the spring of 1804, the governor of Orleans Territory wrote to Secretary of State Madison to inform him that local federal authorities had shut the doors of a Catholic parish church "in response to a conflict between two priests concerning who was the rightful leader of the congregation."[264] Although the territorial governor was clearly pleased with his manner of handling the dispute, President Jefferson, who learned about it from Madison, was not.[265] In a July 5, 1804, letter to Madison, Jefferson wrote:

> [I]t was an error in our officer to shut the doors of the church. . . . The priests must settle their differences in their own way, provided they commit no breach of the peace. . . . On our principles all church-discipline is voluntary; and never to be enforced by the public authority.[266]

Jefferson's warning to not get involved in matters of church polity nor the supervision and discipline of clergy, was passed from Madison back down to the territorial governor. Only a year went by before the governor had an opportunity to put to use Jefferson's legal principle. In the summer of 1805, the governor became aware of a Spanish priest serving the Church of St. Louis in New Orleans. The priest was at odds with his superior, who as the Acting Vicar General was concerned that the priest might have retained his loyalties to Spain. The renegade priest was ordered removed from his appointment to the Church of St. Louis by the vicar. But the parish congregation resisted and allowed the priest to continue to conduct worship services. The vicar reported his dilemma to the territorial governor, an act characteristic of a state-established church. However, chastened by his earlier mishandling of religious affairs to the disappointment

260 *Id.* at 209.

261 *Id.* at 210-18.

262 27 Journals of the Continental Congress 1774-1789 at 368 (May 11, 1784).

263 Although this incident preceded the adoption of the 1787 Constitution and ratification of the First Amendment, it is significant that this way of thinking about the church as a separate authority from the state was already present, and it should inform how we read the later legal text. *See* William Lee Miller, The Business of May Next: James Madison & the Founding 105-110 (1992). *See id.* at 108-09 ("Usually now our American disengaging of church from state is found to rest in the First Amendment, but one may find it already in a negative way in the silence of the rest of the Constitution.").

264 Pybas at 281.

265 *Id.* at 282.

266 *Id.*

of Jefferson, the territorial governor did not get involved in the religious dispute. The governor did, however, ask for an interview with the wayward priest to enquire into possible sedition.[267]

Some of the inhabitants of this former French territory had cause to be concerned for the security of their titles to land. An order of Ursuline nuns had operated a convent, orphanage, and school for girls and young women in New Orleans since 1727. The sisters had initially received their lands from the French Crown as a feature of the established church. The sisters wondered what this meant for their works of charity and education in a nation they regarded as Protestant but without an established religion. In a letter dated June 13, 1784, the Mother Superior of the convent wrote President Jefferson setting forth her anxieties about the security of title to the lands used by the Ursuline ministries. A month later, on July 13, Jefferson responded with his own letter. He began by assuring the nuns that the transfer of control from Catholic France to the United States would not undermine the ownership of their religious school and the glebe lands that supported it. However, Jefferson went further and assured the convent, school, and orphanage freedom of self-governance and freedom from the superintending hand of government. As the president explained, "the principles of the constitution . . . are a sure guaranty to you that [your property] will be preserved to you sacred and inviolate, and that your institution will be permitted to govern itself according to it's [*sic*] own voluntary rules, without interference from the civil authority."[268] The latter—the ability to govern itself free of bylaws except those adopted voluntarily and self-enforced—was a liberty the Ursulines would not have enjoyed under the French establishment.

These episodes give a taste of how the federal church-government understanding was implemented in the post-revolutionary period, and they show that church autonomy was presupposed where the government would otherwise have become entangled in the internal governance of religious ministries. These accounts confirm that *Hosanna-Tabor* and *Our Lady* are on target.

V. Conclusion

Over 230 years after adoption of the First Amendment, the doctrine of church autonomy, and its ministerial exception in particular, remain projects under development. Yet the most important features of these concepts were settled in *Kedroff* and *Hosanna-Tabor*. The Supreme Court has recognized the doctrine of church autonomy since at least *Watson*, and the doctrine has a body of precedent different from those lines of cases decided under the Free Exercise Clause and the Establishment Clause, respectively. Church autonomy protects churches, religious schools, and other genuinely religious organizations, but not as entities with freedom of association rights like any other organization, and not as mere voluntary associations representing the aggregate rights of their individual members. It protects them as ontological beings. Churches and other genuinely religious organizations are tacitly acknowledged by the U.S. Supreme Court to exist in their own right, and not only because the government or the positive law is willing to recognize that they exist. Indeed, these organizations preexisted the state, and they transcend the state in that they are not confined to the recognized borders of a Westphalian state. The doctrine thereby has the state acknowledging that it is not all powerful. Surely this is an encouraging incident of secular modesty.

In an adversarial system, church autonomy will always be contested out on the frontiers. However, building on *Watson* and *Kedroff*, the High Court has strongly reaffirmed in the seminal case of *Hosanna-Tabor* that a religious organization's internal governance is a government-free zone. And while the ministerial exception is an affirmative defense for purposes of pleading and pretrial practice, once its prima facie elements are proven-up by the religious organization the doctrine of church autonomy affords a categorical immunity, rooted in the Constitution, that cannot be waived—the strongest protection available in law.

267 *See id.* at 282-83 for a fuller telling of the incident.

268 *Id.* at 281. *See generally id.* at 278-81.

Environmental Law in the Supreme Court: Highlights from the October 2020 Term

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Other Views:

• David Fotouhi, *Environmental Cases to Watch in the U.S. Supreme Court for 2021*, Gibson Dunn, (Mar. 18, 2021), https://www.gibsondunn.com/environmental-cases-to-watch-in-the-us-supreme-court-for-2021/.

• Jonathan Kidwell, *The Biggest Environmental Rulings of 2021: Midyear Report*, Kirkland & Ellis, (July 9, 2021), https://www.kirkland.com/news/in-the-news/2021/07/the-biggest-environmental-rulings-of-2021_midyear.

The Supreme Court decided nine important environmental law cases during its October 2020 term. This article discusses four of the most significant cases.[1] These cases are important because they may affect how climate change litigation proceeds through the federal courts, how and when deliberative process privilege is asserted by the federal government, and other important matters relating to environmental and administrative law. As the Court begins its October 2021 term, it is worth reviewing the environmental law cases from the previous term to consider how the Court has recently approached and analyzed environmental issues.

I. Federal Removal Law in a Climate Change Case

In *BP P.L.C. v. Mayor and City Council of Baltimore*, the Court held 7-1 (Justice Samuel Alito took no part in considering the case) that the Fourth Circuit erred in concluding that it lacked jurisdiction to consider all of the defendant energy companies' grounds for removal under Section 1447(d).[2]

The case began in the Circuit Court for Baltimore City.[3] The Mayor and City Council of Baltimore sued 26 energy companies on eight causes of action, including public and private nuisance, failure to warn, and consumer protection claims stating the energy companies concealed the environmental impacts of the fossil fuels they promoted.[4] Two defendants filed a notice of removal from state court to the United States District Court for the District of Maryland, invoking a number of grounds for federal jurisdiction.[5] One of those grounds was based on the Removal Clarification Act, which provides for federal officer removal.[6] To support this

1 Other cases from the Court's October 2020 term could also be discussed. For example, the Court decided three cases on eminent domain, an issue that is important to environmental and property law practitioners. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021); PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 155 (2020); Pakdel v. City and Cnty. of San Francisco, California, 141 S. Ct. 2226 (2021). Further, the Court also decided two important interstate water compact cases. *See* Florida v. Georgia, 141 S. Ct. 1175 (2021); Texas v. New Mexico, 141 S. Ct. 509 (2020).

2 141 S. Ct. 1543 (2021).

3 *See id.* at 1546 (Sotomayor, J., dissenting).

4 *See* Pl.'s Compl. i-v (Cir. Ct. Balt. City), *available at* https://www.law.nyu.edu/sites/default/files/Baltimore%20Lawsuit.pdf. *See id.* at 49 (alleging that the "[d]efendants' extraction, sale, and promotion of their fossil fuel products are responsible for substantial increases in ambient (surface) temperature, ocean temperature, sea level, droughts, extreme precipitation events, heat waves" which will all affect Baltimore).

5 Joint Appendix at 187, *available at* https://www.supremecourt.gov/DocketPDF/19/19-1189/160816/20201116134752162_19-1189_ja.pdf (last visited Aug. 20, 2021).

6 28 U.S.C. § 1442(a)(1) (promising a federal forum for actions against an "officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office"). The history of this

ground for removal under Section 1442, defendants alleged their energy extraction efforts were pursuant to government mandates and contracts, performed functions for the U.S. military, and engaged in activities on federal lands pursuant to federal leases.[7] The district court reviewed each of the defendants' cited bases for removal, and it agreed with the city and remanded the case to Maryland state court.[8]

While such an order denying jurisdiction typically ends the removal battle, 28 U.S.C. Section 1447(d) permits appellate review of a remand order when removal is sought under Section 1442 (federal officer removal statute) or Section 1443 (civil rights removal statute):

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that *an order* remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.[9]

Based on this exception to the general bar on appellate review of remand orders, the defendants appealed.[10]

The Fourth Circuit concluded that it only had jurisdiction to review defendants' Section 1442 ground for removal—the only one that permitted their appeal of the remand order—not their other claims for federal jurisdiction such as those based on admiralty and bankruptcy.[11] Finding defendants' Section 1442 claim insufficient to establish grounds for removal, the Fourth Circuit affirmed the district court's order granting the city's motion to remand.[12] Defendants then sought certiorari in the United States Supreme Court, which the Court granted.[13]

The scope of the Court's review was narrow, excluding the merits of defendants' claims and the issue of climate change.[14] The Court granted review to resolve the circuit split on the question: "Does 28 U.S.C. Section 1447(d) permit a court of appeals to review any issue in a district court order remanding a case to state court where the defendant premised removal in part on the federal officer removal statute, § 1442, or the civil rights removal statute, § 1443?"[15] In an opinion authored by Justice Neil Gorsuch, the Court concluded that Section 1447(d) *does* permit a court of appeals to review multiple grounds for removal in such a case, and that it does not limit review to the grounds that allowed for an exception to the no-appeal rule. Justice Sonia Sotomayor dissented.

The Court looked first to the text, specifically the term "order."[16] The Court found that, at the time of Section 1447(d)'s adoption and amendment, the word meant the same thing it means now: a "written direction or command delivered by . . . a court or judge."[17] An order remanding a case is a formal command from a district court returning a case to state court.[18] Therefore, the Court stated that Section 1447(d) "allows courts of appeals to examine the whole of a district court's 'order,' not just some of its parts or pieces."[19] Thus, the district court did not have discretionary authority to remand the case until it determined that it lacks *any* authority to entertain defendants' suit.[20] And when a district court's removal order rejects all of a defendant's grounds for removal, Section 1447(d) authorizes the court of appeals to review every one of them.[21]

The Court's 1996 decision in *Yamaha*, which the *Baltimore* Court relied on, offers further guidance on how the Court reads Section 1447(d).[22] In *Yamaha*, the Court was asked to resolve a dispute about the meaning of 28 U.S.C. Section 1292(b).[23] This statute allowed a district court to certify "an order" to the court of appeals if it "involves a controlling question of law as to which there is substantial ground for difference of opinion," and if "an immediate appeal *from the order* may materially advance the ultimate termination of the litigation."[24] In a unanimous opinion delivered by Justice Ruth Bader Ginsburg, the Court held that "[a]s the text of § 1292(b) indicates, appellate jurisdiction applies to the order certified to the court of appeals, and is not tied to the particular question formulated by the district court."[25] Applying *Yamaha*, the Court in *Baltimore* stated "appellate courts . . . 'may address any issue fairly included within the certified order because it is the *order* that is appealable, and not the controlling question

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statute is rather intriguing. During Reconstruction, state officers would often arrest federal officers (especially tax collectors) and seize their property. Section 1442(a)(1) would allow cases like this to be removed to federal court where they could be dismissed. *See* Josh Blackman, *BP v. Baltimore Provides a Lengthy Escape Hatch From State Court*, The Volokh Conspiracy, May 18, 2021, https://reason.com/volokh/2021/05/18/bp-v-baltimore-provides-a-lengthy-escape-hatch-from-state-court/ (last visited Aug. 20, 2021).

7 Joint Appendix at 225.

8 Mayor and City Council of Balt. v. BP P.L.C., 388 F. Supp. 3d 538, 574 (D. Md. 2019).

9 28 U.S.C. § 1447(d) (emphasis added).

10 *Baltimore*, 141 S. Ct. at 1537.

11 *See* Mayor and City Council of Balt. v. BP P.L.C., 952 F.3d 452, 457 (4th Cir. 2020).

12 *Id.* at 471.

13 *Baltimore*, 952 F.3d 452 (4th Cir. 2020), *cert. granted*, (No. 19-1644), *available at* https://www.supremecourt.gov/qp/19-01189qp.pdf (last visited Aug. 20, 2021).

14 *Baltimore*, 141 S. Ct. at 1535-36.

15 *Id.* at 1536.

16 *Id.* at 1537. *See also id.* (noting that "when called upon to interpret a statute, this Court generally seeks to discern and apply the ordinary meaning of its terms at the time of their adoption") (citing Niz-Chavez v. Garland, 141 S. Ct. 1474, 1479-80 (2021)).

17 *Id.* at 1537; *see also id.* at 1547 n.1 with accompanying text.

18 *Id.* at 1537.

19 *Id.* at 1538.

20 *Id.* at 1537 (citing Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 356 (1988).

21 *Id.* at 1538.

22 *Id.* at 1539 (citing Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 204 (1996)).

23 *Id.*

24 *Id.*

25 *Id.* at 1540 (citing *Yamaha*, 516 U.S. at 205).

identified by the district court."[26] The Court held that the Fourth Circuit erred in considering only defendants' Section 1442 claims in its review of the district court's remand order.[27] The Court vacated the judgment below and remanded with instructions that the Fourth Circuit consider all grounds for removal raised by the defendants.[28]

Justice Sotomayor, dissenting alone, argued that the Court's interpretation of Section 1447(d) allows defendants to sidestep the removal statute's bar on appellate review by "shoehorning" a Section 1442 or Section 1443 argument into their case for removal, and that the Court's interpretation of Section 1447(d) "lets the exception[s] swallow the rule."[29] Originally, there were no exceptions to Section 1447(d)'s bar on appellate review of remand orders, but in 1964, as part of the Civil Rights Act, Congress carved out two exceptions.[30] During the first several decades in which those exceptions were in effect, every court of appeals to consider the issue adopted the view that appellate review encompassed only Section 1442 and Section 1443 claims.[31] Congress legislated against this backdrop in 2011, when it amended Section 1447(d) to cover not only Section 1443 but also Section 1442.[32] The Court has stated that "'[i]f a word or phrase has been given a uniform interpretation by inferior courts, a later version of that act perpetuating the wording is presumed to carry forward that interpretation.'"[33] Justice Sotomayor concluded that the fact that "Congress did not disturb the prevailing interpretation of Section 1447(d) is a compelling reason this Court should not either."[34] She also raised the policy concern that the Court's opinion "opens a back door to appellate review that would otherwise be closed" to defendants, increasing judicial caseloads for borderline frivolous arguments.[35]

The Court's majority pushed back, stating that "even the most formidable" policy arguments cannot "overcome" a clear statutory directive like that seen in Section 1447(d).[36] The Court focused its analysis on the language Congress used in Section 1447(d), especially the word "order," which it found means the order, the whole order, and nothing but the order.

II. FOIA Exemptions and Endangered Species

In Justice Amy Coney Barrett's first majority opinion for the Court, the Court held 7-2 that the Freedom of Information Act's (FOIA) deliberative process privilege protects from disclosure draft biological opinions that are both predecisional and deliberative, even if such in-house drafts are an agency's last view discussing a proposal.[37] Justice Stephen Breyer dissented from the majority opinion, joined by Justice Sotomayor.

U.S. Fish & Wildlife Service v. Sierra Club began in the U.S. District Court for the Northern District of California.[38] The Sierra Club submitted a FOIA request seeking draft biological opinions of the U.S. Fish & Wildlife Service and National Marine Fisheries Service's evaluation of a proposed EPA rule.[39] The Services refused to provide these documents to Sierra Club, claiming they were exempt from production, and Sierra Club sued.[40] The District Court agreed with Sierra Club that the requested documents were not exempt from FOIA production.[41] The Ninth Circuit affirmed in part, holding that the draft biological opinions and several other draft documents which accompanied them were not exempt from FOIA because they represented the Services' final opinion on the proposed EPA rule.[42]

In 2011, the EPA proposed a rule on the design and operation of cooling water intake structures that withdraw large volumes of water from various sources to cool industrial equipment.[43] In writing this rule, the EPA's stated goal was to require such industrial facilities to use the best available technology to minimize adverse environmental impacts.[44] Such adverse impacts might include fish and other organisms being sucked into a water intake system and killed.[45]

The Endangered Species Act (ESA) requires consultation with the Services when a proposed rule threatens endangered species.[46] The purpose of such inter-agency consultation is to allow the Services to gather information, prepare a draft biological opinion, and, when necessary, issue a final biological opinion on a proposed rule's potential adverse impact on an endangered

26 *Id.* (quoting *Yamaha*, 516 U.S. at 205).

27 *See id.* at 1543.

28 *Id.*

29 *Id.* (Sotomayor, J., dissenting).

30 *Id.*

31 *Id.* at 1545. *See also id.* at 1544 ("Section 1447(d) contains neither kind of clarifying language, leaving uncertain how the provision applies to cases that are not removed under § 1442 or § 1443 alone.") (citing Board of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 965 F.3d 792, 805 (10th Cir. 2020)).

32 *Id.* at 1545.

33 *Id.* (quoting Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc., 576 U.S. 519, 536 (2015) (quoting Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 322 (2012) (ellipses omitted))).

34 *Baltimore*, 141 S. Ct. at 1545.

35 *Id.* at 1547.

36 *Id.* at 1542 (citing Kloeckner v. Solis, 568 U.S. 41, 56 n.4 (2012)).

37 United States Fish & Wildlife Serv., et al. v. Sierra Club, Inc., 141 S. Ct. 777, 783 (2021); *see also id.* at 785 (deliberative process privilege shields "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency") (citing 5 U.S.C. § 552(b)(5)).

38 Sierra Club, Inc. v. Nat'l Marine Fisheries Services and United States Fish & Wildlife Serv., Case No. 3: 15-cv-05872-EDL (Mar. 22, 2015).

39 *Sierra Club,* 141 S. Ct. at 784-85.

40 *Id.* at 785.

41 *Id.*

42 Sierra Club, Inc. v. U.S. Fish & Wildlife Serv., 925 F.3d 1000, 1018 (9th Cir. 2019); *see also Sierra Club*, 141 S. Ct. at 785.

43 *Sierra Club*, 141 S. Ct. at 783 (citing 76 Fed. Reg. 22174 (2011)).

44 *See generally* 76 Fed. Reg. 22174 (2011).

45 *Sierra Club*, 141 S. Ct. at 783 (citing 16 U.S.C. § 1531 et seq.).

46 *Id.* at 784-85 (citing 16 U.S.C. § 1536(a)(2)).

species.[47] These biological opinions classify agency action as either "no jeopardy" (where they will not seriously harm protected species) or "jeopardy" (where they will seriously harm protected species).[48] If the Services make a "jeopardy" finding, the agency may suggest reasonable and prudent alternatives to its proposed action to avoid harming threatened species, seek an exemption from the Services' Endangered Species Committee, or terminate the proposed action altogether.[49]

The inter-agency consultation process on the cooling water intake rule worked as it should: the Services and the EPA consulted on how the proposed rule would affect aquatic wildlife, and the EPA settled on an approach it said would not jeopardize protected species.[50] Staff at the Services completed their draft biological opinions on the EPA's rule in December 2013.[51] These draft biological opinions were sent to the relevant decisionmakers at the Services, but those decisionmakers neither approved the drafts nor sent them to the EPA.[52] Instead, they concluded "'more work needed to be done,'" and they "decided to continue discussions with the EPA" because "EPA was still engaged in an internal debate about key elements of the rule."[53] Over the next several months, the EPA and the Services continued their consultation on the rule, and in March 2014, the EPA sent the Services a proposed rule that differed significantly from the 2013 version.[54] The Services—satisfied that the revised rule was unlikely to harm protected species—issued a joint final "no jeopardy" biological opinion, and the EPA issued its final rule that same day.[55] Sierra Club agreed with this result, but it nevertheless sued the Services under FOIA for release of their draft biological opinions.[56]

FOIA allows members of the public to sue federal agencies for access to information, but it exempts from disclosure information protected by the deliberative process privilege.[57] This is an executive branch privilege akin to the attorney-client and attorney work-product privileges in civil litigation.[58] The purpose of the deliberative process privilege—like that of attorney-client and attorney work-product privileges—is to allow federal officials to communicate candidly among themselves when drafting agency policy without fear that "each remark is a potential item of discovery and front-page news."[59] The privilege shields in-house documents generated during an agency's deliberations about a policy.[60] However, documents that embody or explain the adopted agency policy are not privileged.[61]

The Court had to determine whether the Services' draft biological opinions were "predecisional" or "deliberative" or both. If so, the FOIA exemption for deliberative process privilege would apply and the documents would not be subject to release under FOIA; if not, the exemption would not apply, and Sierra Club would be entitled to compel release of the draft biological opinions under FOIA.[62] The majority stated documents are "predecisional" if they are generated before the agency's final decision, and they are "deliberative" if they are prepared to help the agency formulate a policy position.[63] The Court noted that in determining whether the exemption applies, "[w]hat matters, then, is not whether a document is last in line, but whether it communicates a policy on which the agency has settled."[64] In making this functional, non-formal inquiry, courts "must consider whether the agency treats the document as its final view on the matter."[65] The Court stated that the last document compiled by an agency on a matter might not be last because it is "final"; instead, it might be last because the issue "died on the vine," proceeding no further.[66]

The dissenters agreed with the majority on two issues. First, Justice Breyer stated that he agreed with the Court's inquiry into whether a document is "final" or "deliberative," and that this inquiry hinges on the document's "function" in an agency's decision-making process.[67] Second, Justice Breyer stated that it is unclear whether the documents at issue in the case are draft

47 *Id.* at 784 (citing 50 CFR § 402.14(g)(4)). A biological opinion contains within it scientific data; it is not just a policy document.

48 *Id.* (citing 50 CFR § 402.14(h)(1)(iv), as amended, 84 Fed. Reg. 45017 (2019)). As Justice Breyer noted in his dissent, a finding of jeopardy is exceedingly rare; the Services have made this finding only twice out of 6,829 total consultations between 2008 and 2015. *Id.* at 790 (Breyer, J., dissenting) (citing Brief Amici Curiae of the Center for Biological Diversity et al. at 22–23).

49 *Id.* at 784 (citing 16 U.S.C. § 1536(b)(3)(A)).

50 *Id.* (citing 16 U.S.C. §§ 1536(b)(4), (g), 1538(a)).

51 *See id.*

52 *Id.*

53 *Id.* (citing Joint Appendix at 37, 58-59).

54 *Id.*

55 *Id.*

56 Sierra Club was pleased with the final rule produced by EPA because it resulted in less endangered species take, but it sued the federal government anyway. *See* Oral Argument at 57:09-57:14, *available at* https://www.oyez.org/cases/2020/19-547.

57 *See Sierra Club*, 141 S. Ct. at 783.

58 *See id.*

59 *Id.* at 785 (citing Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001)).

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.* (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-152 (1975) and Renegotiation Bd. v. Grumman, 421 U.S. 168, 184-86 (1975)).

64 *Id.* at 786. The Court also rejected formalism by making it clear that the label "draft" is not determinative. In other words, an agency cannot shelter in the deliberative process privilege exemption by simply watermarking a document "draft," for this would put form over substance. *Id.*

65 *Id.* (citing *Sears*, 421 U.S. at 161). Furthermore, if an agency makes implicit judgments that are not memorialized in a written document, those too can be considered an agency's final view on the matter, which would remove such judgments from the scope of FOIA's deliberative process privilege exemption. *See id.* at 788.

66 *Id.* (citing *Sears*, 421 U.S. at 151 n.18 ("'[C]ourts should be wary of interfering" with drafts that "do not ripen into agency decisions.")).

67 *Id.* at 789; *see also Sears*, 421 U.S. at 138 ("'[T]he function of the documents' and 'the context of the administrative process which

biological opinions or *drafts of* draft biological opinions, and that the lower courts should determine whether some of the documents are the latter in a "segregability analysis" on remand.[68]

But Justice Breyer's dissent disagreed with the Court's decision that the Services' draft biological opinions did not reflect final agency decisions regarding jeopardy.[69] He argued that "[a] Draft Biological Opinion differs from a Final Biological Opinion in only one way that matters. The Services must make the Draft Biological Opinion available to the EPA before issuing a Final Biological Opinion."[70] He said that after a draft biological opinion issues, the Services continue their inter-agency consultation with the EPA but do not look to change their own analyses or conclusions.[71] Instead, inter-agency efforts are focused on minimizing the projected impact on endangered species.[72] In turn, the agency may publicly adopt the Services' proposed alternatives, and this process will culminate in a final biological opinion.[73] Therefore, he argued, a draft biological opinion finding jeopardy functions exactly like a final biological opinion finding jeopardy, and it should be treated the same way under FOIA.[74]

The *Sierra Club* decision further clarified the scope of FOIA's deliberative process privilege exemption for draft biological opinions under the ESA, and it could have some broader effects. Indeed, the majority stated in footnote 3 that "the logic applied to these drafts also applies to the other draft documents."[75]

III. Renewable Fuel Standards

In *HollyFrontier Cheyenne Refining LLC v. Renewable Fuels Association*, Justice Gorsuch wrote for a 6-3 majority holding that a small refinery which had previously received a hardship exemption may obtain an "extension" under the Renewable Fuels Program (RFP) even if it had a lapse in exemption coverage in a previous year.[76] Justice Barrett wrote a dissenting opinion, which Justices Sotomayor and Kagan joined.[77]

During George W. Bush's presidency, Congress passed and the president signed the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007 in response to profound concerns about the nation's dependence on foreign oil.[78] These statutes required, among other things, the addition of renewable fuel into the nation's fuel supply.[79] To that end, Congress mandated that 1) transportation fuel sold in the United States (e.g., gasoline and diesel) contain specified quantities of certain renewable fuel typically derived from agricultural products made in the United States and 2) the total amount of renewable fuels used grow from 4 billion gallons in 2006 to 36 billion gallons in 2022.[80]

One way the EPA reaches these goals is by managing a market-based system of credits called Renewable Identification Numbers (RINs). Refiners may generate RINs by blending their fuel; however, if a refinery cannot blend enough fuel to generate sufficient RINs, refiners may cover by purchasing other refineries' RINs. As such, RINs are subject to economic scarcity and vary in price annually. This policy may lead to economic hardship for small refineries. To increase the amount of renewables without negatively impacting small refineries, Congress created within the RFP[81] the Renewable Fuels Standard (RFS).[82] In the RFS, Congress offered protection to "small" refineries.[83] The RFS defines small refineries as those with an "average aggregate daily crude oil throughput" of 75,000 barrels per day or less each calendar year.[84]

Further, under subsection (A), Congress provided an initial temporary exemption that relieved all small refineries of any obligations under the RFP from its enactment until 2011; this initial exemption could be extended for an additional two years if the U.S. Department of Energy determined that a refiner's RFP obligations would pose a "disproportionate economic hardship."[85] In subsection (B), Congress provided that small refiners may petition the EPA "at any time" for an extension of subparagraph (A)'s two-year extension (from 2011-2013) when there is "disproportionate economic hardship."[86] The program expanded over time, from eight small refinery exemptions in 2013 to 31 in 2018.[87]

HollyFrontier concerned three small refineries that initially received an exemption, let it lapse for a period, and then petitioned the EPA for an extension of the exemption under subparagraph

generated them" is '[c]rucial' to understanding whether the deliberative process privilege applies.").

68 *Sierra Club*, 141 S. Ct. at 792; *see also id*. at page 792 n.5 (stating "[w]e agree with the parties that the District Court must determine on remand whether any parts of the documents at issue are segregable").

69 *Id*. at 790 (Breyer, J., dissenting).

70 *Id.* at 791 (citing 50 CFR § 402.14(g)(5)).

71 *Id*. at 790.

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id*. at 786 n.3.

76 141 S. Ct. 2172 (2021).

77 *Id.* at 2183 (Barrett, J., dissenting).

78 *See* Br. for Federal Resp't at 4.

79 Energy Policy Act of 2005, 42 U.S.C. § 13201 et seq. (2005); Energy Independence and Security Act of 2007 (EISA), 42 U.S.C. § 17001 et seq. (2007).

80 *HollyFrontier*, 141 S. Ct. at 2175.

81 42 U.S.C. § 7545(o)(2)(A)(i).

82 42 U.S.C. §§ 7545(o)(2)(B)(i)-(ii).

83 *HollyFrontier*, 141 S. Ct. at 2176.

84 *Id.* (citing 42 U.S.C. § 7545(o)(1)(K)). Small refineries include businesses ranging from small mom-and-pop shops to Fortune 500 companies. Whether a refinery is "small" turns on its crude oil throughput, not its actual size or parent company.

85 42 U.S.C. § 7545(o)(9)(A)(ii).

86 *HollyFrontier*, 141 S. Ct. at 2176 (citing 42 U.S.C. § 7546(o)(9)(B)(i)).

87 *Id. See also* U.S. EPA, *RFS Small Refinery Exemptions*, https://www.epa.gov/fuelsregistration-reporting-and-compliance-help/rfs-small-refineryexemptios (last visited Aug. 20, 2021).

(B)(i); the EPA granted the petitions.[88] A group of renewable fuel producers objected and petitioned for review of the EPA's decision in the Tenth Circuit, arguing that the EPA had acted "in excess of statutory jurisdiction, authority or limitation" by granting these waivers.[89] The Tenth Circuit vacated the EPA's decisions and concluded that the refineries were ineligible for an extension because the refiners had allowed their exemptions to lapse at some point in the past.[90] The Supreme Court granted review to decide "whether a small refinery that manages to comply with renewable fuel mandates in one year is forever forbidden from applying for an 'extension' in any future year."[91]

The Court answered this question in the negative, finding that missing one or more years of hardship exemption does not disqualify a refinery from again receiving the exemption.[92] In reaching this conclusion, the Court examined several subparagraphs of the RFS; however, the key provision at the heart of this case is found in Section 7545(o)(9)(B)(i), which says "[a] small refinery may at any time petition [the EPA] for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship."[93]

Congress failed to define "extension" in subsection (B)(i).[94] Although the EPA had argued—alongside the refineries—that the Tenth Circuit should defer to its interpretation of "extension" under *Chevron*, it did not make the same argument in the Supreme Court, perhaps due to the change in administrations; thus, the Court "declin[ed] to consider whether any deference might be due" in the case.[95] Thus, the Court had to determine the definition of extension, and it patiently explained the tools of statutory interpretation it used to reach its holding.[96] The dissent employed a similar tack, although it reached the opposite conclusion.[97] In examining this provision of the RFS and seeking to define the word extension, both the Court majority and the dissent relied heavily on dictionaries; the majority cited three dictionaries,[98] while the dissent cited seven.[99]

Justice Gorsuch began the majority opinion by noting that where Congress does not furnish a definition of its own, the Court must generally seek to afford a statutory term "its ordinary or natural meaning."[100] To this extent, the Court agreed with Respondent and the Tenth Circuit that subparagraph (B)(i) uses the word extension to refer to the lengthening of a period of time.[101] However, the Court departed from the Tenth Circuit insofar as the latter had also imposed a "continuity requirement," whereby a small refinery becomes permanently ineligible for a further extension once a current exemption lapses.[102] The majority cited examples of uses of the term extension in which the term does not necessarily imply a continuous or unbroken increase in time, such as the forgetful student who asks for an *extension* on a term paper after the deadline has passed,[103] or the recently enacted COVID-19 relief bills that provided for the *extension* of public benefits that had lapsed or been interrupted.[104] The majority argued that although "[a word's] meaning may change with time," "unless the dissent thinks the ordinary meaning of 'extension' changed in just 10 years, it's hard to understand why these enactments don't shed at least some light" on the issue at hand.[105]

88 *HollyFrontier*, 141 S. Ct. at 2176.

89 *Id.* Generally, oil industry advocates "argue[] that the EPA has the power to grant waivers to refineries," and "[b]iofuels groups say the waivers have the potential to put a significant dent in their business and run afoul of the RFS' [policy] goals." Marc Heller and Pamela King, *Justices hit biofuel blending in 'hypothetical-rich case*, E&E News, Apr. 27, 2021, *available at* https://login.politicopro.com/?redirect=https%3A%2F%2Fsubscriber.politicopro.com%2Farticle%2Feenews%2F1063731095&s=eenews (last visited Aug. 20, 2021).

90 *HollyFrontier*, 141 S. Ct. at 2176 (citing Renewable Fuels Assoc. v. U.S. EPA, 948 F.3d 1206, 1249 (10th Cir. 2020)).

91 *Id.* The Court granted review over the Trump administration's objections; under the Biden administration, the EPA joined Respondent renewable fuel producers arguing that the Tenth Circuit's decision should be upheld. *See* Br. for Federal Resp't at 14.

92 *HollyFrontier*, 141 S. Ct. at 2183.

93 *Id.* (citing § 7545(o)(9)(B)(i)).

94 *Id.* at 2187 (Barrett, J., dissenting).

95 *Id.* at 2180. This could have interesting implications for the future of *Chevron* deference. *See* Jonathan H. Adler, *Supreme Court Declines to Consider Chevron Deference Because Government Did Not Ask (Updated)*, The Volokh Conspiracy, June 25, 2021 (1:27 PM), https://reason.com/volokh/2021/06/25/supreme-court-declines-to-consider-chevron-deference-because-government-did-not-ask-it-to/ (stating that this "seems to indicate that a clear majority of the Court is on board with the idea that the federal government may waive *Chevron* deference); Aaron L. Nielson, *D.C. Circuit Review – Reviewed: More Chevron Waiver (Part Two)*, Yale J. Reg. Notice & Comment, June 25, 2021, https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-more-chevron-waiver-part-two/.

96 *See, e.g.*, *HollyFrontier*, 141 S. Ct. at 2181. The Court quoted its decision in *Baltimore* to support its analysis here, explaining that "this Court has made clear that statutory exceptions are to be read fairly, not narrowly, for they 'are no less part of Congress's work than its rules and standards—and all are worthy of a court's respect.'" *Id.* (quoting *Baltimore*, 141 S. Ct. at 1539).

97 *See id.* at 2183.

98 *Id.* at 2177-78.

99 *Id.* at 2184-86 (Barrett, J., dissenting).

100 *Id.* at 2176 (quoting FDIC v. Meyer, 510 U.S. 471, 476 (1994).

101 *Id.* at 2177.

102 *Id.*

103 *Id.* The dissent disagreed with the majority's reasoning based on this hypothetical. The dissent argued that this use of the term "extension" would either refer to an extension of the student's deadline (retaining continuity in the definition), or be a misuse of the term extension for what is in fact the start of an entirely new window for timely conduct. *HollyFrontier*, 141 S. Ct. at 2183 (Barrett, J. dissenting).

104 *HollyFrontier*, 141 S. Ct. at 2178 (citing the Consolidated Appropriations Act of 2021, Pub. L. 116–260, § 203, 134 Stat. 1182 (providing an "extension" of unemployment compensation starting on December 26, 2020, after it had lapsed on July 31, 2020); Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116–136, § 2114, 134 Stat. 281 (providing an "extension" of unemployment benefits starting in 2020, after they had lapsed in 2013)).

105 *Id.*

Not every use of the word extension must be read in the same way. For example, Congress sometimes requires extensions to be "consecutive" or "successive."[106] The Tenth Circuit had posited that such modifiers may suggest a continuity requirement.[107] But the Court disagreed, arguing that these examples do not mean that the term extension, when standing alone, encompasses such modifiers.[108] Instead, the Court concluded, "the absence of any parallel modifying language in the statute before us supplies one clue that continuity is not required here."[109] The Court also pointed out that subparagraph (B)(i)'s "at any time" language does not denote rigid continuity, but rather allows refiners to petition EPA *at any time* for the application of a RFS waiver.[110] Further, subparagraph (A)(ii) uses the term extension without a continuity requirement, and the Court stated that it did not see any "persuasive countervailing evidence that Congress meant to adopt one meaning of the term [extension] in subparagraph (A)(ii) and a different one next door in subparagraph (B)(i)."[111]

Finally, when the EPA sought public comment on a regulation that would clarify what counts as a "small" refinery in 2014, some suggested that a refinery should be eligible for exemption *only if* it consistently remained "small" from 2006 onward.[112] However, the EPA expressly rejected this suggestion, which the Court saw as evidence that continuity was not required to qualify for exemptions either.[113] Thus, the Court concluded that the key provision of the text "simply does not contain the continuity requirement the court of appeals supposed."[114] Instead, the Court stated, this provision "means exactly what it says: A small refinery can apply for (if not always receive) a hardship exemption 'at any time.'"[115]

The dissent, on the other hand, argued that the "EPA cannot 'extend' an exemption that a refinery no longer has" in place.[116] According to the dissent, the majority's analysis "clashes with [the] statutory structure," "caters to an outlier meaning" of the word "extension," and "forgoes the obvious answer" in this case.[117] The dissent noted that the Court does not usually define a word according to its "outer limits" of definitional possibilities at the expense of its ordinary and common meaning.[118]

In seeking to define extension, the dissent walked through "four structural features" of the RFP, which it found cut for respondents' reading of the word extension, and it gave two reasons the majority's "structural counters are not persuasive."[119] In short, it argued that the "at any time" language in Section 7545(o)(9)(B)(i) informs *when* a refinery may file an extension request, but it does not change the *type* of request the EPA can grant.[120] The dissent concluded that even if the word extension does not require continuity, the Petitioners' argument "is otherwise overwhelmed" by the ordinary meaning of the word extension and other aspects of the RFP's structure.[121]

IV. Contribution Suits Under the Comprehensive Environmental Response, Compensation, and Liability Act

CERCLA's complex statutory scheme for responding to environmental hazards like waste management and site cleanup often raises the difficult but crucial question, "who pays?"[122] Justice Clarence Thomas wrote for a unanimous Court in *Guam v. United States* just four weeks after oral argument, holding that "CERCLA contribution requires a resolution of a CERCLA-specific liability."[123]

In the 1940s, the United States Navy constructed the Ordot Dump to dispose of military waste, some of it allegedly toxic.[124] After several decades, the United States ceded control of the Ordot Dump to Guam, which used it as a public landfill.[125] In 2002, after determining that the Ordot Dump posed an ecological hazard, the EPA sued Guam for failing to comply with the Clean Water Act (CWA) and EPA directives to remediate the dump's allegedly toxic conditions.[126] At that time, the EPA asserted Guam

106 *Id.* at 2179 (citing 8 U.S.C. § 1184(g)(8)(D); 10 U.S.C. § 2304(a)(f); 19 U.S.C. § 2432(d)(1); 28 U.S.C. §594(b)(3)(A)).

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.* (The Court "do[es] not construe subparagraph (B) as part of some sunset scheme" because "subparagraph (B)(i) expressly contemplates exemptions beyond 2013—'at any time' hardship conditions are satisfied."). *Id.* at 2180.

111 *Id.* (citing Henson v. Santander Consumer USA, Inc., 137 S. Ct. 1718, 1722-23); s*ee also id*. at 2187 (Barrett, J., dissenting) ("[A]bsent contrary evidence, this Court normally presumes consistent usage.").

112 *Id.* at 2180.

113 *Id.* (citing 40 C.F.R. § 80.1441(e)(2)(iii)). Perhaps this was because the EPA foresaw that such an interpretation would force small refiners that once attained but could not maintain compliance with RFS's requirements "to exit the market," but would permit "the least compliant [small] refiners" to continue operating. *Supreme Court Upholds Broad Eligibility for Small Refineries Seeking Hardship Exemptions From Compliance With The EPA's Renewable Fuel Standards*, Gibson Dunn, *available at* https://www.gibsondunn.com/supreme-court-upholds-broad-eligibility-for-small-refineries-seeking-hardship-exemptions-from-compliance-with-the-epas-renewable-fuel-standards/.

114 *HollyFrontier*, 141 S. Ct. at 2181.

115 *Id.* The Court did not address the Tenth Circuit's alternative ruling that the EPA may not grant an exemption based on hardship flowing from something other than compliance with the RFS's obligations, such as economic hardship caused by other factors.

116 *HollyFrontier*, 141 S. Ct. at 2183 (Barrett, J., dissenting).

117 *Id*. at 2183-84.

118 *Id.* at 2184 (citing FCC v. AT&T Inc., 562 U.S. 397, 407 (2011)).

119 *Id*. at 2188 (Barrett, J., dissenting).

120 *Id.*

121 *Id.* at 2189.

122 Guam v. United States, 141 S. Ct. 1608, 1611 (2021).

123 *Id.*

124 *Id.*

125 *Id.*

126 Press Release, U.S. EPA, *United States Settles Clean Water Act Case with Guam* (last visited Aug. 9, 2021), https://archive.epa.gov/epapages/newsroom_archive/newsreleases/b477b3704493371c852570d8005e15d4.html.

was "'discharging pollutants . . . into waters of the United States without obtaining a permit'" to do so.[127] This litigation ended in 2004 when Guam and the EPA entered into a consent decree, which required Guam to pay a civil penalty and close the Ordot Dump.[128] The parties agreed that Guam's compliance would be "'in full settlement and satisfaction of the civil judicial claims of the United States . . . as alleged in the [CWA] Complaint.'"[129] However, the agreement did not "waive any [future] rights or remedies available to [the United States] for any violation by the Government of Guam . . . except as specifically provided."[130]

Then in 2017, Guam sued the United States seeking nearly $160 million for its earlier use of the dump in 1) a cost-recovery action under CERCLA Section 107(a),[131] and 2) a contribution action under CERCLA Section 113(f).[132] In 2020, the D.C. Circuit dismissed Guam's complaint. The D.C. Circuit found that Guam had had a contribution claim at some point because the remedial measures and conditional release in the CWA sufficiently resolved Guam's liability for the Ordot Dump.[133] But it also found that the 2004 consent decree had triggered the three-year statute of limitations for contribution actions—and that the statute of limitations had run—so Guam was not entitled to any relief.[134] Guam petitioned for certiorari, arguing that a settlement of CWA claims could not trigger a right of contribution under CERCLA, and therefore could not trigger the statute of limitations that had doomed its CERCLA contribution claim. The Supreme Court granted review to determine "whether a party must resolve a CERCLA-specific liability in order to trigger the right of contribution, or whether a broader array of settlements involving environmental liability will do."[135]

The Court first noted the title of subsection 113(f) of the Act: "contribution."[136] This indicated to the Court that the subsection is concerned only with the distribution of CERCLA liability for a *contribution* suit, and that it is a tool for apportioning the burdens of a predicate common liability among the responsible parties.[137] The Court then said that "the most obvious place to look" for threshold liability is CERCLA's statutory matrix of environmental duties and liabilities.[138] After all, CERCLA's very title reinforces that it is a "comprehensive" act.[139] Thus, the Court stated that remaining within the bounds of CERCLA is consistent with the familiar principle that a federal contribution action is virtually always a creature of a specific statutory regime.[140]

The Court reminded the parties that "there is no 'general federal right to contribution.'"[141] As such, subsection 113(f)(3)(B) recognizes a statutory right to contribution in the special circumstances where a party has resolved its liability via settlement, but still presumes that CERCLA liability is necessary to trigger contribution liability.[142] This is especially true, the Court stated, when the subsection is properly read in sequence as an integral part of the whole statute.[143]

The Court found that subsection 113(f)(1)'s anchor provision is especially clear on this point, allowing contribution during or following any civil action.[144] And while subsections 113(f)(2)-(3) "are not quite as explicit," their phrasing and context still presume that CERCLA liability is necessary to trigger contribution. For example, subsection 113(f)(2) explains that a settlement by one party "'does not discharge any of the other potentially liable persons unless its terms so provide," and subsection 113(f)(3)(B)'s final clause explains that contribution is available "'from any person who is not party to a settlement referred to in [subsection 113(f)(2)].'"[145]

Thus, the Court concluded that the "most natural reading" of subsection 113(f)(3)(B) is that a party may seek contribution under CERCLA only after settling CERCLA-specific liability.[146] As such, the Court reversed the judgment of the D.C. Circuit and remanded the case for further proceedings.[147]

V. Conclusion

The Supreme Court's October 2020 term saw a bevy of environmental law cases, including the first majority opinion by Justice Barrett for the Court in *U.S. Fish & Wildlife Service v. Sierra Club*. Three of the four majority opinions covered here were written by recently appointed Justices. *HollyFrontier* featured an

127 Guam v. United States, 950 F.3d 104, 109 (2020).

128 *Guam*, 141 S. Ct. at 1611.

129 *Id.* (citing *Guam,* 950 F.3d at 116).

130 *Id.* (citing App. to Pet. for Cert. 166a).

131 *See* § 107(a) (allowing for recovery of "all costs of removal or remedial action" to "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of").

132 *See* § 113(f)(3)(B) (under which a "person who has resolved its liability to the United States for some or all of a response action or for some or all of the costs of such action in [a] settlement may seek contribution from any person who is not [already] party to a [qualifying] settlement").

133 *Guam*, 141 S. Ct. at 1611 (citing *Guam*, 950 F.3d at 114-17.).

134 *Id.* (citing *Guam*, 950 F.3d at 118.); *see also* § 113(g)(3).

135 *Guam*, 141 S. Ct. at 1611.

136 *Id.*

137 *Id.*

138 *Id.* at 1613 (citing Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 610 (2009) (stating that Section 107(a)(3) of the Act may not extend beyond the limits of the statute itself)).

139 *Id.*

140 *Id.* (citing Nw. Airlines, Inc. v. Transp. Workers, 451 U.S. 77, 95-97 (1981) (noting that there is a narrow exception for admiralty cases)).

141 *Id.* at 1613; *cf.* Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Assn., 453 U.S. 1, 13–15 (1981) (refusing to "assum[e] that Congress intended to authorize by implication additional judicial remedies for private citizens suing under [two environmental statutes]")).

142 *Guam*, 141 S. Ct. at 1613.

143 *Id.* (citing New Prime Inc. v. Oliveria, 139 S. Ct. 532, 538 (2019)); *see also* Cooper Indus. Inc. v. Aviall Serv., Inc., 543 U.S. 157, 167 (2004) (looking at "the whole of § 113").

144 *Guam*, 141 S. Ct. at 1612.

145 *Id.*

146 *Id.* at 1615.

147 *Id.*

interesting debate between two textualist Justices, Gorsuch for the majority and Barrett for the dissent. Each majority opinion discussed here gives the text of the statute at issue a fairly close read and applies the law as written to the facts of the matter at hand. As the Court's October 2021 term begins, it will be interesting to see if such trends continue, and what else the Court might have in store for environmental practitioners.

An Academic Freedom Exception to Government Control of Employee Speech

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Other Views:

• Mark Strasser, Pickering, Garcetti, *& Academic Freedom*, 83 Brook. L. Rev. 579 (2018), *available at* https://brooklynworks.brooklaw.edu/blr/vol83/iss2/13/.

• Aaron Worthen, *Think of the Children: How the Role of Students in the Classroom Informs Future Applications of* Garcetti v. Ceballos *in Academic Contexts*, 2014 BYU L. Rev. 983 (2014), *available at* https://digitalcommons.law.byu.edu/lawreview/vol2014/iss4/7/.

• Carol N. Tran, Comment, *Recognizing an Academic Freedom Exception to the* Garcetti *Limitation on the First Amendment Right to Free Speech*, 45 Akron L. Rev. 945 (2012), *available at* https://ideaexchange.uakron.edu/cgi/viewcontent.cgi?article=1056&context=akronlawreview.

Public employee speech cases often arise as Section 1983 actions in which a public employee claims to have suffered retaliatory employment consequences for speech that the First Amendment protects.[1] When the speech in question is not pursuant to the speaker's official duties as an employee of the government—say, a DMV employee alleges she was fired for placing a campaign poster at her desk—courts assess these actions under the Supreme Court's decision in *Pickering v. Board of Education*.[2] In that seminal public employee speech case, the Supreme Court instructs courts to apply a two-part test: First, they determine whether the speech was on a matter of public concern. If not, the First Amendment does not limit the government employer's right to regulate the speech. But if so, courts then balance the speaker's free speech interest against the government's administrative interest to determine which is more significant.

When the speech in question *is* pursuant to official duties, the government's interests receive an additional layer of protection. Perhaps fearing that public employee speech actions in such cases threaten "displacement of managerial discretion by judicial supervision,"[3] the Supreme Court, in its 2006 decision *Garcetti v. Ceballos*, extended government speech doctrine to public employee speech. According to government speech doctrine, the government "is entitled to say what it wishes" when it "appropriates public funds to promote a particular policy of its own."[4] *Garcetti* reasons that when public employees speak pursuant to their official duties, that speech is government speech because it results from an appropriation of public funds. Because it is government speech, it is not attributable to the person speaking at all. Thus, the speech implicates no First Amendment rights of the public employee to balance against the government's interests.[5]

Both the majority opinion and Justice David Souter's dissent recognized that applying this logic to public university professors would deny professors First Amendment protection for

1 42 U.S.C. § 1983 gives citizens the right to sue public officials for violations of their constitutional rights.

2 391 U.S. 563 (1968). *See also* Connick v. Myers, 461 U.S. 138 (1983) (further refining *Pickering*'s test).

3 Garcetti v. Ceballos, 547 U.S. 410, 423 (2006).

4 Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

5 *Garcetti*, 547 U.S. at 421 ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."); *Id.* at 421–22 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.").

"expression related to scholarship or teaching."[6] Public universities would be free to undermine academic freedom by retaliating against professors who express ideas their university disagrees with. To avoid that uncomfortable result, the Court expressly stipulated that it did not "decide whether the analysis . . . would apply in the same manner to a case involving speech related to scholarship or teaching."[7]

Thus, the Court implied that there may be an academic freedom exception to *Garcetti*'s rule that public employee speech pursuant to official duties receives no First Amendment protection because it is government speech. Currently, three circuits (or four, depending on how one reads the cases) have recognized some form of an academic freedom exception to *Garcetti* for speech by public university professors.[8] These circuits agree that, because *Garcetti* itself creates an exception to standard public employee speech analysis under *Pickering*,[9] that standard analysis applies to speech that qualifies for the academic freedom exception to *Garcetti*.[10] So where, for example, a public university professor alleges that she was denied tenure because she published a controversial paper, a court that would normally apply *Garcetti* to a speech retaliation claim by a public employee would instead find *Garcetti* inapplicable due to the academic freedom exception. The court would then proceed to *Pickering*'s two-part inquiry requiring courts to ask whether the speech in question involves a matter of public concern,[11] and if so whether the employee's interest in expression outweighs the government's interest in regulating its employees' speech to maintain an effective workplace.[12]

Are these circuits correct to recognize an academic freedom exception to *Garcetti*? If so, how does the exception operate, and how broadly does it apply? This article posits that a fully defined academic freedom exception to *Garcetti* emerges from careful inspection of *Garcetti*, public employee speech doctrine, and government speech doctrine. That exception, when properly understood, applies to all public university professor speech on matters of public concern. Moreover, while the exception does not exempt all public university professor speech pursuant to official duties from *Garcetti*'s holding, it does render *Garcetti* wholly inconsequential in every First Amendment retaliation claim by a public university professor. Therefore, courts hearing such claims may safely ignore *Garcetti* altogether.

I. *Garcetti* and the Academic Freedom Exception

A. Garcetti v. Ceballos

On March 2, 2000, a deputy district attorney for the Los Angeles County District Attorney's Office named Richard Ceballos submitted to his supervisor a memo he had written to explain his concerns about the veracity of a sheriff's deputy's affidavit on which a prosecution was based.[13] The memo led to a heated meeting and, according to Ceballos, retaliatory employment actions including reassignment, transfer, and denial of a promotion.[14] Ceballos brought a Section 1983 claim alleging a violation of his right to free speech guaranteed by the First Amendment and applied to the states through the Fourteenth.[15] Following disagreement between the district court and the Ninth Circuit, the Supreme Court granted certiorari.[16]

The Court, in an opinion by Justice Anthony Kennedy, explained that "[t]he controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy," and it held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does

6 *Id.* at 428 (Souter, J., dissenting).

7 *Id.* at 425.

8 *See* Adams v. Trustees of the Univ. of N.C.-Wilmington, 640 F.3d 550 (4th Cir. 2011); Demers v. Austin, 746 F.3d 402 (9th Cir. 2014); Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021). The arguable case is *Buchanan v. Alexander*, 919 F.3d 847 (5th Cir. 2019). *See infra* Section I.B.4.

9 *See* Mark Strasser, Pickering, Garcetti, *& Academic Freedom*, 83 Brook. L. Rev. 579, 596 (2018) ("*Garcetti* suggests that the First Amendment protections under the *Pickering* line of cases are not triggered insofar as an individual speaks as an employee. The *Garcetti* exception, however, may be inapplicable insofar as the employee's speech is made in the course of teaching or research."). Some readers may prefer to think of *Garcetti* as adding a new preliminary step to the *Pickering* analysis (asking whether the speaker was acting "as a citizen" or pursuant to "official duties"), instead of denying *Pickering* analysis to speech pursuant to official duties. That is, some might see *Garcetti* as a modification of *Pickering*, not an exception to it. These readers may prefer to read "pre-*Garcetti*" where the author has written "standard" or "ordinary." On this reading, the academic freedom exception operates by using the pre-*Garcetti* two-step *Pickering* analysis instead of the post-*Garcetti* three-step *Pickering* analysis. The author reads *Garcetti* as an exception to *Pickering* because he understands the very application of *Pickering* analysis to be a form of First Amendment protection, even when it leads to the speech regulation being upheld. Therefore, *Garcetti*'s denial of First Amendment protection to speech pursuant to official duties does not modify *Pickering* (though the *Garcetti* Court rooted its holding in *Pickering*'s language), but instead renders *Pickering* (that is, First Amendment protection) wholly inapplicable to public employee speech that is pursuant to official duties. Post-*Garcetti* circuit cases applying a two-step *Pickering* analysis (instead of performing a third "as a citizen" step as part of the *Pickering* analysis) support the author's reading. *See infra* note 11.

10 *See infra* Section I.B.

11 Barker v. City of Del City, 215 F.3d 1134, 1138 (10th Cir. 2000) (citing *Pickering* and *Connick*); Nord v. Walsh Cty., 757 F.3d 734, 740 (8th Cir. 2014) ("This analysis requires a two-step inquiry. First, we determine whether the employee's speech can be 'fairly characterized as constituting speech on a matter of public concern. Second, if the speech addresses a matter of public concern, we balance the interests of the 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.") (internal citations and quotation marks omitted); *Demers*, 746 F.3d at 412 ("We hold that academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering*. The *Pickering* test has two parts. First, the employee must show that his or her speech addressed matters of public concern. Second, the employee's interest in commenting upon matters of public concern must outweigh the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.") (internal citations and quotation marks omitted).

12 *Connick*, 461 U.S. at 146.

13 *Garcetti*, 547 U.S. at 414.

14 *Id.* at 414–15.

15 *Id.* at 415.

16 *Id.*

not insulate their communications from employer discipline."[17] The Court then reasoned that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."[18] To draw a sharp distinction between government speech and citizen speech, the Court added a step to *Connick*'s two-part formulation of the test that *Pickering* initially laid out. The Court held that the first inquiry—"whether the employee spoke as a citizen on a matter of public concern"—presupposes that the employee spoke "as a citizen," not merely as a government mouthpiece, and that courts must confirm that this supposition is true before asking whether the speech was on a matter of public concern.[19] The Court reasoned that speech on a matter of public concern does not necessarily implicate the speaker's interest "as a citizen" unless he was in fact speaking in his capacity as a citizen. In the case at hand,

> Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.[20]

Because official communications must "promote the employer's mission . . . [i]f Ceballos' supervisors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action."[21]

Justice Souter, joined by Justices John Paul Stevens and Ruth Bader Ginsburg, took issue with the Court's apparent holding "that any statement made within the scope of public employment is (or should be treated as) the government's own speech, and should thus be differentiated as a matter of law from the personal statements the First Amendment protects."[22] Justice Souter warned that this conception of government speech is so broad as "to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'"[23]

The Court responded to Justice Souter's dissent by explicitly not deciding whether its analysis "would apply in the same manner to a case involving speech related to scholarship or teaching" because such expression might "implicate[] additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."[24] Seizing on the majority's suggestion that its sharp distinction between government and citizen speech by public employees may not apply to public university professors, courts soon began recognizing an academic freedom exception to *Garcetti*.

B. The Academic Freedom Exception in the Courts of Appeals

1. The Fourth Circuit

In 2011, the Fourth Circuit became the first federal court of appeals to hold that an academic freedom exception to *Garcetti* preserves First Amendment protection for some public university professor speech. The occasion arose when the senior faculty at the University of North Carolina-Wilmington ("UNCW") voted 7-to-2 against promoting associate professor Michael Adams to full professor.[25] Adams sued, asserting claims under Section 1983 for First Amendment retaliation, among other things.[26] He alleged that UNCW refused to promote him because of the faculty's disagreement with ideas he'd expressed in several "external writings and [media] appearances" that he had mentioned in his application for full professor.[27] These writings included articles in "non-refereed publications," columns published on TownHall.com, and a book that republished several of these columns.[28]

The district court awarded UNCW summary judgment on Adams' First Amendment claims.[29] The court ruled that Adams' columns, other publications, and public appearances were all speech pursuant to his "official duties," and that his listing them on his promotion application was an implicit admission that this was the case.[30] Having characterized Adams' speech as government speech, the court ended its analysis by relying on *Garcetti* to deny First Amendment protection to the speech.[31]

In reversing the district court's decision, the Fourth Circuit declared that it was "persuaded that *Garcetti* would not apply in the academic context of a public university as represented by the facts of this case."[32] The Fourth Circuit explained that *Garcetti* was inapplicable because Adams' speech at issue was not speech "'pursuant to [his] official duties' as intended by *Garcetti*."[33]

17 *Id.* at 421.

18 *Id.* (citing *Rosenberger*, 515 U.S. at 833) ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.").

19 *Id.*

20 *Id.* at 422.

21 *Id.* at 423.

22 *Id.* at 436 (Souter, J., dissenting).

23 *Id.* at 449 (internal citation omitted).

24 *Id.* at 425.

25 *Adams*, 640 F.3d at 555.

26 *Id.* at 556.

27 *See id.* at 555–57.

28 *Id.* at 553–54.

29 *Id.* at 561.

30 *Id.*

31 *Id.*

32 *Id.* at 562.

33 *Id.* at 564.

But as UNCW had argued, "because Adams was employed as an associate professor, and his position required him to engage in scholarship, research, and service to the community,"[34] even his external speech was pursuant to these broad official duties. Rather than reject this logic, the Fourth Circuit read a directness requirement into *Garcetti*. As the court explained, "Adams' speech was not tied to any more specific or direct employee duty than the general concept that professors will engage in writing [and] public appearances."[35] This "thin thread" connecting Adams' speech to his official duties was, for the court, "insufficient to render Adams' speech 'pursuant to [his] official duties' as intended by *Garcetti*."[36]

Thus, the Fourth Circuit's academic freedom exception operates by narrowing the definition of speech "pursuant to official duties" to encompass only speech *directly* pursuant to official duties. This direct/indirect distinction provides little guidance in close cases. Speech mandated by administrative duties, such as an emergency evacuation plan announcement on the first day of class, clearly falls on the direct side of the line. But how should courts apply the Fourth Circuit's approach in teaching and scholarship cases? Can public universities remove First Amendment protection for such speech by defining professors' teaching and writing responsibilities in great detail? Would not classroom speech dictated by university curriculum committees be directly pursuant to official duties and therefore unprotected, despite also directly implicating cherished First Amendment values? The Fourth Circuit's academic freedom exception fails to wholly resolve "the problem recognized by both the majority and the dissent in *Garcetti*."[37]

2. The Ninth Circuit

The Ninth Circuit recognized an academic freedom exception when Washington State University ("WSU") associate professor David Demers alleged that WSU administrators violated his First Amendment rights by retaliating against him for distributing a pamphlet called "The 7-Step Plan."[38] Demers wrote this two-page pamphlet while a member of a "Structure Committee" created to consider revisions to WSU's communications department, some of which the pamphlet recommended.[39] Demers did not submit the pamphlet to the Structure Committee, but instead distributed it to various media sources, WSU administrators and faculty, and others.[40] The district court found that the pamphlet was speech pursuant to official duties, applied *Garcetti*, and granted WSU summary judgment.[41]

Reversing the district court, the Ninth Circuit agreed that the pamphlet was speech pursuant to Demers' official duties as a member of the WSU Mass Communications faculty and Structure Committee.[42] But it went on to

> conclude that *Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed "pursuant to the official duties" of a teacher and professor. We hold that academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering*.[43]

It also noted that "*Connick* refined the *Pickering* analysis" when it "did not insist on characterizing [the employee's speech on matters of public concern] as speech 'as a citizen.'"[44]

Turning to Demers' claim, the Ninth Circuit found that his 7-Step Plan was speech "related to scholarship or teaching" within the meaning of *Garcetti*, and therefore qualified for the newly recognized academic freedom exception. The court found a sufficient connection between Demers' out-of-classroom, administration-focused speech and "teaching" in Demers' belief that "[h]is Plan, if implemented, would . . . greatly improve the education of mass communications students at [WSU]."[45] After making this threshold finding, the court moved to the first step of *Pickering* analysis, the "matters of public concern" inquiry, and it offered that "protected academic writing is not confined to scholarship."[46] Other writing pursuant to official duties, including "memoranda, reports, and other documents addressed to such things as a budget, curriculum, departmental structure, and faculty hiring . . . may well address matters of public concern under *Pickering*."[47] Demers' 7-Step Plan addressed matters of public concern because it "contained serious suggestions about the future course of an important department of WSU, at a time when [WSU] itself was debating some of those very suggestions."[48]

For the Ninth Circuit, unlike the Fourth, speech "related to teaching and academic writing" is also speech "pursuant to official duties" under *Garcetti*, but it nonetheless receives First Amendment protection because *Garcetti* left open the possibility of an exception for such speech.[49] The Ninth Circuit explicitly includes professors' non-scholarly writing in its academic freedom exception. Still, its formulation offers little concrete guidance on how closely related to scholarship or teaching professor speech must be to qualify for the academic freedom exception.[50]

34 *Id.* (quoting *Garcetti*, 547 U.S. at 421).

35 *Id.*

36 *Id.*

37 *Id.*

38 *Demers*, 746 F.3d at 406–07.

39 *Id.* at 407.

40 *Id.* at 408.

41 *Id.* at 409.

42 *Id.* at 410.

43 *Id.* at 412.

44 *Id.* at 413.

45 *Id.* at 416.

46 *Id.*

47 *Id.*

48 *Id.* at 417.

49 *Id.* at 418.

50 *See id.* at 416 (offering only that applicability of the academic freedom exception depends on the speech's "scope and character").

3. The Sixth Circuit

The Sixth Circuit joined the ranks of courts of appeals recognizing an academic freedom exception when it ruled that Shawnee State University violated associate professor Nicholas Meriwether's free speech rights by taking disciplinary actions against him for declining to refer to a student using the student's preferred gender pronouns.[51] Meriwether contravened a university policy that requires professors to refer to students by pronouns that reflect the student's self-asserted gender identity when—in accordance with his religious beliefs—he referred to a transgender student by last name only.[52] Meriwether also expressed his belief that referring to students formally as "Mr." or "Ms." during his political philosophy class serves the important pedagogical interest of "foster[ing] an atmosphere of seriousness and mutual respect" in a class where "students discuss many of the most controversial issues of public concern."[53]

The district court rejected Meriwether's argument that Shawnee State University's application of its gender-identity policy violated his free speech rights and held that, under *Garcetti*, professors' in-classroom speech never receives First Amendment protection.[54] Reversing the district court, the Sixth Circuit cited sweeping language from the Supreme Court's decisions in *Grutter v. Bollinger*,[55] *Sweezy v. New Hampshire*,[56] and *Keyishian v. Board of Regents*[57] to "establish that the First Amendment protects the free-speech rights of professors when they are teaching"[58] by protecting broad notions of "academic freedom."[59]

The court then relied on this tradition of First Amendment concern for academic freedom to recognize an academic freedom exception to *Garcetti* that "covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not."[60] The exception applies to all speech on matters of public concern because "the need for the free exchange of ideas in the college classroom is unlike that in other public workplace settings."[61] In university classrooms, "there are three critical interests at stake (all supporting robust speech protection): (1) the students' interest in receiving informed opinion, (2) the professor's right to disseminate his own opinion, and (3) the public's interest in exposing our future leaders to different viewpoints."[62]

The Sixth Circuit placed limits on its version of the academic freedom exception even as applied to classroom speech. The court observed that, "[o]f course, some classroom speech falls outside the exception: A university might, for example, require teachers to call roll at the start of class, and that type of non-ideological ministerial task would not be protected by the First Amendment."[63] Pronoun usage, the court found, was not such a "ministerial task" because "titles and pronouns carry a message [on a matter of public concern]."[64]

The Sixth Circuit's academic freedom exception, then, is rooted in its conception of the university classroom's unique implication of three First Amendment interests simultaneously. Although the court does not say so, its version of the academic freedom exception appears not to apply to non-scholarly professor speech occurring outside the classroom (such as David Demers' 7-Step Plan) because the first and third "critical interests" (the students' interest in receiving informed opinion and the public's interest in exposing students to different viewpoints) on which the court rested its exception would be absent in such cases (or at least greatly diminished). Further, the court's reliance on the uniqueness of the classroom would not support the exception's application to professors' writing despite *Garcetti*'s willingness to exempt from its holding speech "related to scholarship or teaching."[65] These considerations indicate that the Sixth Circuit's current formulation of the academic freedom exception may be incomplete.

4. A Fifth Circuit Academic Freedom Exception?

The Fifth Circuit disposed of Teresa Buchanan's First Amendment retaliation suit by applying *Pickering* analysis without assessing whether Buchanan's speech was pursuant to her official duties, nor so much as mentioning *Garcetti*. Louisiana State University ("LSU") fired Buchanan for making in-class comments on her own and students' personal lives that bore no relevance to the early childhood education classes she taught, and for regularly using equally irrelevant profanity.[66] LSU argued that *Garcetti* bars any First Amendment protection for Buchanan's speech because Buchanan spoke "while performing her official duties of teaching and supervising students."[67] The court ignored this argument, cited pre-*Garcetti* circuit precedent for the proposition that "classroom discussion is protected activity,"[68] and proceeded directly to *Pickering* analysis.

51 *Meriwether*, 992 F.3d 492.

52 *Id.* at 498.

53 *Id.* at 499.

54 *Id.* at 503.

55 539 U.S. 306, 329 (2003) (". . . given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition").

56 354 U.S. 234, 250 (1957) (referring to "[t]he essentiality of freedom in the community of American universities").

57 385 U.S. 589, 603 (1967) (affirming that the Constitution protects "academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned").

58 *Meriwether*, 992 F.3d at 504–05.

59 *See id.* at 507 (marshalling precedent to hold that "academic freedom" belongs to individual professors as well as universities).

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

65 *Garcetti*, 547 U.S. at 425.

66 *Buchanan*, 919 F.3d at 850–51.

67 Appellee Br. at 36.

68 *Buchanan*, 919 F.3d at 852 (quoting Kingsville Indep. Sch. Dist. v. Cooper, 611 F.2d 1109, 1113 (5th Cir. 1980)).

There are at least four possible ways to read *Buchanan*'s omission of any discussion of *Garcetti*. First, it could have been a glaring oversight by the court. Second, it could imply a holding that Buchanan's classroom speech, though pursuant to official duties, nonetheless receives First Amendment protection because an academic freedom exception exists and applies to it. Third, *Buchanan* might be a repeat of the Fourth Circuit's *Adams* decision,[69] recognizing that, although Buchanan's speech was pursuant to her official duties within the common meaning of that term, an academic freedom exception narrows "official duties" to a term of art that excludes the speech at issue here.[70] The problem with the second and third possible readings is that they involve very consequential implicit holdings that a court would not likely leave unstated. The fourth, and probably correct, possible reading is an implicit holding that Buchanan's speech, though it occurred while she was at work, was so far removed from her employer's purposes that it was not pursuant to her official duties even within the ordinary meaning of that term. So the speech never triggers *Garcetti*'s exception to *Pickering* in the first place. This reading requires a less complicated and far less consequential implicit holding than the second and third possibilities, while avoiding the first possibility's assumption of gross negligence by the court.

II. Toward a Uniform Academic Freedom Exception

The cases recognizing an academic freedom exception to *Garcetti* rest on somewhat discordant assumptions and offer only partial explanations of its theoretical underpinnings. The next part of this article aims to solidify the exception by offering a definitive statement of its function, scope, and theoretical foundation.

A. How Does the Academic Freedom Exception Operate?

Although the courts that recognize an academic freedom exception agree that it restores *Pickering* analysis where it applies, none has offered a theoretical account of how the exception achieves this effect. There are at least three ways in which an academic freedom exception could operate to exempt certain speech pursuant to official duties from *Garcetti*'s denial of First Amendment protection. (For convenience, assume that all speech discussed in this section addresses a matter of public concern.)

First, the academic freedom exception might operate by preventing speech that would otherwise be government speech from being such. The exception would do this by rendering *Garcetti*'s phrase "speech pursuant to official duties" a term of art meaning "government speech." Speech within the exception, though "pursuant to official duties" in a literal sense, is not government speech. It is therefore exempt from *Garcetti*'s rule. On this understanding, standard public employee *Pickering* analysis would apply because no other speech doctrine competes for simultaneous application. Government speech doctrine is simply not applicable.

The Fourth Circuit appears to have embraced this approach in *Adams*.[71] There, the court held that Adams' out-of-classroom speech, though pursuant to his broad employment duties in a literal sense, was not speech "'pursuant to [his] official duties' as intended by *Garcetti*" because the message was not directly attributable to the government.[72] Thus, the Fourth Circuit implicitly held that *Garcetti* used that phrase as a synonym for government speech and that Adams' speech was not that.

Second, the academic freedom exception might make academic speech hybrid government-citizen speech. If so, then unlike other public employee speech created pursuant to official duties, the speech of public university professors pursuant to their official duties retains some attributes of speech "as citizen." Thus, the government is not categorically "entitled to say what it wishes"[73] through its professor employees because, unlike in the ordinary government speech case, the speaker has some ownership of the contested speech, even though it was expressed pursuant to official duties. That partial citizen ownership creates a competing First Amendment interest not present in other government speech cases. On this understanding, courts would have to apply some sort of balancing test (but not necessarily *Pickering*'s) to weigh the competing interests. A test different than *Pickering*'s final step of balancing the citizen and government interests is necessary if *Pickering*'s formulation of the government interest—"promoting the efficiency of the public services it performs through its employees"—does not fully include the government's broader interest in conveying any permissible message as speaker.[74] If so, the likely result would be a new balancing test that weakens standard government speech doctrine and is more deferential to government than *Pickering* balancing because it adds an extra interest to the government side of the balance.[75]

Third, the academic freedom exception might cause both government speech and citizen speech labels to attach to the contested expression as in the second possibility, but with a different result. Instead of requiring courts to merge government and public employee speech doctrines into a more government-friendly *Pickering* balancing test, the partial citizen character of academic speech might exempt it entirely from government speech analysis. Because the cases that establish the absolute rule of government speech doctrine presuppose that the speech is wholly attributable to government, this approach would consider the doctrine wholly inapplicable to speech that is not wholly attributable to government.[76] On this theory, speech that fits within the academic freedom exception is, by virtue of its dual speakers, entirely exempt from *Garcetti*'s extension of government speech doctrine. No obstruction to ordinary *Pickering* analysis would remain for this subset of government speech.

69 *Adams*, 640 F.3d 550.

70 *See supra* Section I.B.1.

71 *Id.*

72 *Adams*, 640 F.3d at 564.

73 *Rosenberger*, 515 U.S. at 833.

74 *Pickering*, 391 U.S. at 568.

75 *But see* Joseph J. Martins, *Tipping the* Pickering *Balance: A Proposal for Heightened First Amendment Protection for the Teaching and Scholarship of Public University Professors*, 25 Cornell J.L. & Pub. Pol'y 649, 651 (2016) (arguing for a modified *Pickering* analysis that is more favorable to public university professors than other public employees).

76 *Cf. Garcetti*, 547 U.S. at 411 ("[T]he controlling factor is that Ceballos' expressions were made pursuant to his official duties. . . . He did not act as a citizen by writing it.").

The government's interest in conveying its message undistorted becomes relevant only to the extent that distortion interferes with the speaker's performance of daily duties or with the operation of the university. Thus, the government speech aspects of the challenged expression are not necessarily wholly ignored, but subsumed into the ordinary *Pickering* analysis, where they can be analyzed with nuance.

The Sixth Circuit in *Meriwether* and the Ninth Circuit in *Demers* have implicitly endorsed possibility three by finding the challenged speech to be "pursuant to official duties" (and therefore government speech per *Garcetti*), but holding that the academic freedom exception nonetheless requires courts to proceed with unmodified *Pickering* analysis.[77]

The third theoretical framework for the academic freedom exception also conforms closest with *Garcetti*'s logic and fits neatly with the relevant language in *Pickering*. First, *Garcetti* itself casts doubt on the first possibility by suggesting that speech within an academic freedom exception would still be government speech. Justice Souter's dissent, which led directly to the majority's allusion to an academic freedom exception to its decision, objected not to the characterization of Ceballos's speech as government speech, but to the conclusion that all such speech is "the government's own speech and should thus be differentiated as a matter of law from the personal statements the First Amendments protects."[78] Justice Souter's argument is not, as possibility one would have it, that the speech is not government speech, but that it is both government and citizen speech.

Assuming that the first approach gets it wrong and academic speech by public university professors is at least partially government speech, the question is what to do with hybrid speech. Courts could create a new test (as described in formulation two), or they could apply the existing *Pickering* balancing test after confirming that the speech was on a matter of public concern (as described in formulation three). Because *Garcetti* creates an exception to the ordinary rule that courts should apply *Pickering* to public employee free speech challenges,[79] the effect of the academic freedom exception to *Garcetti*'s exception should be to restore that ordinary rule by negating the first exception. Moreover, as a practical matter, if the government interest prong of *Pickering*'s balancing test fully considers the government's legitimate interests in controlling hybrid expression, then there is no reason to create another test. Using an existing test would promote clarity by applying well-established concepts rather than contribute to doctrinal clutter with yet another balancing test.

In the context of speech by public university professors, *Pickering* fully accounts for all government interests in challenged speech. Recall that the relevant government interest under *Pickering* is in "promoting the efficiency of the public services it performs through its employees,"[80] and that the government's interest in government speech is to convey its message undistorted.[81] In public university settings, *Pickering*'s efficient public services rationale requires courts to consider the effect that distortion of a government message would have on teaching, research, and general university operations (all public services that government provides through state-funded universities). In some contexts where the government has great need to speak clearly, such as disciplinary hearings and administrative meetings, government speech interests would often be decisive. But in other contexts, such as most in-classroom speech, where the government's interest in absolutely controlling the message is less pressing, citizen speech interests are more likely to prevail. Thus, standard *Pickering* balancing weighs the government speech interests that the *Garcetti* Court identified in academic speech. That weighing obviates any need for a new hybrid government-citizen speech test. So the Sixth and Ninth Circuits found the best way to construe the academic freedom exception's effect. Where it applies, the academic freedom exception requires courts to apply unmodified *Pickering* analysis to speech that is "pursuant to official duties" under *Garcetti*. The Fourth Circuit should consider revising its reasoning to conform to this logic in an appropriate case.

B. How Broad Is the Academic Freedom Exception?

No Supreme Court or circuit-level case defines the academic freedom exception's full scope of application. The question remains open: how closely "related to scholarship or teaching" must be speech pursuant to a public university professor's "official duties" to retain First Amendment protection? In *Meriwether*, the Sixth Circuit offers some guidance with its holding that "the academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not," whereas speech pursuant to a "non-ideological ministerial task," such as a roll call, "falls outside the exception."[82] The Sixth Circuit correctly points to the "matter of public concern" factor as the decisive issue, but its holding is limited to classroom speech. This section demonstrates that the academic freedom exception applies to all public university professors' speech on matters of public concern, regardless of the setting in which the speech occurs.

77 *See Meriwether*, 992 F.3d at 505 ("Simply put, professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship."). If such speech were not pursuant to official duties (and therefore not government speech), there would be no need to hold that speakers "retain" First Amendment rights. *Demers*, 746 F.3d at 411 ("Demers presents the kind of case that worried Justice Souter. Under *Garcetti*, statements made by public employees 'pursuant to their official duties' are not protected by the First Amendment. But teaching and academic writing are at the core of the official duties of teachers and professors.") (internal citation omitted).

78 *Garcetti*, 547 U.S. at 436 (Souter, J., dissenting).

79 *See* Strasser, *supra* note 9, at 596.

80 *Pickering*, 391 U.S. at 568.

81 *Rosenberger*, 515 U.S. at 833 (citing Rust v. Sullivan, 500 U.S. 173, 194, 196–200 (1991)) ("We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.").

82 *Meriwether*, 992 F.3d at 507.

1. *Garcetti*'s Phrase "Related to Scholarship or Teaching" Means the Same as *Pickering*'s "On a Matter of Public Concern"

Garcetti's allusion to an exception for public university professors' speech "related to scholarship or teaching" has led to at least one academic attempt to define the exception's scope by first defining the words "scholarship" and "teaching" and then construing the exception's scope as covering speech that fits the definition of one of those terms.[83] But that approach gives no effect to the words "related to" and thus threatens to unduly restrict the exception's scope. The Ninth Circuit came closer to the mark when it explained that "protected academic writing is not confined to scholarship" and extended First Amendment protection to a professor's plan for revamping his department, which the court found to address a matter of public concern.[84]

To understand the academic freedom exception's scope, one must understand the purpose of protecting speech "related to scholarship or teaching" from retaliation. That purpose is to promote the free exchange of ideas.[85] The critical role that public universities play in the market of ideas explains the Supreme Court's longstanding recognition of "expansive freedoms of speech and thought associated with the university environment," and it explains why "universities occupy a special niche in our constitutional tradition."[86] Teaching and scholarship are protected because they promote the free exchange of ideas.[87] Therefore, other forms of professor speech that support the free exchange of ideas are "related to scholarship or teaching" in the sense necessary to warrant First Amendment protection.[88]

In *Meriwether*, the Sixth Circuit marked the trail to recognizing that all public university professors' speech on matters of public concern promotes the free exchange of ideas, and is therefore closely enough "related to scholarship or teaching" to qualify for the academic freedom exception. Recall the holding that "the academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not."[89] Although the court limited its holding to classroom speech (the only category of speech at issue in the case), it made clear that lack of germaneness to what is being taught cannot disqualify speech on matters of public concern from First Amendment protection under the academic freedom exception. That suggests that the setting in which professors' speech occurs is irrelevant to determining whether the academic freedom exception applies; if the speaker is a professor and the subject is a matter of public concern, the venue does not render the speech unrelated to scholarship or teaching.

The setting in which speech occurs cannot affect the determination of whether a protectable First Amendment interest exists, that is, whether the speech furthers the free exchange of ideas. When the speech is on a matter of public concern, it furthers the free exchange of ideas, regardless of where it is spoken. All speech on matters of public concern furthers the free exchange of ideas to some degree because such speech expresses ideas that society has an interest in receiving. Consider the example of professor speech in a student disciplinary hearing. The hearing may be closed to the public and attended only by people who already have access to the ideas conveyed. Nonetheless, a professor's raising an idea of public concern causes those present to confront the idea and increases the likelihood that they will discuss the idea with others. Thus, even in this most restricted environment, the speech marginally advances society's interest in freely receiving important ideas.[90] The venue may affect *how much* the speech serves society's interest in the free exchange of ideas, but it cannot eliminate the interest.

Thus, all professor speech on matters of public concern is "related to scholarship or teaching" in the sense necessary to qualify for the academic freedom exception. In contrast, speech on matters of private concern, by definition, never serve society's interest in the free exchange of ideas.[91] Therefore, the academic freedom exception does not prevent *Garcetti* from denying First Amendment protection to professor speech on matters of private concern spoken pursuant to official duties.

2. An Academic Freedom Exception Defined and Operated In This Way Would Not Invite Meritless Litigation

Defining the academic freedom exception this way—that is, without reference to where the professor speaks—would not place significantly greater limits on university control of professor speech than would an exception that only protects speech in certain venues. A court that applies the exception simply analyzes the professor's free speech claim under *Pickering*—which balances free speech interests against government interests—rather than discounting the free speech interest under *Garcetti*. In the *Pickering* analysis, venue is relevant to the government's interest in ensuring efficient performance of professors' day-to-day duties and university functioning. If a professor loudly presents a new scientific theory in a student disciplinary hearing thereby disrupting scheduled proceedings, the government's interest in regulating that speech would almost certainly outweigh the professor's interest in speaking. Applying the academic freedom

83 Carol N. Tran, Comment, *Recognizing an Academic Freedom Exception to the* Garcetti *Limitation on the First Amendment Right to Free Speech*, 45 Akron L. Rev. 945, 973–82 (2012).

84 *Demers*, 746 F.3d at 416.

85 *See Meriwether*, 992 F.3d at 507 (extending the academic freedom exception to non-teaching classroom speech because of "[t]he need for the free exchange of ideas in the college classroom"). *See* Lane v. Franks, 573 U.S. 228, 235–36 (2014) ("Speech by citizens on matters of public concern lies at the heart of the First Amendment, which 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people,'") (citing Roth v. United States, 354 U.S. 476, 484 (1957)).

86 *Grutter*, 539 U.S. at 329.

87 *See Meriwether*, 992 F.3d at 507.

88 *See id.*

89 *Id.*

90 Bradley v. W. Chester Univ. of Penn. State Sys. of Higher Educ., 880 F.3d 643, 653 (3d Cir. 2018) (indicating that speech at a public university committee meeting that was closed to the public could receive First Amendment protection).

91 *Connick*, 461 U.S. at 146 (explaining that speech is on a matter of private concern only when the "expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community").

exception to that professor's speech would mean only that the professor has some First Amendment interest, if only a shred, that the court must weigh against the government's regulatory interest before upholding the regulation. Likely losers remain likely losers.

Among circuits that have not yet addressed the academic freedom exception, adopting a broad understanding of it would have little effect on the number and outcome of public university professors' First Amendment retaliation claims. In no-exception jurisdictions,[92] professors can bring these claims and simply argue that their speech was not "pursuant to official duties" as intended by *Garcetti*. Those courts would likely engage in *Pickering* balancing dressed in different terms.[93] Thus, if no-exception jurisdictions adopt a broad exception, the likely outcome of most cases remains the same. The main practical difference is that courts would reach results through more candid, clearer analyses. Because cases that would be likely losers under *Garcetti* in a narrow-exception or no-exception jurisdiction would remain losers under *Pickering* in a broad-exception jurisdiction, recognizing a broad exception would not significantly encourage First Amendment retaliation suits.

C. A Theoretical Foundation for the Academic Freedom Exception

Thus far, this article has argued that an academic freedom exception that preserves *Pickering*'s application to all public university professor speech on matters of public concern is workable and coherent, in that it serves the societal interests that the First Amendment seeks to protect. This section argues further that a broadly defined academic freedom exception survives the layering-on of government speech doctrine that *Garcetti* requires. Applying government speech doctrine to public university professors indicates that there is an academic freedom exception to *Garcetti*'s rule. It does not, however, define the exception's proportions.

1. Public University Professors' Speech on Matters of Public Concern is Different from Other Forms of Government Speech

To understand the concept of an exception to *Garcetti*, one must begin by reexamining the logic of *Garcetti*'s holding. At bottom, it is a government speech case. It reasons that speech pursuant to official duties is attributable to the government exclusively, not at all to the citizen-employee, because the speech "owes its existence to a public employee's professional responsibilities."[94] The employee transmits the speech as a government mouthpiece, not a citizen speaker. This conceptualization has three major consequences. First, because the citizen has not spoken, the citizen has no interest in the speech for the First Amendment to protect. Thus, restricting the speech "does not infringe any liberties the employee might have enjoyed as a private citizen."[95] Second, because the speech is government speech, the doctrine that the government-as-speaker "is entitled to say what it wishes" applies.[96] Third, because official communications must be accurate and "promote the employer's mission," the employer has "authority to take proper corrective action"[97] when the employee-speaker does not promote the employer's mission. Each of these principles alone provides a sufficient reason for courts to inquire no further before upholding regulation of speech pursuant to public employees' official duties because the regulation "simply reflects the exercise of employer control over what the employer itself has commissioned or created."[98]

This reasoning applies to all public employee speech pursuant to official duties except that of public university professors on matters of public concern. In all other contexts, when the government creates a job that requires the employee to speak, the government employer reserves an absolute right to determine whether speech, once spoken, "promote[d] the employer's mission."[99] That right includes power to control the message the public employee conveys by punishing the employee who contradicts that mission.[100] In *Garcetti*, for example, Ceballos's supervisors in the Los Angeles County District Attorney's Office had not surrendered the right to determine whether Ceballos's memo advanced the office's mission. Thus, the Court found no reason "to prohibit his supervisors from evaluating his performance."[101]

But only when the government creates a university and hires professors to offer ideas is the government's mission to speak some ideas it knows it may later regret having spoken. Put differently, when the government creates a university, its mission is to create a marketplace of ideas that includes ideas the government disapproves of.[102] By creating a marketplace anyway,

92 At the time of writing, no circuit court has held that no academic freedom exception to *Garcetti* exists.

93 *See Adams*, 640 F.3d 550 (openly considering speaker's academic freedom interests to decide that challenged speech was not pursuant to official duties). *See also Garcetti*, 547 U.S. at 424–25 (practically admitting that the "official duties" determination is a free-form inquiry by stating, "The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.").

94 *Garcetti*, 547 U.S. at 411, 421–22 (citing *Rosenberger,* 515 U.S. at 833) ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.").

95 *Id.*

96 *Rosenberger*, 515 U.S. at 833.

97 *Garcetti*, 547 U.S. at 423.

98 *Id.* at 422.

99 *Id.* at 423.

100 *See id.* ("If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.").

101 *Id.*

102 *Cf.* Land-Grant College Act of 1862, 7 U.S.C. § 304 (granting land to states for "the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life"). All speech by professors at land-grant colleges that promotes education of "the industrial classes" therefore achieves the government's mission.

the government transfers to its professors (the proprietors in that marketplace) some of the government's right to determine the content of the government speech on offer. The government's act of commissioning the professor to transmit, in its name, messages of which it expects to disapprove retrospectively, is a delegation to the professor of some role in determining what the government wishes to say.

This delegation of control does not result merely from leaving the individual to choose the specific content of the speech. A government employer might have said, as it did to Ceballos, "you shall speak words of your choice that shall please us." Instead, in the delegation to professors, the government pre-commits itself to speaking ideas through these specific employees regardless of whether the government approves of the ideas. Thus, in the public university professor context only, the government exercises its absolute right "to say what it wishes"[103] by alienating its power to control its message.

When the government regrets the speech it commissions public university professors to transmit, and then responds by retaliating against the professor, the government cannot truthfully allege that the speaker distorted the message that the government commissioned the professor to transmit. So long as the professor offered an idea to the marketplace, the professor said what the government wished to say. The government pre-committed itself to speaking whatever the professor said. The government's choice to delegate some control to professors likely stems from its belief, first, that society has a long-term interest in the free exchange of ideas, and second, that the government is likely to act contrary to this long-term societal interest every time the government feels a less important, but more acute, contrary interest (such as the desire to suppress criticism).

Whatever the reasons for delegating control, the act of delegation has two consequences that cause public university professor speech to fall outside the logic of *Garcetti* and into an academic freedom exception. First, delegation prevents the resulting speech from being attributable exclusively to government. Second, delegation divides the government's interest in "say[ing] what it wishes" against itself.

a. Public University Professors' Speech is Attributable to Both the Government and the Government Employee-Speaker

The government delegates some of its right to control its message to public university professors when it commissions professors as idea-proprietors. That delegated control gives professors a role in determining not only what the government *does* say (as Ceballos did), but also what the government *wishes* to say. That role, however small, is enough to make speech pursuant to the professor's official duties partially attributable to the professor who voiced or wrote it, not attributable only to the government as in the typical public employee speech case. When the government shares its right to control its message, it also shares its ownership of the message.

This distinction makes *Garcetti*'s logic inapplicable to public university professors' speech on matters of public concern. *Garcetti* relies (at least in part) on the premise that such speech, if pursuant to the professor's official duties, is exclusively attributable to the government. Because the government is the only speaker and the government has an undivided interest in controlling its message, the complainant has no competing right of control to weigh against it. Thus, *Garcetti*'s categorical "government may control" rule is appropriate. But public university professors' speech on matters of public concern is partially attributable to the government, and partially attributable to professors themselves. So, contrary to *Garcetti*'s analysis of a prosecutor's speech, the public university professor speaks "as a citizen" distinct from the government, not just "as a government employee."[104] The speech that the government seeks to control therefore implicates a First Amendment interest, belonging to the professor as citizen-speaker, in controlling the speech that the professor has some ownership stake in. The presence of two legitimate claims to a right to control means that courts cannot apply *Garcetti*'s categorical "government may control" rule without ignoring a citizen's cognizable First Amendment interest. The academic freedom exception that *Garcetti* hinted at offers a way to protect this interest without depriving the government of its interest in controlling employee speech. That virtue alone may be a sufficient theoretical justification for recognizing an academic freedom exception that provides some First Amendment protection to public university professors' speech.

b. Public University Professors' Speech Divides the Government's Interest in "Say[ing] What it Wishes"

Nevertheless, *Rosenberger v. Rector* makes clear that government, when it speaks, "is entitled to say what it wishes."[105] If this dictum applies even when a citizen is a co-speaker with the government, then a public university professor's part-ownership of speech pursuant to official duties does not exempt the speech from *Garcetti*'s logic. Although the professor has an interest in controlling the speech, so does the government, and the government may say what it wishes whenever it acts as speaker—no First Amendment inquiry necessary. But even if this logic is sound, another aspect of public university professors' speech on matters of public concern preserves its First Amendment protection: the speech splits the government's "wishes" for its message into two opposing parts.

When it establishes public universities as idea-marketplaces and hires professors as proprietors in those marketplaces, government sets out to produce speech it cannot control. When a professor speaks pursuant to official duties, the government also speaks. When the government regrets having commissioned this speech and retaliates against a professor, it engages in a second speech act (expressing displeasure) that opposes its earlier speech (the professor's speech commissioned by the government).

In other public employee speech cases, by contrast, both the employee's initial expression and the government employer's later expression of displeasure comprise a single speech act. The expressions are a single act because the second expression completes the first by making the whole conform to the message the government wished to convey from the outset. Consider how

103 *Rosenberger*, 515 U.S. at 833.

104 *Garcetti*, 547 U.S. at 422.

105 *Rosenberger*, 515 U.S. at 833.

this worked in Ceballos's situation. Ceballos's memo conveyed to his superiors and the defense attorney that the government doubted the veracity of the affidavit on which prosecution was based.[106] But the government had not commissioned Ceballos to convey this message. The expression was not the speech that the government commissioned until the government corrected and completed it by the expressive acts of reassigning, transferring, and not promoting Ceballos.[107] Once completed, it was clear to onlookers that the government never commissioned Ceballos's uncorrected speech in the first place, and therefore the uncorrected speech never was an act of government speech at all.

In public university professor speech cases though, the initial expression is a complete government speech act in itself. Recall that in such cases, the government affirms in advance that it wishes to convey the message its professor-employee speaks. Thus, the speech, when it occurs, is necessarily an accurate expression of the government's wish. A subsequent expression of displeasure is therefore a separate expression of regret for having spoken earlier. Thus, even if the government "is entitled to say what it wishes" when the speech has a citizen co-owner, that entitlement would not settle public university professor retaliation claims because these claims (and only these claims) present two conflicting exercises of the government's entitlement to control its speech.

The question for courts in such cases is thus whether the First Amendment allows the government to punish a faithful transmitter of its own message. Government speech doctrine's response that the government "is entitled to say what it wishes" does not settle that question. Thus, *Garcetti*'s extension of government speech doctrine to public employee speech pursuant to official duties should not deny First Amendment protection to speech by public university professors on matters of public concern. This second unique result of the governmental pre-commitment to speaking through its professors completes the theoretical foundation for recognizing an academic freedom exception to *Garcetti* applicable to all public university professor speech on matters of public concern.

2. The Relevance of Third-Party Interests

The *Garcetti* opinion does not reveal what constitutional significance, if any, third-party interests have for regulating speech pursuant to official duties. The majority discusses the importance of "the public's interest in receiving informed opinion" as a "First Amendment interest[]," [108] but seemingly limits the relevance of such "societal interests" to cases "when employees *speak as citizens* on matters of public concern."[109] Do societal interests play any role when employees speak pursuant to official duties on matters of public concern? *Garcetti* gives no explicit answer, but its failure to account for such interests when analyzing Ceballos' claim suggests the answer is "no."[110] The *Garcetti* Court asked whether the contested speech was government speech or citizen speech before asking whether it was on a matter public concern, and it held that a "government speech" answer ends the inquiry.[111] The Court thus never reached the "public concern" question, which would have determined whether third-party interests were present and relevant.[112] This section argues that, under the best reading of *Garcetti* and other government speech cases, third-party interests are irrelevant to determining whether particular speech "pursuant to official duties" is entitled to First Amendment protection.

In *Meriwether*, the Sixth Circuit's holding implied that third-party interests are of critical significance for determining when the First Amendment protects government employee speech pursuant to official duties.[113] The court held that "the academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern" because "in the college classroom there are three critical interests at stake (all supporting robust speech protection): (1) the students' interest in receiving informed opinion, (2) the professor's right to disseminate his own opinion, and (3) the public's interest in exposing our future leaders to different viewpoints."[114] On further examination though, this observation cannot exempt such speech from the *Garcetti* rule without swallowing *Garcetti* entirely.

Garcetti held that a public employee speaking pursuant to official duties is not really speaking at all.[115] Instead, the government is speaking, and the employee is a mere transmitting device like a bullhorn or ventriloquist dummy. Because the employee is not the speaker, the employee has no protected interest in determining the content of the speech. Thus, according to the strict logic of *Garcetti*—and without the theoretical distinction of professors from other government employees detailed above—the second of the "critical interests" that the Sixth Circuit identified does not exist.

Even so, the "critical interests" of students and the public in university classroom speech remain valid.[116] These third-party interests are significant because they remain to oppose the government's interest in regulating the speech even after *Garcetti*'s rule invalidates the professor's interest as speaker. Arguably, when the government is not the only party with an interest in challenged speech, the First Amendment requires courts to balance the competing interests, even if those interests are not the speaker's. If so, then *Garcetti*'s per se approach of upholding regulations of speech pursuant to official duties would be unconstitutional as applied to all speech that creates third-party interests; challenges

106 *See Garcetti*, 547 U.S. at 414.

107 *Id.* at 414-15.

108 *Id.* at 419.

109 *Id.* at 420 (emphasis added) (internal citation omitted).

110 *See id.* at 420–25.

111 *Id.*

112 *Id.*

113 *See Meriwether*, 992 F.3d at 507 (discussing third party interests).

114 *Id.* (citing *Lane*, 573 U.S. at 236 and *Sweezy*, 354 U.S. at 250 (plurality opinion)).

115 *Garcetti*, 547 U.S. at 421 (citing *Rosenberger*, 515 U.S. at 833 ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes")).

116 *See Lane*, 573 U.S. at 236 ("There is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees. . . . 'The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.'") (quoting San Diego v. Roe, 543 U.S. 77, 82 (2004) (per curiam)).

to such regulations would instead require courts to balance government and third-party interests—an exception to the categorical *Garcetti* rule.

But if that assessment were correct, then *Garcetti* could not constitutionally apply to any public employee speech on a matter of public concern, because all speech on matters of public concern creates a third-party interest—that of the public in receiving the information or opinion expressed.[117] The court would therefore have to balance that interest against the government's regulatory interest rather than deny the speech First Amendment protection under *Garcetti*. That result would swallow the *Garcetti* rule by causing it to do nothing but, in some instances, add a superfluous reason (in addition to *Pickering*'s public versus private concern inquiry) to allow the government to regulate its employees' speech on matters of private concern. That consequence does not mean that the preceding paragraph's analysis is certainly wrong. It might be that the First Amendment requires that the exception *Garcetti* alluded to be a "public concern" exception much broader than the "academic freedom" exception that the Court anticipated.[118]

Moreover, the distinction that classroom speech on matters of public concern necessarily implicates two third-party interests (of students and the public at large) while other speech on matters of public concern may implicate only one (of the public) probably does not make a constitutional difference. The Constitution might allow *Garcetti*'s rule to deny protection to speech that gives rise to only one, but not two, third-party interests on the premise that one third-party interest in receiving speech can never, by itself, outweigh the government's interest in controlling its speech, but adding a second third-party interest might overcome the government's interest in a *Pickering* analysis.[119] But it would be strange for the Constitution to allow courts to treat weak constitutional interests as if they were not constitutional interests at all.

The more likely constitutional underpinning of *Garcetti* is that when the government speaks, "it is entitled to say what it wishes,"[120] even when other parties have protectable interests in the speech.[121] If so, then the existence of two third-party interests in all classroom speech on matters of public concern does not meaningfully distinguish that speech from all other speech on matters of public concern, which always creates one, but not necessarily two, third-party interests. Thus, the Sixth Circuit's assertion that the presence of "three critical interests at stake" is what makes professor classroom speech constitutionally "anything but speech by an ordinary government employee"[122] is almost certainly incorrect. Instead, public university professor speech on matters of public concern is constitutionally different from all other types of public employee speech because the professor retains a citizen's interest in the speech and the government's wish for the content of that speech is divided against itself.[123] These unique aspects of professor-employee speech on matters of public concern make the *Garcetti* rule inapplicable to that speech.[124] Neither the classroom setting nor third-party interests affect *whether* the First Amendment protects speech (a *Garcetti* question), but both may greatly affect *how* the First Amendment protects speech to which it applies (a *Pickering* question).

III. Conclusion: Applying the Academic Freedom Exception

How should a court proceed when a professor brings a First Amendment retaliation claim? Because the *Garcetti* rule denying First Amendment protection to public employee speech pursuant to official duties is itself an exception to ordinary public employee speech analysis under *Pickering*, the first analytical step is to determine whether the professor spoke pursuant to official duties. However, the academic freedom exception to the *Garcetti* rule makes this first step unnecessary because it causes the "official duties" question to have no bearing on the ultimate outcome of the case. To understand why, consider the table at the top of the next page.

The table makes plain that a court will always arrive at the right answer if it skips the "official duties" question altogether and instead begins with the "matter of public concern" question that it would have begun with under *Pickering* had *Garcetti* never been decided. This is the consequence of the *Garcetti* rule's being a mere barrier to standard *Pickering* analysis. Recall that if a professor has a First Amendment claim (either because *Garcetti* doesn't apply or because both *Garcetti* and the academic freedom exception to *Garcetti* apply), the court applies *Pickering* analysis, asking first whether the speech is on a matter of public concern. When the answer is "no," the speech regulation is upheld. It is inconsequential why the regulation is valid, that is, whether *Garcetti* deprived the speech of all First Amendment protection, or the speech can be regulated even after receiving the First Amendment protection it is due under *Pickering*. Accordingly, whether the speech on a matter of private concern was pursuant to official duties so as to trigger *Garcetti* makes no practical difference.

When the speech is on a matter of public concern, the question of whether that speech was pursuant to official duties so as to trigger *Garcetti* remains inconsequential. If the speech on a matter of public concern was pursuant to official duties, then the academic freedom exception cancels the *Garcetti* rule, leaving the court to apply *Pickering* analysis. If the speech was not pursuant to official duties, then *Garcetti* does not stand in the way, leaving the court to apply *Pickering* analysis.

117 *Supra* text accompanying note 114.

118 But if the Constitution does require a "public concern" exception to *Garcetti*, then it was probably unconstitutional for the *Garcetti* Court to apply its categorical rule in that case, because the government misconduct Ceballos spoke about was almost certainly a matter of public concern that society had a First Amendment interest in receiving. *See Garcetti*, 547 U.S. at 425 ("Exposing governmental inefficiency and misconduct is a matter of considerable significance.").

119 This rationale would be an extension of *Garcetti*, which did not directly address the importance of third-party interests to the case at hand, even though a third-party interest belonging to the public was almost certainly present in the *Garcetti* case. *See supra* Section I.A.

120 *Rosenberger,* 515 U.S. at 833.

121 This rationale would be an extension of *Rosenberger*.

122 *Meriwether*, 992 F.3d at 507.

123 *Supra* Section II.C.1.b.

124 *Id.*

Characteristics of the Challenged Speech		Intermediate Analysis	Outcome-Determinative Analysis
Pursuant to official duties	matter of public concern	*Garcetti* is triggered, "academic freedom exception" applies	Apply *Pickering* balancing
Not pursuant to official duties	matter of public concern	*Garcetti* does not apply	Apply *Pickering* balancing
Pursuant to official duties	matter of private concern	*Garcetti* applies	No First Amendment protection for professor, speech regulation upheld*
Not pursuant to official duties	matter of private concern	*Garcetti* does not apply	Apply *Pickering*, speech regulation upheld at step one
* Note that if *Garcetti* did not apply, *Pickering* would, and the outcome would not change because *Pickering* step one would allow the speech regulation to stand.			

Garcetti, properly understood, has no effect on public university professor free speech claims. In this sui generis area, the law stands as if *Garcetti* were never decided, except that *Garcetti* creates a superfluous analytical reason for upholding restrictions of speech pursuant to official duties on matters of private concern. In the end, the Fifth Circuit appears to have gotten it right by giving *Garcetti* the silent treatment in *Buchanan*:[125] the best way to apply *Garcetti* to public university professor speech cases is to ignore *Garcetti* completely when analyzing them.

125 *Buchanan*, 919 F.3d 847.

The Gordian Knot of Abortion Jurisprudence

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Other Views:

• Steven Mazie & Melissa Murray, *How the Supreme Court could decimate reproductive rights without overruling Roe*, Washington Post, July 23, 2021, https://www.washingtonpost.com/opinions/2021/07/23/how-supreme-court-could-decimate-reproductive-rights-without-overruling-roe/.

• David French & Sarah Isgur, *Swinging for the Fences on Abortion*, Advisory Opinions Podcast, July 26, 2021, https://advisoryopinions.thedispatch.com/p/swinging-for-the-fences-on-abortion.

• Evan Gerstman, *No, The Supreme Court Is Not About To Overrule Roe v. Wade*, Forbes, May 18, 2021, https://www.forbes.com/sites/evangerstmann/2021/05/18/no-the-supreme-court-is-not-about-to-overrule-roe-v-wade/?sh=635b4a5d22b9.

• David Lat, *Notice And Comment: The Supreme Court's Abortion Showdown*, Original Jurisdiction, May 20, 2021, https://davidlat.substack.com/p/notice-and-comment-the-supreme-courts.

On December 1, the Supreme Court will hear argument in *Dobbs v. Jackson Women's Health Organization*. The Court originally granted certiorari on a relatively narrow question: "Whether all pre-viability prohibitions on elective abortions are unconstitutional." But Petitioners, Respondents, and the United States all argue in their merits briefs that the Court must either reaffirm or overturn *Roe* and *Casey*. As the abortion clinic stated, "There are no half-measures here."

The parties are right. The courts of appeals are widely fractured on several important issues around abortion regulations—a fracture caused by the Supreme Court's own internal disagreements. The current abortion regime (which is now in something like its third iteration) is dominated by two *minority* opinions: a three-Justice plurality opinion in *Planned Parenthood v. Casey*, and a one-Justice concurrence in *June Medical v. Russo*. And both minority opinions purported to interpret, but essentially discarded, prior majority decisions: *Casey* purported to reaffirm, but in fact replaced *Roe v. Wade*. And *June Medical* purported to apply, but in fact rejected *Whole Woman's Health v. Hellerstedt*.

Any "half measure" in *Dobbs* will both upset any existing jurisprudence it purports to save and create more circuit confusion going forward. And heaven help us all if it comes in the form of a plurality opinion.

I. The Past: An Evolving Standard

A. Roe v. Wade*: The Trimester System*

The Supreme Court nationalized and constitutionalized abortion regulations in 1973 in *Roe v. Wade*. *Roe* created a strict trimester-based regime: a state could not ban or regulate abortion in the first trimester; it could *not* ban but *could* regulate abortion in the second trimester (but only to advance maternal health); and it could ban or regulate abortion in the third trimester.[1]

B. Planned Parenthood v. Casey*: No Bans or "Undue Burdens" on Previability Abortions*

After 19 years of complex litigation, public outcry, and advancements in fetal medicine, the Supreme Court decided to revisit its controversial decision. In 1992, in a remarkable show of hubris, the Court announced that it was going to "resolve the sort of intensely divisive controversy reflected in *Roe*" and "call[] the contending sides of a national controversy to end their national division."[2] As we all well know by now, Court did nothing of the sort.

Casey ostensibly reaffirmed the "central premise" of *Roe*, but it replaced the rigid trimester scheme with a more flexible (and amorphous) viability standard. According to the plurality, a state cannot ban previability abortions. But a state may regulate previability abortion access as long as the regulation does not

1 410 U.S. 113, 164-65 (1973).

2 Planned Parenthood v. Casey, 505 U.S. 833, 866-67 (1992).

create an "undue burden"—that is, as long as the regulation (1) is rationally related to a legitimate state interest, and (2) does not have the "purpose or effect" of placing a "substantial obstacle" in front of a woman seeking a previability abortion.[3]

C. Whole Women's Health v. Hellerstedt*: No Restrictions on Previability Abortions Where the Burdens Outweigh the Benefits*

States largely took the Supreme Court at its word, enacting regulations to promote the health and safety of women obtaining abortions. One set of regulations reached the Supreme Court in 2016, in *Whole Women's Health v. Hellerstedt*. *Hellerstedt* claimed to apply *Casey*'s undue burden standard. But the Court announced what looked like a new test: when determining whether a state regulation creates an undue burden on abortion access, the Court must weigh the regulation's benefits against the burden it imposes.[4] After all, the concept of an *undue* burden implies the existence of a *due* burden. Under that test, a court can enjoin an abortion restriction if, in its view, the restriction provides few or no benefits, *even if* it does not create a substantial obstacle to abortion access. Applying that standard, the Court enjoined Texas laws requiring abortion providers to have admitting privileges at a nearby hospital, and abortion clinics to meet the health and safety standards of surgical centers.

D. June Medical v. Russo*: Perhaps* Casey*, Perhaps* Hellerstedt

Four years after *Hellerstedt*, a nearly identical set of Louisiana laws came to the Court. A four-Justice plurality reasoned that the laws should be enjoined under *Hellerstedt*.[5] But Chief Justice John Roberts concurred only in the judgment, in an opinion that simultaneously applied and rejected *Hellerstedt*.

In section I of his concurrence, the Chief Justice explained that stare decisis compelled him to enjoin Louisiana's laws because they were virtually identical to the laws enjoined in *Hellerstedt*.[6] But in section II, the Chief Justice vigorously disputed *Hellerstedt*'s interpretation of *Casey* (or perhaps the *June Medical* plurality's interpretation of *Hellerstedt*). In his view, *Casey* directed courts to evaluate only whether a law creates an undue *burden* on abortion access—that is, a court may invalidate *only* those restrictions that create a "substantial obstacle" to abortion access, regardless of whether the court thinks the restriction creates a benefit. An amorphous balancing test "would result in nothing other than an 'unanalyzed exercise of judicial will' in the guise of a 'neutral utilitarian calculus.'"[7] Any balancing of benefits and burdens should be done by the legislature, not the courts.[8]

Casey's undue burden test was contentious from the beginning, criticized by both Justice Harry Blackmun (the author of *Roe*) in concurrence and Justice Antonin Scalia (writing for four Justices) in dissent.[9] Both Justices predicted that the undue burden standard would be arbitrary, easily manipulated, and difficult for the Court to administer. Both proved prophetic.

II. The Present: A Circuit Fracture on How to Read and Apply *June Medical*

In the sixteen months since *June Medical* was decided, the courts of appeals have largely agreed on two points. First, that a "ban" on previability abortions is presumptively unconstitutional, but a "regulation" is not. Second, that the Chief Justice's concurrence in *June Medical* is the controlling opinion, setting the standard for how to evaluate previability regulations.

But the courts of appeals are split on how to apply those two principles. Several states prohibit performing an abortion by a particular method or for a particular reason. The courts of appeals disagree about whether these restrictions are bans or regulations under *June Medical*. And as the courts analyze these and other regulations, they split further over which section of the Chief Justice's *June Medical* concurrence should guide their analysis—section I's invocation of stare decisis (which means that *Hellerstedt* is actually controlling) or section II's reaffirmation of the undue burden test (which means that *Casey*—however courts choose to read it—is controlling).[10] The result is less of a circuit split, and more of a circuit complex fracture.

A. Section I Controls, and Restrictions Are Bans

The Seventh and Eleventh Circuits treat only section I of Chief Justice Roberts' *June Medical* concurrence—the invocation of stare decisis—as controlling.[11] So in those circuits, the benefits-and-burdens balancing test from *Hellerstedt* is the standard for evaluating abortion regulations.[12]

3 *Id.* at 876-77. The decision to abandon the trimester framework invalidated all of the Court's pre-*Casey* precedents. For example, before *Casey*, a state could require abortion clinics to meet the same health and safety standards required of surgical centers and require second trimester abortions to be performed in licensed clinics. Simopoulos v. Virginia, 462 U.S. 506 (1983). But after *Casey*, such requirements were unconstitutional because "the second trimester includes time that is both previability and postviability," so cases like *Simopoulos* were unworkable. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2320 (2016). Any effort to modify *Casey*, *Hellerstedt*, or *June Medical* promises to create similar instability.

4 136 S. Ct. at 2309.

5 June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020).

6 *Id.* at 2133-35 (Roberts, C.J., concurring).

7 *Id.* at 2135-36 (quoting New Jersey v. T.L.O., 469 U.S. 325, 369 (1985) (Brennan, J., concurring in part and dissenting in part)). One might pause here and ask whether phrases like "undue burden" and "substantial obstacle"—or anything else in *Casey* for that matter—are the antidote to "unanalyzed exercise[s] of judicial will." The *Casey* plurality essentially announced that the undue burden standard was an act of judicial will from the beginning. The opinion stated at the outset that its "reasoned judgment" was "not susceptible of expression as a simple rule," not "reduced to any formula," and "cannot be determined by reference to any code," but must instead be developed from living tradition. *Casey*, 505 U.S. at 849-50 (plurality opinion) (quoting Poe v. Ullman, 367 U.S. 497, 542 (Harlan, J., dissenting)).

8 *June Med.*, 140 S. Ct. at 2135-36.

9 *Casey*, 505 U.S. at 930 (Blackmun, J., concurring); *id.* at 993-94 (Scalia, J., dissenting).

10 Even panels within the same circuit are split over the controlling test. See *infra* note 28.

11 Reprod. Health Servs. v. Strange, 3 F.4th 1240, 1259 n.6 (11th Cir. 2021); Planned Parenthood of Indiana & Kentucky, Inc. v. Box, 991 F.3d 740, 752 (7th Cir. 2021).

12 The Ninth Circuit read *Casey* as requiring a benefits-and-burdens analysis even before *Hellerstedt*. Planned Parenthood Arizona, Inc. v. Humble,

1. Anti-Eugenics Laws

The Seventh Circuit was the first court of appeals to consider an anti-eugenics law. Indiana forbids performing abortions sought because of the race, sex, or Down-syndrome diagnosis of the baby.[13] In 2018, the Seventh Circuit enjoined the statutes as presumptively unconstitutional bans on previability abortions.[14]

2. Parental Notification Laws

The Seventh Circuit was also among the first courts of appeals to address parental consent or parental notification laws in the *Hellerstedt* era of abortion jurisprudence. Indiana requires parental consent, or a judicial bypass of parental consent, before a minor can have an abortion.[15] But if the minor chooses judicial bypass, her parents must be notified before she has the abortion. The Seventh Circuit enjoined the notice requirement in a 2019 decision, adopting the benefits-and-burdens standard of *Hellerstedt*.[16] In the court's view, Indiana's notice requirement unduly burdened abortion access without providing any benefits.[17]

Last term, the Supreme Court vacated that opinion and remanded for reconsideration in light of *June Medical*.[18] On remand, the Seventh Circuit largely re-issued its original decision, continuing to adhere to the benefits-and-burdens test it saw as reaffirmed in section I of Chief Justice Roberts' *June Medical* concurrence.[19]

The Eleventh Circuit followed a similar route earlier this year. Like Indiana, Alabama requires parental consent or a judicial bypass before a minor can obtain an abortion.[20] But the judicial bypass procedure includes an evidentiary hearing that involves the local district attorney and a guardian ad litem for the unborn child (and the minor's parents if they were already aware of the proceeding).[21] And any party has a right to appeal the bypass decision.[22] The Eleventh Circuit evaluated the statute under the benefits-and-burdens test of *Hellerstedt* and *June Medical* section I and, like the Seventh Circuit, concluded that the law imposed a significant burden without any appreciable benefit.[23] But the court *immediately* stayed the panel's mandate.[24] Alabama's petition for en banc rehearing is pending, and the court ordered the challengers to respond.

B. Section II Controls, and Restrictions Are Regulations

The Fifth and Sixth Circuits see things differently, instead treating section II of the *June Medical* concurrence as binding.[25] So those courts evaluate abortion regulations under *Casey*'s undue burden rubric without balancing their benefits and burdens.

1. Anti-Eugenics Laws

Like Indiana, Ohio forbids performing abortions sought because of a Down-syndrome diagnosis.[26] The Sixth Circuit held that a prohibition on performing an abortion for a particular *reason* is a restriction—not a ban—and therefore subject to undue burden analysis.[27] The court concluded that anti-eugenics laws do not unduly burden abortion access (under either section of the *June Medical* concurrence), so Ohio was free to enforce its statute.[28]

2. Dismemberment Restrictions

Texas prohibits performing live dismemberment abortions unless there is a medical emergency.[29] The Fifth Circuit concluded that Texas's law is a restriction subject to an undue burden analysis under section II of the *June Medical* concurrence.[30] And the court held that a prohibition on a particular *method* of abortion is not a "substantial obstacle" to obtaining an abortion in general, so Texas can prohibit dismemberment abortions.[31]

Alabama and Kentucky also forbid live dismemberment abortions.[32] The Sixth and Eleventh Circuits agreed that those statutes are restrictions, not bans, but they held that the restrictions unduly burden abortion access under *Casey*.[33]

753 F.3d 905 (9th Cir. 2014).

13 Ind. Code Ann. §§ 16-34-4-5, -6, -7, -8, -9.

14 Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r of Indiana State Dep't of Health, 888 F.3d 300, 306-07 (7th Cir. 2018), *and cert. granted in part, judgment rev'd in part sub nom.* Box v. Planned Parenthood of Indiana & Kentucky, Inc., 139 S. Ct. 1780 (2019).

15 Ind. Code Ann. § 16-34-2-4.

16 Planned Parenthood of Indiana & Kentucky, Inc. v. Adams, 937 F.3d 973, 981 (7th Cir. 2019).

17 *Id.* at 984-90.

18 *See* Box v. Planned Parenthood of Ind. & Ky., Inc., 141 S. Ct. 187 (2020).

19 *Box*, 991 F.3d at 742.

20 Ala. Code § 26-21-3, -4.

21 *Id.*

22 *Id.*

23 *Reprod. Health Servs.*, 3 F.4th at 1261.

24 Reprod. Health Servs. v. Strange, No. 17-13561 (11th Cir. July 1, 2021) (order).

25 Whole Woman's Health v. Paxton, 10 F.4th 430, 440-441 (5th Cir. 2021) (en banc); Preterm-Cleveland v. McCloud, 994 F.3d 512, 525 (6th Cir. 2021) (en banc).

26 Ohio Rev. Code § 2919.10.

27 *Preterm-Cleveland*, 994 F.3d at 527-29.

28 A panel of the Sixth Circuit suggested that the *Preterm* rationale may not apply where the reason for the abortion is the race or sex of the baby, rather than a Down-syndrome diagnosis. Memphis Center for Reprod. Health v. Slatery, 14 F.4th 409, 435 (6th Cir. 2021). It is difficult to see how that could be true. Tennessee's petition for en banc rehearing is pending, and the court has directed the challengers to respond.

29 Tex. Health & Safety Code Ann. § 171.152.

30 *Paxton*, 10 F.4th at 453.

31 *Id.*

32 Ala. Code § 26-23G-2; Ky. Rev. Code § 311.787. States that ban *live* dismemberment abortions still permit dismemberment as long as the baby is first killed by some less gruesome, but equally fatal method.

33 W. Alabama Women's Ctr. v. Williamson, 900 F.3d 1310, 1324-28 (11th Cir. 2018); EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 960 F.3d 785, 797 (6th Cir. 2020). The district courts found that all of the two states' proposed methods for killing the baby were infeasible and unsafe: local abortionists evidently lacked the "great technical skill" required

C. Section II Controls, and Restrictions Are Bans

The Eighth Circuit landed in the middle. It agrees with the Fifth and Sixth Circuits that section II of the *June Medical* concurrence controls: previability abortion regulations are evaluated under the undue burden standard.[34]

Like Indiana, Arkansas and Missouri also forbid performing abortions sought because of a Down-syndrome diagnosis.[35] But the Eighth Circuit held in two cases that such reason-based restrictions amount to bans on previability abortions and are thus unconstitutional under *Casey*.[36] In *Little Rock Family Planning Services v. Rutledge*, Judges Bobby Shepherd and Ralph Erickson wrote separate concurrences arguing that the viability standard is not a workable rubric for evaluating antidiscrimination laws and urging the Supreme Court to reconsider it.[37]

The Eighth Circuit agreed to rehear the Missouri case en banc, but it has not disturbed *Rutledge*.

III. Pending Cert Petitions: What is the Test and When Does it Apply?

The Court's decision in *Dobbs* will likely be informed by two cert petitions on its docket, which ask the Court to resolve a nesting doll of circuit splits.

At the most basic level, the Court must resolve the split over whether a state may forbid performing an abortion sought because the baby's race, gender, or Down-syndrome diagnosis. The circuit split on that question pits the en banc Sixth Circuit against the Seventh and Eighth. Arkansas has asked the Supreme Court to resolve the split in *Rutledge v. Little Rock Family Planning*.[38] Supreme Court denied cert on this question in *Box v. Planned Parenthood* because, at the time, the Seventh Circuit was the only court of appeals to have addressed an anti-eugenics law.[39] That is no longer the case, so the issue is now ripe for Supreme Court review.

Within that basic split are two others on which petitioners are requesting the Court's review. The first is the split over which section of the Chief Justice's *June Medical* concurrence is the controlling law for previability abortion regulations. Arkansas' cert petition in *Rutledge* and Indiana's in *Box v. Planned Parenthood* both ask the Court to at least answer that question. The second split is over the types of laws to which *June Medical* applies in the first place, namely whether restrictions on methods or reasons for performing abortions are "regulations" subject to *June Medical* analysis or "bans" that are presumptively invalid—a split squarely presented in *Rutledge*.

IV. The Next Stage: Standing, Fractions, Dismemberment, and Cascades

A. Do Abortion Providers Have Third-Party Standing to Challenge Abortion Restrictions?

More circuit splits and major questions will come to the Court over the next three terms, beginning (as all cases do) with standing. Ordinarily, "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[40] But the Supreme Court has allowed abortion providers to challenge abortion restrictions on behalf of (typically unknown) women who might seek abortions in the future. At least four Justices have signaled that the Court should reconsider third-party standing for abortionists.[41] If the Court leaves any of its abortion jurisprudence standing after *Dobbs*, it can expect that many states will add standing to their existing battery of arguments.

B. What Is the Burden of Proof for Facial Challenges to Abortion Restrictions?

Next on the horizon is the burden of proof for facial challenges to abortion restrictions. A litigant can challenge a law's constitutionality in two ways: 1) by arguing that the law is unconstitutional as applied to the litigant, but could be constitutional in other contexts (an "as-applied" challenge); 2) by arguing that the law is unconstitutional on its face (a "facial" challenge"). To prevail on a facial challenge, a litigant typically must show that "no set of circumstances exists under which [the law] would be valid."[42]

But the Supreme Court appears to have softened the requirements for facial challenges to abortion restrictions. Under *Casey*, an abortion statute is facially unconstitutional if it "will operate as a substantial obstacle to a woman's choice to undergo an abortion" in a "large fraction of the cases in which [it] is relevant."[43] Even if the law poses no burden in some cases. Here too, several Justices have expressed concern about—or outright

to deliver an injection to the unborn baby, the "training" and facilities required to read a sonogram to cut the umbilical cord, and apparently the incentive to solve either problem. *Williamson*, 900 F.3d at 1322-24. *Accord Friedlander*, 960 F.3d at 804-06.

The Sixth Circuit denied the Kentucky Attorney General's request to intervene in that case to seek en banc rehearing or certiorari. The Supreme Court granted certiorari as to whether the Attorney General could intervene and heard argument on that point on October 12. Cameron v. EMW Women's Surgical Ctr., P.S.C., 141 S. Ct. 1734 (2021).

34 Hopkins v. Jegley, 968 F.3d 912, 915-16 (8th Cir. 2020).

35 Ark. Code Ann. § 20-16-2103; Mo. Rev. Stat. § 188.038.

36 Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson, 1 F.4th 552 (8th Cir. 2021), *reh'g en banc granted, opinion vacated,* July 13, 2021; Little Rock Fam. Plan. Servs. v. Rutledge, 984 F.3d 682 (8th Cir. 2021).

37 *Rutledge*, 984 F.3d at 692-93 (Shepherd, J., concurring); *id.* at 693-94 (Erickson, J., concurring).

38 No. 20-1434 (Apr. 13, 2021). The Supreme Court denied cert in *Schmitt v. Reprod. Health Servs. of Planned Parenthood of the St. Louis Region*, No. 21-3, because the Eighth Circuit is reconsidering the case en banc.

39 *Box*, 139 S. Ct. at 1782. In concurrence, Justice Thomas documented the long history of eugenic abortions and the recent state laws forbidding intentionally eugenic abortions, and he noted that the Court has a duty to address the precise scope of the abortion right. *Id.* at 1783-93 (Thomas, J., concurring).

40 Warth v. Seldin, 422 U.S. 490, 499 (1975).

41 *June Medical*, 140 S. Ct. at 2142 (Thomas, J., dissenting); *id.* at 2153 (Alito, J., dissenting); *id.* at 2173 (Gorsuch, J., dissenting); *id.* at 2182 (Kavanaugh, J., dissenting).

42 United States v. Salerno, 481 U.S. 739, 745 (1987).

43 *Casey*, 505 U.S. at 895.

hostility to—the unique test for abortion restrictions.[44] The most vexing part of the test is figuring out which group of women makes up the numerator and which makes up the denominator of the "fraction" made pivotal in *Casey*.[45] Indeed, the circuits are split over whether those groups are even different:

- The Sixth Circuit took the broadest approach to identifying the denominator. In *Planned Parenthood Southwest Ohio Region v. DeWine*, the court examined a ban on certain medication abortions, and because the ban by its terms applied to all women seeking an abortion, the court held that the relevant denominator was all Ohio women attempting to obtain an abortion.[46]
- The Eighth Circuit took a slightly narrower view. In *Planned Parenthood of Arkansas and Eastern Oklahoma v. Jegley*, the court considered an Arkansas statute that required any physician who provides medication abortions to 1) sign a contract with a physician who would agree to handle complications arising from that abortion, and 2) have active admitting privileges at a hospital that could handle any emergencies arising from that abortion.[47] The court held that the "relevant denominator" was "women seeking medication abortions in Arkansas."[48]
- The Seventh Circuit went narrower still—in a decision that all but guarantees that the numerator and denominator will always be the same. In *Planned Parenthood of Indiana & Kentucky, Inc. v. Commissioner of Indiana State Department of Health*, the court considered an Indiana law requiring women to undergo an ultrasound at least 18 hours prior to obtaining an abortion.[49] The court held that the denominator is "the group for whom the law is a restriction," specifically "women for whom an additional lengthy trip to a PPINK health center for their informed-consent appointment acts as an impediment to their access to abortion services."[50] Which is to say, the denominator of the "large fraction" is only those women for whom the law is in fact a substantial obstacle. Since the numerator is *also* the women for whom the law is a substantial obstacle, the fraction will always be 1/1—"which is pretty large as fractions go."[51]
- The Ninth Circuit adopted a similarly narrow approach. In *Planned Parenthood Arizona, Inc. v. Humble*, the court considered a ban on medication abortions similar to the one the Sixth Circuit examined in *DeWine*, and it explicitly disagreed with the Sixth Circuit on how to define the denominator.[52] The court defined the denominator as "women who, in the absence of the Arizona law, would receive medication abortions under the evidence-based regimen."[53] Which is to say, the denominator is only those women for whom the Arizona law was a substantial obstacle, making up another 1/1 fraction.

Suffice it to say, the Supreme Court will at some point have to clarify the large fraction test—if not eliminate it entirely.

C. Can States Ban Certain Methods of Performing Abortions?

Next, the Court will have to resolve a circuit split on whether a state may ban live dismemberment abortions. As explained in section II.C., the Fifth Circuit upheld Texas's ban on live dismemberment abortions, while the Sixth and Eleventh enjoined enforcement of similar bans in Kentucky and Alabama. On October 12, the Supreme Court heard oral argument in *EMW v. Cameron*, where the Kentucky Attorney General asked for leave to intervene specifically so that he may file a cert petition to ask the Court to resolve the existing split on this question. So while the Court will not reach the merits of live dismemberment bans in *Cameron*, if it grants the state attorney general leave to intervene in the Kentucky case, it will almost certainly be asked to do so next term.

D. At What Stage May a State Restrict or Ban Abortions?

The other questions may tie the Court up for a couple of terms, but they are ultimately second-order questions. If the Court does not throw out its abortion precedents in *Dobbs*, then it will have to decide at precisely what week a state may ban abortions. Several states have passed cascading bans on abortions. Courts of appeals have generally enjoined enforcement of those statutes as impermissible bans on previability abortions:

- Tennessee criminalizes performing an abortion after 6, 8, 10, 12, 15, 18, 20, 21, 22, 23, or 24 weeks gestation.[54] The statute has a severability clause, essentially declaring that the state will enforce whichever time limit the Supreme Court will permit.[55] The Sixth Circuit enjoined the statute in toto.[56]

44 *See June Medical*, 140 S. Ct. at 2175-76 (Gorsuch, J., dissenting); *Hellerstedt*, 136 S. Ct. at 2343 n.11 (Alito, J., dissenting).

45 For those (like the author) who attended law school with the hope of avoiding math, those are the top and bottom numbers, respectively, in a fraction.

46 696 F.3d 490, 515–16 (6th Cir. 2012).

47 864 F.3d 953, 956 (8th Cir. 2017).

48 *Id.* at 958-59.

49 896 F.3d 809, 812 (7th Cir. 2018).

50 *Id.* at 819.

51 *Hellerstedt*, 136 S. Ct. at 2343 n.11 (Alito, J., dissenting).

52 753 F.3d at 914.

53 *Id.*

54 Tenn. Code Ann. § 39-15-216(c).

55 *Id.* § 216(h).

56 *Slatery*, 14 F.4th at 413.

- Missouri criminalizes performing an abortion after 8, 14, 18, and 20 weeks gestation.[57] And each provision contains its own severability clause, announcing that the state will enforce whichever provision passes constitutional muster.[58] The Eighth Circuit enjoined the statutes in toto.[59]
- Arkansas bans abortions at 12, 18, and 20 weeks gestation.[60] The Eighth Circuit enjoined the 12- and 18-week bans.[61]

These are just a few of the many examples of previability abortion restrictions currently on the books and involved in pending litigation.

V. The Consequences of *Dobbs*

Just a few months ago, the conventional wisdom was that the Court would seek some middle ground in *Dobbs*. That was not a prediction based on any articulable legal principle, so much as a guess that some members of the Court would be shy about making a difficult decision. Aside from that being an unfairly dim view of the Justices, Professor Sherif Girgis capably explained why there is no middle path here.[62] And true to Professor Girgis's analysis, both sides in *Dobbs* agreed in their briefing that the Court must either reaffirm or reverse *Roe* and *Casey*.

The *Dobbs* litigants are right. *Casey* already demonstrated that stare decisis-with-modifications is an untenable path. In *Casey*, the Court set out to reaffirm "the essential holding of *Roe*" on stare decisis grounds.[63] But Justice Blackmun, the author of *Roe*, maintained that *Roe*'s trimester framework was "far more administrable, and far less manipulable" than the viability and undue burden framework of the *Casey* plurality.[64] And Justice Scalia (writing for four dissenters) professed not to know what the undue burden test meant—or even what had been saved from *Roe*, given that *Casey* upheld many of regulations that *Roe* invalidated.[65]

The complex circuit fracture outlined above in section II demonstrates that Justice Blackmun was right: the undue burden test created more confusion than it solved. And Justice Scalia proved prophetic as well: far from "reaffirming" the "unbroken commitment" of the pre-*Casey* precedents, the Court invalidated all of them.[66]

Suppose the Court hews closely to the question presented in *Dobbs* and declares only that not *all* previability prohibitions on elective abortions are unconstitutional. The Court will then have to manufacture a new test for when previability prohibitions are allowed, and thus invalidate all of the pre-*Dobbs* precedents it might profess to preserve.

More importantly, if the Court tries to avoid affirming or reversing *Roe* and *Casey* in *Dobbs*, it will have no choice but to do so later. Litigation over the cascade bans will eventually force the Court either to fully abandon the fifty-year game of micro-managing abortion regulations, *or* to come full circle to the basic rule of *Roe*: a clear-but-arbitrary rule that states may ban abortions after X weeks, and not before. That kind of fundamentally legislative decision-making from the Court ignited a firestorm after *Roe*; it is hard to imagine it will fare any better fifty years later.

The Court will have to make a clear decision: reverse *Roe* and its progeny, or return to it in full. That much is unavoidable. The only question in *Dobbs* is whether the Court wants to do so now, or after three more years of bitter, all-consuming litigation.

57 Mo. Ann. Stat. §§ 188.056, .057, .058, .375.

58 *Id.*

59 *Parson*, 1 F.4th at 559.

60 Ark. Code Ann. §§ 20-16-1304, 20-16-1405, 20-16-2004.

61 *Rutledge*, 984 F.3d at 688 (18 weeks); Edwards v. Beck, 786 F.3d 1113, 1117 (8th Cir. 2015) (12 weeks).

62 Sherif Girgis, *Two Obstacles to (Merely) Chipping Away at Roe in Dobbs*, SSRN, Aug. 19, 2021, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3907787.

63 *Casey*, 505 U.S. at 870.

64 *Id.* at 930 (Blackmun, J., concurring).

65 *Id.* at 993-94 (Scalia, J., dissenting).

66 *See supra* note 3.

A Change in Direction for the Federal Trade Commission?

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Other Views:

• Rohit Chopra & Lina Khan, *The Case for "Unfair Methods of Competition" Rulemaking,* 87 U. Chi. L. Rev. 357 (2020), *available at* https://chicagounbound.uchicago.edu/uclrev/vol87/iss2/4/.

• Lina Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 564 (2017), *available at* https://www.yalelawjournal.org/note/amazons-antitrust-paradox.

• Tom Wheeler et al., *New Digital Realities; New Oversight Solutions in the U.S. The Case for a Digital Platform Agency and a New Approach to Regulatory Oversight,* Shorenstein Center (August 2020), *available at* https://shorensteincenter.org/wp-content/uploads/2020/08/New-Digital-Realities_August-2020.pdf.

• Memo from Chair Lina M. Khan to Commission Staff and Commissioners Regarding the Vision and Priorities for the FTC (Sept. 22, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf.

While antitrust and regulation are supposed to be two sides of the same coin,[1] there has always been a healthy debate over which enforcement paradigm is the most efficient. Those who have long suffered under the zealous hand of ex ante regulation would prefer to be overseen by the more dispassionate and case-specific oversight of antitrust.[2] Conversely, those dissatisfied with the current state of antitrust enforcement have increased calls to abandon the ex post approach of antitrust and return to some form of regulation.[3]

While the "antitrust versus regulation" debate has raged for some time, the election of President Joe Biden has brought a new wrinkle: Lina Khan, the newly-appointed Chair of the Federal Trade Commission (FTC), has made it very clear that she would like to expand the Commission's role from that of a mere enforcer of the nation's antitrust laws to that of an agency that also promulgates ex ante "bright line" rules to regulate firms' conduct. Thus, the "antitrust versus regulation" debate is no longer academic.

Khan, even before she was nominated, has been quite open about her policy vision for the FTC. For example, last year, Khan coauthored an essay with her former boss (and later briefly her FTC colleague) Rohit Chopra in the *University of Chicago Law Review* entitled "The Case for 'Unfair Methods of Competition' Rulemaking."[4] Given the tremendous power Khan now wields and

1 *See, e.g.,* United States v. FCC, 652 F.2d 72, 88 (D.C. Cir. 1980) (quoting Northern Natural Gas Co. v. FPC, 399 F.2d 953, 959 (D.C. Cir. 1968)) (The "basic goal of governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same—to achieve the most efficient allocation of resources possible."); Town of Concord v. Boston Edison Co., 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.), *cert. denied*, 499 U.S. 931 (1991) (The goals of regulation and antitrust laws are "low and economically efficient prices, innovation, and efficient production methods.").

2 *See, e.g.,* J. Eggerton, *AT&T's Cicconi to FCC: Change or Become Irrelevant,* Multichannel News, Sept. 10, 2013, *available at* https://www.nexttv.com/news/att-s-cicconi-fcc-change-or-become-irrelevant-262775.

3 *See, e.g.,* George J. Stigler Center for the Study of the Economy and the State, The University of Chicago Booth School of Business, Committee for the Study of Digital Platforms - Market Structure and Antitrust Subcommittee, Report (July 1, 2019), *available at* https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf; T. Wheeler, P. Verveer, & G. Kimmelman, *New Digital Realities; New Oversight Solutions in the U.S. The Case for a Digital Platform Agency and a New Approach to Regulatory Oversight,* Shorenstein Center (August 2020), *available at* https://shorensteincenter.org/wp-content/uploads/2020/08/New-Digital-Realities_August-2020.pdf; *but c.f.* G.S. Ford, *Beware of Calls for a New Digital Regulator,* Notice & Comment – Yale J. Regulation (Feb. 19, 2021); L.J. Spiwak, *A Poor Case for a "Digital Platform Agency",* Phoenix Center Policy Perspective No. 21-02 (March 9, 2021), *available at* http://www.phoenix-center.org/perspectives/Perspective21-02Final.pdf.

4 Rohit Chopra & Lina Khan, *The Case for "Unfair Methods of Competition" Rulemaking,* 87 U. Chi. L. Rev. 357 (2020).

the aggressive agenda she has laid out for the agency,[5] perhaps it makes sense to summarize and scrutinize her arguments.

I. Summary of Chopra and Khan's Case for Unfair Methods of Competition Rulemaking

At the outset of their essay, Chopra and Khan lay out what they believe to be the shortcomings of modern antitrust enforcement. As they correctly note, "[a]ntitrust law today is developed exclusively through adjudication," which is designed to "facilitate[] nuanced and fact-specific analysis of liability and well-tailored remedies."[6] However, the authors contend that while a case-by-case approach may sound great in theory, "in practice, the reliance on case-by-case adjudication yields a system of enforcement that generates ambiguity, unduly drains resources from enforcers, and deprives individuals and firms of any real opportunity to democratically participate in the process."[7] Chopra and Khan blame this alleged policy failure on the abandonment of per se rules in favor of the use of the "rule of reason" approach in antitrust jurisprudence. In their view, a rule of reason approach is nothing more than "a broad and open-ended inquiry into the overall competitive effects of particular conduct [which] asks judges to weigh the circumstances to decide whether the practice at issue violates the antitrust laws."[8] To remedy this perceived analytical shortcoming, they argue that the Commission should step into the breach and promulgate ex ante bright line rules[9] to enforce better the prohibition against "unfair methods of competition" (UMC) outlined in Section 5 of the Federal Trade Commission Act.[10]

As a threshold matter, while courts have traditionally provided guidance as to what exactly constitutes a UMC, Chopra and Khan argue that it should be the FTC that has that responsibility in the first instance. Because Congress set up the FTC as the independent, expert agency to implement the FTC Act and because the phrase "unfair methods of competition" is ambiguous, Chopra and Khan argue that courts must accord great deference to "FTC interpretations of 'unfair methods of competition'" under the Supreme Court's *Chevron* doctrine.[11]

Having thus asserted definitional primacy for the FTC over the phrase "unfair methods of competition," the authors also argue that the FTC has statutory authority to promulgate substantive rules to enforce the FTC's interpretation of UMC. In particular, they point to the broad, catch-all provision in Section 6(g) of the FTC Act.[12] Section 6(g) provides, in relevant part, that the FTC may "[f]rom time to time . . . make rules and regulations for the purpose of carrying out the provisions of this subchapter."[13] Although this catch-all rulemaking provision is far from the detailed statutory scheme Congress set forth in the Magnusen-Moss Act to govern rulemaking to deal with Section 5's other prohibition against "unfair or deceptive acts and practices" (UDAP),[14] Chopra and Khan argue that the D.C. Circuit's 1973 ruling in *National Petroleum Refiners Association v. FTC*[15]—a case that predates the Magnusen-Moss Act—provides judicial affirmation that the FTC has the authority to "promulgate substantive rules, not just procedural rules" under Section 6(g).[16] Stating the argument a different way, although there may be no affirmative specific grant of authority for the FTC to engage in UMC rulemaking, in the absence of any *limit* on such authority, the FTC may engage in UMC rulemaking subject to the constraints of the Administrative Procedure Act.[17]

Aside from legal arguments, the authors offer three policy arguments to support their position. First, they submit that "rulemaking would enable the Commission to issue clear rules to give market participants sufficient notice about what the law is, helping ensure that enforcement is predictable."[18] Second, they argue that "establishing rules could help relieve antitrust enforcement of steep costs and prolonged trials." In particular, "[t]argeting conduct through rulemaking, rather than adjudication, would likely lessen the burden of expert fees or protracted

5 *See, e.g.,* Memo from Chair Lina M. Khan to Commission Staff and Commissioners Regarding the Vision and Priorities for the FTC (Sept. 22, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf; Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines (Sept. 15, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf; Statement of the Commission Regarding the Adoption of Revised Section 18 Rulemaking Procedures (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591786/p210100commnstmtsec18rulesofpractice.pdf.

6 Chopra & Khan, *supra* note 4, at 359.

7 *Id.*

8 *Id.* at 359-60.

9 *Id.* at 356 ("The Commission has in its arsenal a far more effective tool that would provide greater notice to the marketplace and that is developed through a more transparent and participatory process: rulemaking. Through engaging in rulemaking, the Commission could define 'unfair methods of competition' through processes established by the Administrative Procedure Act (APA).").

10 15 U.S.C. § 45 ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").

11 Chopra & Khan, *supra* note 4, at 378-79. *See* Chevron U.S.A., Inc. v. Natural Res. Defense Council, 467 U.S. 837 (1984).

12 *Id.* at 377.

13 15 U.S.C. § 46.

14 Magnuson-Moss Warranty Act, Pub. L. No. 93-637, 88 Stat. 2183.

15 482 F.2d 672 (D.C. Cir. 1973).

16 Chopra & Khan, *supra* note 4, at 378.

17 Notably, the authors maintain that they do not want regulation for regulation's sake, but only in circumstances in which there is some sort of market failure that cannot be adequately addressed by current antitrust laws. They identify two broad circumstances where they believe such failures might be present. The first situation is when the Commission has an "extensive enforcement record" about "a particular anticompetitive practice," but that enforcement record was unsuccessful in "eliminat[ing] the practice altogether." *Id.* at 371-72. The second circumstance is when "private litigation is unlikely to discipline anticompetitive conduct." *Id.* at 372. But both criteria are highly subjective and provide little constraint on FTC behavior.

18 *Id.* at 367.

litigation, potentially saving significant resources on a present-value basis."[19] And third, they contend that rulemaking "would enable the Commission to establish rules through a transparent and participatory process, ensuring that everyone who may be affected by a new rule has the opportunity to weigh in on it, granting the rule greater legitimacy."[20]

II. Discussion

By arguing for an aggressive regime of UMC rulemaking, Khan and her coauthor raise important questions about the FTC's mission—and its power to enforce that mission—going forward. As detailed below, there is a legitimate debate as to whether the Commission has the legal authority to promulgate rules to define and enforce against UMC under the FTC Act and, perhaps just as important, whether the FTC *should* engage in such rulemaking as a policy matter.

A. Common Critiques of Khan's Legal Arguments

As many courts have taken a broad view of *Chevron* deference, Khan's legal arguments in support of UMC rulemaking are certainly plausible.[21] But they are not infallible. A recent paper by former Acting FTC Chair Maureen Ohlhausen and former Assistant Attorney General for Antitrust at the Department of Justice James Rill lays out some of the common critiques of Khan's legal thesis.[22]

For example, Ohlhausen and Rill point out that the FTC's ability to promulgate substantive rules under Section 6(g) is far from clear. While Khan cites to *National Petroleum Refiners* as definitive authority, Ohlhausen and Rill point out that the D.C. Circuit's opinion "dealt with both UMC and UDAP authority under Section 6(g) yet Congress' reaction to the decision was to provide specific UDAP rulemaking authority and expressly take no position on UMC rulemaking." Thus, Ohlhausen and Rill submit that the FTC Act "is best read as [Congress] declining to endorse the FTC's UMC rulemaking authority and instead leaving the question open for future consideration by the courts."[23]

Chief Justice John Roberts wrote a few years back that the federal bureaucracy now "wields vast power and touches almost every aspect of daily life."[24] For example, the Federal Energy Regulatory Commission regulates wholesale electricity and gas pipelines; the Federal Communications Commission regulates telephone, cable, wireless, and broadcasting services; the Surface Transportation Board regulates freight rail; the Federal Reserve regulates banks; and the Federal Aviation Administration regulates commercial air travel. In each case, Congress has set forth a detailed statutory scheme detailing administrative procedures, subject matter jurisdiction, and agency powers and responsibilities. But as Ohlhausen and Rill point out, the FTC Act is devoid of such specificity when it comes to UMC, which suggests that Congress does not intend for the FTC to regulate UMC the way other agencies regulate in their areas. Khan, however, sees this lack of specificity as a regulatory void that the FTC has the authority to fill in the name of agency discretion.[25] At minimum, such a large analytical leap raises important issues under the Supreme Court's major questions doctrine.[26]

Ohlhausen and Rill also argue that Khan's loose approach to statutory construction is in tension with the Supreme Court's more rigorous view of statutory construction in recent years. They point to Justice Antonin Scalia's memorable line in *Whitman v. American Trucking Association* that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[27] Thus, argue Ohlhausen and Rill, Khan's "claim of broad substantive UMC rulemaking authority based on the absence of limiting language and a vague, ancillary provision authorizing rulemaking . . . stands in conflict with the Court's admonition in *Whitman*."[28]

Along the same lines, Ohlhausen and Rill contend that the FTC Act's lack of any sanctions for violating rules promulgated pursuant to Section 6(g) "seems to indicate that Congress never intended to give the FTC substantive rulemaking authority at all."[29] Accordingly, "it would therefore be very odd for Congress to grant the FTC sole unfair methods of competition rulemaking authority, yet not arm the agency (or anyone else) with the means to enforce violations of those rules."[30]

B. Testing the Bounds of Chevron*: What if the FTC Adopts a Non-Discrimination Rule?*

Whether the FTC has UMC rulemaking authority is an open question. But let's assume arguendo that the FTC has UMC rulemaking authority and uses that authority to adopt a

19 *Id.* at 368.

20 *Id.*

21 *C.f.* L.J. Spiwak, *USTelecom and its Aftermath,* 71 Fed. Comms. L.J. 39 (2019), *available at* http://www.fclj.org/wp-content/uploads/2018/12/71.1-%E2%80%93-Lawrence-J.-Spiwak.pdf.

22 M.K. Ohlhausen & J. Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking,* U.S. Chamber of Commerce (Aug. 12, 2021), *available at* https://www.uschamber.com/sites/default/files/ftc_rulemaking_white_paper_aug12.pdf; *see also* Comments of TechFreedom, In the Matter of Petition for Rulemaking to Prohibit Worker Non-Compete Clauses; Petition for Rulemaking to Prohibit Exclusionary Contracts, Docket ID: FTC-2021-0036 (Sept. 30, 2021), *available at* https://techfreedom.org/wp-content/uploads/2021/10/FTC-UMC-Rulemaking-Authority-FTC-Comment-9.30.2021-FINAL.pdf.

23 Ohlhausen & Rill, *supra* note 22, at 11.

24 City of Arlington, Tex. v. FCC, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (quotation marks omitted).

25 Interestingly, if the FTC goes down the UMC rulemaking path, another unintended consequence might be a conflict with another existing federal or state regulatory regime. *C.f.* Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 368, 411-12 (2004) ("Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation.").

26 *C.f.* King v. Burwell, 576 U.S. 473, 485-89 (2015); Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

27 Whitman v. American Trucking Association, 531 U.S. 457, 468 (2001) (Scalia, J.).

28 Ohlhausen & Rill, *supra* note 22, at 11.

29 *Id.* at 13.

30 *Id.*

non-discrimination rule to address vertically integrated business models such as Amazon's. How might courts treat such a rule? As highlighted below, *Chevron* deference may not be as broad as Khan argues it is when it comes to interpreting the phase "unfair methods of competition."

It is no secret that Khan views Amazon as a dominant, vertically-integrated platform that requires strict government oversight.[31] To mitigate Amazon's ability to exercise its alleged market power, Khan has advocated for, among other things, the adoption of a non-discrimination rule that would prohibit "Amazon from privileging its own goods and from discriminating among providers and consumers . . ."[32] While Khan provided no specifics as to what this rule would actually look like, she has argued that "[c]oupling nondiscrimination with common carrier obligations—requiring platforms to ensure open and fair access to other businesses—would . . . limit Amazon's dominance in anticompetitive ways."[33]

Upon taking office, among Khan's first priorities was to rescind the bipartisan 2015 "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (*2015 UMC Statement*).[34] A central pillar of the *2015 UMC Statement* was a commitment by the FTC to retain and adhere to the consumer welfare standard using a rule of reason analysis,[35] so it is not unreasonable to assume from the rescission that Khan would like to replace the consumer welfare standard with a broader approach. Such an approach might allow for the consideration of competitor interests, labor interests, and equity interests; burden shifting; no requirements of finding any abuse of market power in a defined relevant market, and more.[36] What legal problems could arise if Khan attempts to implement her vision of "[c]oupling nondiscrimination with common carrier obligations" using the FTC's reinvigorated UMC rulemaking authority?[37]

1. The "Common Carrier" Exemption

Before turning to the question of *Chevron* deference, Khan's proposed nondiscrimination rule would suffer from an unambiguous statutory barrier. According to Section 5(a)(2) of the FTC Act, the FTC has no jurisdiction over "common carriers."[38] Where Congress has declined to classify and regulate firms as common carriers and withheld FTC jurisdiction over firms that *are* common carriers, it makes little sense to argue that the FTC can step in to designate common carriers and regulate them as such. Moreover, Khan's logic is circular: because of the common carrier exemption, any effort by the FTC to turn firms into common carriers by regulatory fiat would strip the agency of any jurisdiction immediately upon classification.

2. *Chevron* May Not Condone the Abandonment of the Consumer Welfare Standard

Under our hypothetical, the FTC has used its UMC rulemaking authority to promulgate a nondiscrimination rule which requires "equal access," even though the courts have repeatedly said there is no mandatory duty to deal.[39] While *Chevron* deference is certainly broad, caselaw makes clear that it does not provide the Commission carte blanche to abandon the consumer welfare standard.

a. The Concept of "Discrimination" is Well Established

To begin, if the FTC imposed a public utility-type nondiscrimination rule, it is questionable whether the agency could create a new standard out of whole cloth. The concept of nondiscrimination can be found in a host of federal statutes governing public utility regulation, including the

31 L.M. Khan, *Amazon's Antitrust Paradox,* 126 Yale L.J. 710 (2017), *available at* https://www.yalelawjournal.org/pdf/e.710.Khan.805_zuvfyyeh.pdf.

32 *Id.* at 799.

33 *Id.*

34 *See FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act* (July 1, 2021), *available at* https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under. *See also* Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf.

35 *FTC Issues Statement of Principles Regarding Enforcement of FTC Act as a Competition Statute* (Aug. 13, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf. According to the *2015 UMC Statement,* the Commission would adhere to the following principles when deciding whether to use its standalone authority under Section 5 of the FTC Act to challenge unfair methods of competition. Namely, (1) the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare; (2) the act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and (3) the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice. *Id.*

36 *C.f.* C. Shapiro, *Antitrust: What Went Wrong and How to Fix It,* 35 Antitrust 33 (Summer 2021), *available at* https://faculty.haas.berkeley.edu/shapiro/fixingantitrust.pdf.

37 At the time of this writing, there are various bills which have introduced in Congress that would codify per se nondiscrimination rules for Internet platform companies thar meet certain jurisdictional triggers. *See, e.g.,* Press Release, *Klobuchar, Grassley, Colleagues to Introduce Bipartisan Legislation to Rein in Big Tech* (Oct. 14, 2021), *available at* https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=3AD365BE-A67E-40BB-908A-C8570FF29600. However, as it is impossible to prognosticate if these bills will ever be signed into law, the hypothetical above will proceed under the current state of the law.

38 15 U.S.C. § 45(a)(2). Many traditional public utilities such as telephone companies, railroads, and oil pipelines are considered to be common carriers. However, it is also important to point out that several other types of public utilities such as cable companies, electric utilities, and natural gas pipelines are not common carriers. *See also* Federal Trade Commission v. AT&T Mobility LLC, 883 F.3d 848 (9th Circuit 2018) (holding that for multi-product firms, common carrier classification for purposes of the FTC Act depends on activity, not status).

39 For an excellent summary of the law, see *FTC v. Qualcomm Inc.,* 969 F.3d 974, 993-94 (9th Cir. 2020).

Communications Act of 1934,[40] the Federal Power Act of 1935,[41] and the Natural Gas Act of 1938.[42] In each case, Congress made it clear that the federal government is only concerned with acts of *undue* or *unreasonable* discrimination; garden variety economic discrimination is perfectly lawful. Moreover, as these statutes are nearly ninety years old, there is a rich body of caselaw governing the contours of what exactly constitutes "undue."[43] Thus, a court considering a challenge to our hypothetical FTC non-discrimination rule may decline to interpret it as generously as Khan's FTC would like.

b. Independent Agencies Must Account for Antitrust Terms of Art

Independent agencies also may not ignore accepted antitrust terms of art (particularly when the agency is an antitrust enforcement agency). The D.C. Circuit's ruling in *Comcast Cable Communications v. Federal Communications Commission* illustrates this point well.[44] The FCC had ruled that Comcast had unduly discriminated against the Tennis Channel in violation of the program carriage requirements of Section 616 of the Cable Competition and Consumer Protection Act of 1992 by refusing to broadcast the Tennis Channel in the same tier as Comcast's affiliated sports networks. At issue in *Comcast* was whether that ruling was arbitrary and capricious.

By way of background, the FCC Program Carriage regulations prohibit certain types of discriminatory conduct by a Multichannel Video Programming Distributor (MVPD) believed to threaten competition and diversity in the video programming marketplace. Under this statute, Congress charged the FCC to develop rules

> to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.[45]

Moreover, Congress mandated that the FCC "provide for expedited review of any complaints made by a video programming vendor pursuant to this section."[46] Pursuant to that mandate, the FCC adopted general rules consistent with the statute's specific directions.[47] The FCC's program carriage rules state in relevant part that:

> No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.[48]

In other words, the Program Carriage provisions seek to address potential harm arising from the vertical integration of MVPDs into programming by demanding that unaffiliated and affiliated programming be treated similarly.

The Tennis Channel, with which Comcast was unaffiliated, complained that Comcast placed it "on a tier with narrow penetration that is only available to subscribers who pay an additional fee, while Comcast carries its own similarly-situated affiliated networks Golf Channel and Versus (now NBC Sports Network) on a tier with significantly higher penetration that is available to subscribers at no additional charge."[49] (Market definition is required to place the Tennis Channel in the market with "similarly-situated affiliated networks.") The administrative law judge concluded that Comcast had indeed discriminated against the Tennis Channel,[50] and the full Commission later affirmed the ALJ's finding.[51] Comcast appealed to the D.C.

40 47 U.S.C. § 202 ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.").

41 16 U.S.C. § 824d(b) ("No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any *undue preference or advantage* to any person or subject any person to any *undue prejudice or disadvantage*, or (2) maintain any *unreasonable difference* in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.") (emphasis added).

42 15 U.S.C. § 717c(b) ("No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any *undue preference or advantage* to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any *unreasonable difference* in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.") (emphasis added).

43 For a summary of this caselaw, see *USTelecom and its Aftermath*, *supra* note 21.

44 717 F.3d 982 (D.C. Cir. 2013).

45 47 U.S.C. § 536(a)(3).

46 47 U.S.C. § 536(a)(4).

47 *See* Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, FCC 93-457, Second Report and Order, 9 FCC Rcd. 2642 (1993).

48 47 C.F.R. § 76.1301(c).

49 *See* In the Matter of Tennis Channel, Inc., Complainant, v. Comcast Cable Communications, L.L.C., Defendant, FCC 12-78, Memorandum Opinion and Order, 27 FCC Rcd 8508 (rel. July 24, 2012) at ¶ 1 (Tennis Channel Order).

50 Tennis Channel, Inc. v. Comcast Cable Commc'ns, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, MB Docket No. 10-204, File No. CSR-8258-P, 26 FCC Rcd 17160, 17204 ¶ 101 (ALJ Dec. 20, 2011).

51 Tennis Channel Order, *supra* note 49.

Circuit, and, after review, the court ruled that the FCC's decision was arbitrary and capricious.[52]

The D.C. Circuit began its analysis by noting that the parties agreed that Comcast distributed its affiliates more broadly than the Tennis Channel. But as the also court noted that the plain language of Section 616 only prohibits discrimination "*based on* affiliation."[53] Thus, reasoned the court, if Comcast treated third-party content providers differently "based on a reasonable business purpose," then there is no violation of Section 616.[54] The court found that the Tennis Channel failed to present sufficient evidence of harm to support a claim of discrimination under the statute.

For example, the court found that in contrast to the detailed evidentiary submission by Comcast that showed it would have to bear significant costs if it added the Tennis Channel to the same tier as its affiliates, the Tennis Channel "showed no corresponding benefits that would accrue to Comcast by its accepting the change."[55] Similarly, the court found that the Tennis Channel offered no analysis "on either a qualitative or quantitative basis" to show that Comcast would receive a net benefit from the allegedly discriminatory conduct. As a result, concluded the court, the Tennis Channel had not shown that the discrimination was unreasonable.[56] *Comcast* sends an unmistakable message that when evaluating claims of discrimination, a reviewing court will not overlook the absence of serious economic analysis in agency decisions about anticompetitive harm.[57]

Then-Judge (now-Justice) Brett Kavanaugh's extensive concurrence in *Comcast* is also helpful in elucidating how courts should approach statutory interpretation in this field. Judge Kavanaugh specifically refuted the argument that in passing Section 616, Congress abandoned the long-standing consumer welfare standard requirement that a complainant must demonstrate harm to *competition* in favor of a requirement that it simply showing harm to an individual *competitor*. As Judge Kavanaugh noted, Section 616 sets up a two-part test: a MVPD has violated Section 616 if (1) it discriminated among video programming networks on the basis of affiliation and (2) the discrimination unreasonably restrained an unaffiliated network's ability to compete fairly.[58] As Judge Kavanaugh explained, because the "phrase 'unreasonably restrain' is of course a longstanding term of art in antitrust law," it follows that "Section 616 incorporates antitrust principles governing unreasonable restraints. . . ." Established legal precedent dictates that when "a statute uses a term of art from a specific field of law, [a court must] presume that Congress adopted 'the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.'"[59] In other words, reasoned Judge Kavanaugh, "the goal of antitrust law (and thus of Section 616) is to promote consumer welfare by protecting competition, not by protecting individual competitors."[60] He elaborated:

> It is true that Section 616 references discrimination against competitors. But again, the statute does not ban such discrimination outright. It bans discrimination that *unreasonably restrains* a competitor from competing fairly. By using the phrase "unreasonably restrain," the statute incorporates an antitrust term of art, and that term of art requires that the discrimination in question hinder overall competition, not just competitors.[61]

Judge Kavanaugh also specifically rejected the argument that Section 616 does not require a demonstration of market power. As noted above, Judge Kavanaugh pointed out that because Section 616 specifically uses the antitrust term of art "unreasonably restrain," any application of Section 616 must incorporate antitrust principles and precedent. After providing a lengthy exegesis of the relevant caselaw, Judge Kavanaugh pointed out that:

> Vertical integration and vertical contracts become potentially problematic only when a firm has market power in the relevant market. That's because, absent market power, vertical integration and vertical contracts are *procompetitive.* Vertical integration and vertical contracts in a competitive market encourage product innovation, lower costs for businesses, and create efficiencies—and thus reduce prices and lead to better goods and services for consumers.[62]

Thus, concluded Judge Kavanaugh, because "Section 616 incorporates antitrust principles and because antitrust law holds that vertical integration and vertical contracts are potentially problematic only when a firm has market power in the relevant market, it follows that Section 616 applies only when a video programming distributor has market power in the relevant market."[63]

Rather than abandon the consumer welfare standard in passing Section 616, Congress embraced it. As explained by Judge Kavanaugh,

> Section 616 thus does not bar vertical integration or vertical contracts that favor affiliated video programming networks, absent a showing that the video programming distributor at least has market power in the relevant market. To conclude otherwise would require us to depart from the established meaning of the term of art "unreasonably restrain" that Section 616 uses. Moreover, to conclude otherwise would

52 *Comcast,* 717 F.3d at 985 (emphasis in original).

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.* at 985-86.

57 *Cf.* Cincinnati Bell Tel. Co. v. FCC, 69 F.3d 752, 760 (6th Cir. 1995) (reversing administrative agency's decision because the order contained no "expert economic data or [analogies] to related industries in which the claimed anticompetitive behavior has taken place" but instead justified its conclusions as "simply 'common sense'").

58 *Comcast,* 717 F.3d at 989 (citing 47 U.S.C. § 536(a)(3)).

59 *Id.*

60 *Id.* at 992.

61 *Id.* (emphasis in original).

62 *Id.* at 990 (emphasis in original).

63 *Id.* at 991.

> require us to believe that Congress intended to *thwart* procompetitive practices. It would of course make little sense to attribute that motivation to Congress.[64]

And in this particular case, Judge Kavanaugh argued that Commission failed to make such a showing. Indeed, because the agency defined the relevant geographic market for video programming as national, Judge Kavanaugh pointed out that it was difficult for Comcast to have market power with only a 24% market share.[65]

Judge Kavanaugh's concurrence is particularly applicable to Ms. Khan's thesis. Khan justified the FTC's rescission of the bipartisan *2015 UMC Statement* (and its adherence to a rule of reason analysis and the consumer welfare standard)by arguing that "Congress enacted the Federal Trade Commission Act *to reach beyond* the Sherman Act and to provide an alternative institutional framework for enforcing the antitrust laws."[66] But while the FTC Act is, of course, not the Sherman Act (or Clayton Act for that matter), it is still an antitrust law, and therefore it must adhere to basic antitrust principles as embodied in current caselaw. That caselaw requires antitrust enforcement to proceed using a rule of reason approach under the consumer welfare standard.

c. Courts Have Chastised Other Independent Agencies for Abandoning the Consumer Welfare Standard

It appears that rescinding the *2015 UMC Statement* represents the first step towards a deliberate effort to discard the consumer welfare standard when enforcing Section 5. But it should be noted that courts have chastised other regulatory agencies when they attempted to abandon the consumer welfare standard when adjudicating competition issues under the ubiquitous "public interest" standard.[67] The public interest standard in a regulatory statute is not, in the words of Justice Potter Stuart, "a broad license to promote the general public welfare."[68] For this reason, the courts have provided some important guidance—particularly when an agency is tasked with conducting a competitive analysis—on the boundaries of the public interest standard.[69]

While independent administrative agencies are certainly not required to agree with antitrust enforcement agencies' competitive analyses, they are not permitted to ignore antitrust considerations either.[70] Courts have long "insisted that [administrative] agencies consider antitrust policy as an important part of their public interest calculus."[71] As such, assertions that no relationship exists between antitrust and economic regulation are incorrect. As Supreme Court Justice Felix Frankfurter stated nearly seventy years ago, "[t]here can be no doubt that competition is a relevant factor in weighing the public interest."[72]

Given this requirement, it is little wonder that any application of the public interest standard requires a focus on the interests of the *public,* and not the interests of individual *competitors* who may seek to use the regulatory process to hamstring their rivals.[73] For example, in the 1981 case of *Hawaiian Telephone v. FCC*,[74] the D.C. Circuit remanded an FCC grant of Section 214 authority for service between the U.S. mainland and Hawaii because it found that the Commission had engaged in an ad hoc approach that improperly aimed at "equalizing competition among competitors."[75] The D.C. Circuit stated that the FCC's public interest analysis must be more than an inquiry into "whether the balance of equities and opportunities among competing carriers suggests a change."[76] The court found that it was "[a]ll too embarrassingly apparent that the Commission has been thinking about competition, not in terms primarily as to its benefit to the public, but specifically with the objective of equalizing competition among competitors."[77]

Subsequent decisions reiterate the importance that consumer welfare analysis plays in the public interest standard. In 1995, various parties challenged the FCC's approval of the acquisition of McCaw Cellular licenses by AT&T by arguing that the FCC should have imposed the antitrust Modified Final Judgment (MFJ) restrictions applicable to the Regional Bell

64 *Id.* (emphasis in original).

65 *Id.* at 992 (citing Tennis Channel Order, *supra* note 49, at ¶ 87).

66 *Khan July 1, 2021, Statement, supra* note 34, at 2-3 (emphasis supplied).

67 The public interest standard can be found in a host of public utility statutory regimes, including, but certainly not limited to, the Federal Power Act, *see, e.g.,* 16 U.S.C. § 824b, and the Communications Act, *see, e.g.,* 47 U.S.C. § 310.

68 NAACP v. Fed. Power Comm'n, 425 U.S. 662, 669 (1976) (rejecting arguments the Federal Power Commission must affirmatively promote equal employment opportunity and nondiscrimination in the employment practices of the firms it regulates under the Federal Gas and Power Acts).

69 *C.f.* T.M. Koutsky & L.J. Spiwak, Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the "Public Interest" Standard, 18 Commlaw Conspectus 329 (2010).

70 *See, e.g.*, United States v. FCC, 652 F.2d 72 (D.C. Cir. 1980).

71 *See, e.g.*, *FCC,* 652 F.2d at 82 (In evaluating transactions, the FCC must in the exercise of its responsibilities "make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations."); *Northern Natural Gas*, 399 F.2d at 361 (stating that antitrust laws are a tool that a regulatory agency can use to bring "understandable content to the broad statutory concept of the 'public interest'") (internal citation omitted). *See also* United States v. AT&T, 498 F. Supp. 353, 364 (D.D.C. 1980) (Green, J.) ("[I]t is not appropriate to distinguish between Communications Act standards and antitrust standards . . . . [because] both the FCC, in its enforcement of the Communications Act, and the courts, in their application of the antitrust laws, guard against unfair competition and attempt to protect the public interest.").

72 FCC v. RCA Comm's Inc., 346 U.S. 86, 94 (1953); *see also Northern Natural Gas*, 399 F.2d at 961 (noting that "competitive considerations are an important part of the 'public interest'" standard).

73 *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 488 (1977) ("[A]ntitrust laws . . . were enacted for 'the protection of competition not competitors.'") (quoting Brown Shoe v. United States, 370 U.S. 294, 320 (1962)).

74 498 F.2d 771 (D.C. Cir. 1974).

75 *Id.* at 774–76

76 *Id.* at 776.

77 *Id.* at 775–76

Operating Companies (RBOCs) on the merged firm.[78] Citing *Hawaiian Telephone,* the D.C. Circuit rejected the merger opponents' arguments and found that the application of the MFJ restrictions to the merged entity would "serve the interests only of the RBOCs rather than those of the public."[79] The court stated that when the Commission considers whether a proposed merger serves the public interest, the "Commission is not at liberty . . . to subordinate the public interest to the interest of 'equalizing competition among competitors.'"[80]

C. History Belies Khan's Policy Arguments

Separate from the legal debate over whether the FTC *can* engage in UMC rulemaking, it is also important to ask whether the FTC *should* engage in UMC rulemaking. Khan's argument, if taken to its logical conclusion, essentially posits that the American economy needs a generic business regulator possessed with plenary power and expansive jurisdiction. Given the United States' well-documented (and sordid) experience with public utility regulation, that's probably not a good idea.[81]

Khan's published writings argue forcefully for greater regulatory power, but they suffer from analytical omissions that render her arguments questionable. For example, it is axiomatic that while regulation may have benefits, it can also impose significant costs. These costs can include compliance costs, reductions of innovation and investment, and outright entry deterrence that protects incumbents.[82] Yet nowhere in her coauthored essay does Khan contemplate a cost-benefit analysis before promulgating a new regulation; she appears to assume that regulation is costless.[83] History shows that we cannot always count on future FTC Commissioners to engage in wise economic policymaking.[84] Khan also fails to contemplate the possibility that changing market circumstances or inartful drafting might call for the removal of regulations previously imposed. Khan's argument that "clear rules" would make "enforcement . . . predictable" suffers from the same criticisms.

For example, even if we give an administrative agency the benefit of a doubt that it has promulgated a Pareto-optimal rule, it is still entirely possible that this regulation may be inartfully drafted. For this very reason, the courts have been forced to develop a legal doctrine to deal with the situation of how much deference they should accord an administrative agency's interpretation of its own ambiguous rule.[85] More importantly, as Khan notes, rules must ultimately be enforced. However, enforcement—by definition—requires adjudication on a case-by-case basis that is governed by precedent from prior application of the rule.[86] The FTC cannot pass a rule and punish firms upon allegations that they violated that rule; due process requires more.[87]

Taken together, these analytical omissions reveal a lack of awareness about the realities of modern public utility regulation.

78 SBC Comm's Inc. v. FCC, 56 F.3d 1484, 1490 (D.C. Cir. 1995).

79 *Id.* at 1491

80 *Id.* (quoting *Hawaiian Telephone,* 498 F.2d at 776); *see also* W. Union Tel. Co. v. FCC, 665 F.2d 1112, 1122 (D.C. Cir. 1981) ("[E]qualization of competition is not itself a sufficient basis for Commission action."). One of the counter-arguments to this position is the often misguided notion that the naked "protection of competitors" is the analytical equivalent to attempting to promote tangible new entry into a market currently dominated by a monopoly incumbent. It is not. As the FCC's former chief economist argued, it is "important that the playing field should be leveled upwards, not downwards" because "rules that forbid a firm from exploiting efficiencies just because its rivals cannot do likewise" harm, rather than improve, consumer welfare. J. Farrell, *Creating Local Competition*, 49 Fed. Comm. L.J. 201, 212 (1996). In highly concentrated industries, the focus of policy should be on regulation that promotes competitive entry, rather than regulation that protects competition. The latter will often turn into the mere protection of the private interests of competitors.

81 *C.f.* Ford, *supra* note 3; Spiwak, *A Poor Case for a "Digital Platform Agency," supra* note 3; N. Chilson, *Does Big Tech Need its Own Regulator,* George Mason University Global Antitrust Institute (2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733726.

82 *C.f.* T.A. Lambert, *Rent-Seeking and Public Choice in Digital Markets,* The Global Antitrust Institute Report on the Digital Economy (posted Nov. 12, 2020), *available at* https://ssrn.com/abstract=3728990; Ford, *supra* note 3, and citations therein.

83 Indeed, Khan seems outright dismissive of the cost of regulation. *See, e.g., Amazon's Antitrust Paradox, supra* note 31, at 800 (". . . critics portrayed public utility as a form of corruption, a system in which private industry executives colluded with public officials to enable rent seeking. Ultimately these lines of criticism substantially thinned the very concept of public utility. The trend was part of a broader effort to idealize competitive markets and assume that nonintervention was almost always superior to interference.").

84 For example, as former FTC Chairman Timothy Muris noted nearly twenty years ago, the "unfair competition standard" in the wrong hands produced "a series of proposed rules relying upon vague theories of unfairness that often had no empirical basis, could be based entirely upon the commissioners' personal values, and did not have to consider the ultimate costs to consumers of foregoing their ability to choose freely in the marketplace." Thus, depending on who's in charge, it is unclear how a subjective "unfair competition" standard is any better than the FCC's "public interest" standard so many complain about. T. Muris, *The Federal Trade Commission and the Future Development of U.S. Consumer Protection Policy,* Remarks before the Aspen Summit, Cyberspace and the American Dream, The Progress and Freedom Foundation, Aspen, Colorado (Aug. 19, 2003), *available at* https://www.ftc.gov/public-statements/2003/08/federal-trade-commission-and-future-development-us-consumer-protection#N_49_. Indeed, the FTC is not without its own biases, often engaging in the same type of sloppy, politically-driven decision-making as other administrative agencies in an effort to achieve pre-determined outcomes. *See, e.g.,* G.S. Ford, *FTC Staff Bias On Intra-Brand Car Competition Is A Bad Deal For Consumers*, The Hill (Jan. 19, 2016), *available at* https://thehill.com/blogs/pundits-blog/finance/266251-ftc-staff-bias-on-intra-brand-car-competition-is-a-bad-deal-for. When it comes to abuse of government power, there are no "white hats" among regulatory agencies.

85 *See, e.g.,* Kisor v. Wilkie, 139 S. Ct. 2400 (2019); Auer v. Robbins, 519 U.S. 452 (1997).

86 It should also be noted that enforcement proceedings are often not just limited to the alleged offending party and the government. Many administrative agencies have highly permissive standing requirements which often allow the defendants' competitors to participate actively, thus essentially forcing the defendant to negotiate with both the government and their rivals to escape penalties. *See, e.g., In re Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, Applications for New Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands*, FCC 20-160, Memorandum Opinion and Order On Remand, 35 FCC Rcd. 13317 (Nov. 23, 2020).

87 Taken to its logical conclusion, Khan's argument would essentially have the FTC supplant the judiciary as the final arbiter over whether antitrust violations have taken place. Fortunately, under the Administrative

Indeed, Khan offers up as an example of purported rulemaking success the Obama Administration FCC's *2015 Open Internet Order*,[88] which imposed legacy common carrier regulations designed for the old Ma Bell monopoly on the internet.[89] As noted above, Khan argues that rulemaking is better than adjudication because it provides clear rules, is faster and cheaper, and provides for public input. But in the case of net neutrality regulation, history again bears witness that such assertions simply are not true.

To begin, the heart of the *2015 Rules*—what was referred to as the "general conduct" standard—was far from clear.[90] Under the FCC's "general conduct" standard,

> *Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.*[91]

According to the FCC, it would use a "non-exhaustive list" of seven factors to assess such practices.[92] Although the general conduct rule was upheld based on *Chevron* deference on appeal, the practical application of such a vague and subjective rule was a disaster. As the FCC later found in its *2018 Restoring Internet Freedom Order* after developing an exhaustive record of real-world experience, the

> Internet Conduct Standard is vague and has created regulatory uncertainty in the marketplace hindering investment and innovation. Because the Internet Conduct Standard is vague, the standard and its implementing factors do not provide carriers with adequate notice of what they are and are not permitted to do, i.e., the standard does not afford parties a "good process for determining what conduct has actually been forbidden." The rule simply warns carriers to behave in accordance with what the Commission *might* require, without articulating any actual standard. Even ISP practices based on consumer choice are not presumptively permitted; they are merely "less likely" to violate the rule. Moreover, the uncertainty caused by the Internet Conduct Standard goes far beyond what supporters characterize as the flexibility that is necessary in a regulatory structure to address future harmful behavior. We thus find that the vague Internet Conduct Standard subjects providers to substantial regulatory uncertainty and that the record before us demonstrates that the Commission's predictive judgment in 2015 that this uncertainty was "likely to be short term and will dissipate over time as the marketplace internalizes [the] Title II approach" has not been borne out.[93]

Second, the net neutrality rulemaking process was far from expeditious. The FCC initially attempted to enforce net neutrality rules via a policy statement, but that effort was shot down by the courts.[94] After that, FCC Chairman Julius Genachowski initiated the FCC's first formal efforts at rulemaking by issuing a Notice of Proposed Rulemaking (NPRM) on October 22, 2009.[95] Fourteen months later, the Commission released its *2010 Rules*.[96] The *2010 Rules* were then challenged in federal court, and the case was appealed to the D.C. Circuit in *Verizon v. FCC*, which overturned the rules on January 14, 2014.[97] Five months later, Chairman Tom Wheeler issued another NPRM.[98] The Commission produced the *2015 Open Internet Order* on March 12, 2015.[99] These rules were again challenged and appealed to the D.C. Circuit. The court upheld the rules in *United States Telecom Ass'n v. FCC* on June 14, 2016, and reaffirmed this ruling en banc on May 1, 2017.[100] After the change in administrations, the new FCC Chair Ajit Pai released another *NPRM* on May 23, 2017, to remove the *2015 Rules*.[101] After eight months of deliberations,

Procedure Act, parties to regulatory enforcement actions are permitted to appeal any decision to the courts under the "arbitrary and capricious" standard. While this standard is highly deferential like *Chevron*, it does require agencies to do their due diligence. *See, e.g.,* FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 ("The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency. A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision."). When an agency fails to do its due diligence, judicial deference is not guaranteed. *See, e.g., Comcast*, 717 F.3d 982.

88 In the Matter of Protecting and Promoting the Open Internet, FCC 15-24, Report And Order On Remand, Declaratory Ruling and Order, 30 FCC Rcd 5601 (rel. March 12, 2015).

89 *Amazon's Antitrust Paradox, supra* note 31, at 800 ("Although the concept of public utility regulation remains somewhat maligned today, there are signs that a robust movement to apply utility-like regulations to services that widely register as public—such as the internet—can catch wind. The core of the net neutrality debates, for example, involved foundational discussions about how to regulate the communication infrastructure of the twenty-first century. The net neutrality regime ultimately adopted falls squarely in the common carrier tradition.").

90 2015 Rules, *supra* note 88, at ¶¶ 133 et seq.

91 *Id.* at ¶ 136 (emphasis in original).

92 *Id.* at ¶ 138.

93 *Restoring Internet Freedom,* FCC 17-166, Declaratory Ruling, Report, and Order, 33 FCC Rcd. 311 (rel. Jan. 4, 2018) at ¶ 247 (emphasis in original).

94 *See* Comcast Corp. v. FCC*,* 600 F.3d 642 (D.C. Cir. 2010).

95 *In the Matter of Preserving the Open Internet*, FCC 09-93, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, (rel. Oct. 22, 2009).

96 *In the Matter of Preserving the Open Internet*, FCC 10-201, Report and Order, 25 FCC Rcd 17905 (rel. Dec. 23, 2010).

97 Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

98 *In the Matter of Protecting and Promoting the Open Internet,* FCC 14-61, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (rel. May 15, 2014).

99 *Supra* note 88.

100 United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016), *pet. for rehearing en banc denied*, 855 F.3d 381 (2017).

101 *Restoring Internet Freedom,* FCC 17-60, Notice of Proposed Rulemaking, 32 FCC Rcd 4434 (rel. May 23, 2017).

the Commission released its *2018 Restoring Internet Freedom Order*.[102] These revised rules were again challenged, and the case appealed to the D.C. Circuit, which upheld them in *Mozilla v. FCC* on October 1, 2019.[103]

In all, not counting the policy statement phase, the FCC's net neutrality rulemaking docket has dragged on for well over a decade. And we are not out of the woods: On July 9, 2021, President Biden issued an "Executive Order on Promoting Competition in the American Economy" calling for the reimposition of some sort of net neutrality rules.[104] While the FCC lacks a clear Democratic majority to carry out the President's wishes at the time of this writing, many anticipate that net neutrality will be at the top of the priority list once the FCC returns to full strength.[105] If so, it looks like there is no resolution of the net neutrality debate in sight.

Moreover, given the economic impacts of net neutrality regulation, the cost to society of participating in this rulemaking was not cheap.[106] A cursory review of the FCC's Electronic Comment Filing System (ECFS) reveals that almost every major law firm in Washington—in addition to a host of law firms from across the country—filed comments in the proceeding. Furthermore, many of the same (and expensive) leading economists often utilized in major antitrust litigation were either retained as expert witnesses or authored white papers to influence the debate. And, of course, many third party public interest groups filed comments or wrote op-eds to gin up pollical pressure in favor of their preferred regulatory outcome.

Khan's third argument in favor of regulation over ex post enforcement of antitrust rules is that it allows for greater public participation. Politicians, in theory, are supposed to be responsive to public outcry. When faced with an avalanche of blast emails from angry constituents, legislators generally are moved to act. In contrast, independent regulatory agencies are supposed to be (but admittedly often are not) apolitical and immune from such pressure. While it is true that administrative agencies must subject their actions to "public notice and comment" under the Administrative Procedure Act, regulatory agencies are not created to promulgate rules and regulations based upon the vox populi; rather, these agencies are charged with dispassionately and expertly implementing their respective enabling statutes as delineated by Congress based upon the plain text of the statute, the caselaw interpreting that statute, the economic evidence, and the substantive record before them. If they fail in that task, then administrative agencies can be reprimanded by an appellate court for engaging in arbitrary and capricious behavior or, in very rare cases, rebuked by Congress via the Congressional Review Act.

Fed up with congressional inaction, however, advocacy groups on both sides of the aisle have increasingly turned to applying the same political pressure tactics traditionally used on elected officials on unelected bureaucrats by aggressively pounding regulatory agencies with blast form email comments during controversial rulemaking proceedings. These email comments are commonly referred to as "clicktivism" because of the generally automated nature of the process. Users visit a web page, see a banner which reads "click here and send Washington a message," and voilà, an automated form comment is generated and filed with the agency. If advocacy groups can inundate an agency with an avalanche of angry comments, the thinking goes, then the agency will be compelled to consider the public outcry as it weighs the evidence. But such clicktivism is far from probative evidence.

In the case of the net neutrality debate, clicktivism at the FCC reached new heights.[107] For example, when Chairman Pai was contemplating removing the *2015 Rules*, over 20 million comments were filed in the docket. A detailed forensic analysis revealed that 36 percent of these comments appeared to have been generated by self-described "temporary" and "disposable" email domains attributed to FakeMailGenerator.com. Moreover, this forensic report revealed that 9.3 million comments listed the same email and physical address as another, indicating that many entities filed multiple comments.[108] The overwhelming majority of these comments provided no serious legal, economic,

102 *Supra* note 93.

103 940 F.3d 1 (D.C. Cir. 2019), *reh'g en banc denied,* (D.C. Cir. 18-1051) (Feb. 6, 2020).

104 Executive Order on Promoting Competition in the American Economy (July 9, 2021), *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy.

105 Khan recently called for the FCC to reimpose common carrier regulation on broadband internet access services so as to "once again put in place the nondiscrimination rules, privacy protections, and other basic requirements needed to create a healthier market." *See Remarks of Chair Lina M. Khan Regarding the 6(b) Study on the Privacy Practices of Six Major Internet Service Providers*, Commission File No. P195402 (Oct. 21, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1597790/20211021_isp_privacy_6b_statement_of_chair_khan_final.pdf. Since common carrier status would deprive the FTC of jurisdiction over companies providing broadband internet access services, this was a rare case of an agency head seeking to decline jurisdiction. Such a rejection of jurisdiction is curious, particularly when it comes to enforcing consumer privacy, given that the U.S. Congress—recognizing the economic costs of the asymmetrical privacy regime created by the combination of the FCC's imposition of common carrier status on broadband internet access services and the FTC Act's common carrier exemption—took the extraordinary step of using its authority under the Congressional Review Act to eliminate the Obama-era FCC's privacy rules as it wanted a cohesive federal approach at the Federal Trade Commission. L.J. Spiwak, *Insight: Digital Privacy Requires a Cohesive Federal Solution*, Bloomberg Law (June 13, 2018), *available at* https://www.phoenix-center.org/oped/BloombergLawDigitalPrivacy13June2018.pdf.

106 While it is true that major antitrust litigation may be expensive, the cost of participation is limited to the parties involved in the case. In contrast, because regulations are rules of general applicability across an industry, there are more affected parties who must participate to protect their interests.

107 *See, e.g.,* L.J. Spiwak, *Curbing 'Clicktivism' at the Federal Communications Commission,* The Hill (Sept. 19, 2017), *available at* http://thehill.com/opinion/technology/351082-curbing-clicktivism-at-the-federal-communications-commission.

108 Emprata, *FCC Restoring Internet Freedom Docket 17-108, Comments Analysis* (Aug. 30, 2017), *available at* https://www.emprata.com/insights/reports/fcc-restoring-internet-freedom-docket; *see also* New York State Office of the Attorney General Letitia James, *Fake Comments: How U.S. Companies & Partisans Hack Democracy to Undermine Your Voice* (May 6, 2021), *available at* https://ag.ny.gov/sites/default/files/oag-fakecommentsreport.pdf.

or engineering insight to aid in the FCC's deliberations. Most were simply one-page form email comments asking the FCC to keep or reverse reclassification. Many clicktivists used language so profoundly disgusting that decorum prevents them from being mentioned here. Still, due process required the FCC's staff to comb through this garbage, wasting valuable FCC resources.

We also cannot ignore the other side of the public comment coin: direct lobbying via ex parte meetings with both Commissioners and staff. Again, even a cursory review of the FCC's ECFS system reveals a cornucopia of such meetings as parties (and their lobbyists) tried to influence the outcome. Politicians also attempted to put further political pressure on individual Commissioners.[109] This political full court press ranged the full gamut from state officials to members of the House and Senate to the White House itself.[110]

Finally, but perhaps most importantly, the net neutrality saga also shows that economic regulation has costs as well as benefits. As former FCC Chief Economist Dr. Tim Brennan publicly admitted, the *2015 Rules* were formulated in an "economics free zone" without a cost/benefit analysis or a legitimate theoretical foundation.[111] In fact, the FCC's whole case was based on an erroneous application of a "virtuous circle" theory of innovation.[112] Absent a sound economic theory, it came as no surprise that the *2015 Order* resulted in a significant reduction in network investment to the detriment of consumer welfare.[113]

The story of net neutrality shows that ex ante antitrust rules analogous to those imposed by the FCC would not necessarily be superior to ex post, case-by-case enforcement by the FTC and the Department of Justice under the nation's antitrust laws.[114] Khan's arguments in favor of such per se regulation—that it is more predictable, efficient, and democratic—should be evaluated with attention to the history of how similar attempts at regulation have played out in the real world.

III. Conclusion

As detailed above, Khan's legal arguments in favor of UMC rulemaking are subject to debate. But until the bounds of this claimed authority are squarely resolved by the courts (and perhaps, if ultimately necessary, Congress), Khan nonetheless appears determined to move the FTC down the UMC rulemaking path.[115] But if history is any guide, UMC rulemaking is a terrible policy. Not only will UMC rulemaking inevitably lead to a myriad of unintended economic consequences, but it will inexorably transform the FTC from a respected dispassionate enforcer of our nation's antitrust laws to just another highly politicized institution in the sea of "ABC" regulatory agencies that populate Washington, D.C. today.

109 L.J. Spiwak, *The Law, the Public Interest, and the FCC—A Critique of Title II Comments from Eleven Democratic Congressmen,* Bloomberg BNA (Aug. 25, 2017), *available at* https://www.phoenix-center.org/oped/BloombergBNADemocratCongressmenTitleIIResponse25August2017.pdf.

110 L.J. Spiwak, *The "Clicktivist" In Chief,* The Hill (Nov. 12, 2014), *available at* http://thehill.com/blogs/pundits-blog/technology/223744-the-clicktivist-in-chief.

111 T. Brennan, *Is the Open Internet Order an "Economics-Free Zone"?,* Perspectives from FSF Scholars, Free State Foundation (June 28, 2016), *available at* https://freestatefoundation.org//wp-content/uploads/2019/06/Is-the-Open-Internet-Order-an-%E2%80%9CEconomics-Free-Zone%E2%80%9D-062816.pdf.

112 *Id.*; *see also* G.S. Ford, *Revisiting the "Virtuous Circle" Two Years Later,* Bloomberg BNA (July 10, 2017), https://www.phoenix-center.org/oped/BloombergBNAVirtuousCircleRevisited10July2017.pdf.

113 G.S Ford, Regulation and Investment in the U.S. Telecommunications Industry, 56 Applied Economics 6073 (2018), available at https://tinyurl.com/y2brc94f.

114 It should also be noted that given the dearth of proven allegations of anticompetitive conduct by internet service providers, Khan's arguments for when rulemaking is appropriate, *see supra* note 17, are also not satisfied in this case.

115 *See, e.g.,* Press Release, *FTC Opens Rulemaking Petition Process, Promoting Public Participation and Accountability,* Federal Trade Commission (Sept. 15, 2021), *available at* https://www.ftc.gov/news-events/press-releases/2021/09/ftc-opens-rulemaking-petition-process-promoting-public; *see also* Press Release, *FTC Acting Chairwoman Slaughter Announces New Rulemaking Group* (March 25, 2021), *available at* https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group.

What Happened to Natural Law in American Jurisprudence?

By Kody W. Cooper

Federalism & Separation of Powers Practice Group

A Review of:

The Decline of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped, by Stuart Banner (Oxford University Press), https://global.oup.com/academic/product/the-decline-of-natural-law-9780197556498?cc=us&lang=en&

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Other Views:

• Peter Hammond Schwartz, *Originalism is Dead. Long Live Catholic Natural Law.*, The New Republic, Feb. 3, 2021, https://newrepublic.com/article/161162/originalism-dead-long-live-catholic-natural-law.

• Bruce P. Frohnen, *Lawyers, Natural Law, and the Problem of Pride,* Kirk Center, Sept. 19, 2020, https://kirkcenter.org/reviews/lawyers-natural-law-and-the-problem-of-pride/.

• Lee J. Strang, Originalism's Promise: A Natural Law Account of the American Constitution (2019), https://www.cambridge.org/core/books/originalisms-promise/A5E97D3EB6CAAC72592D1A62E3691B1C.

• Robert Bork, *Natural Law and the Constitution*, First Things (March 1992), *available at* https://www.firstthings.com/article/1992/03/natural-law-and-the-constitution.

Not long after the confirmation of Supreme Court Justice Amy Coney Barrett, *The New Republic* published an essay titled "Originalism is Dead. Long Live Catholic Natural Law."[1] The header illustration portrayed Justice Barrett donning a chasuble, mitered, and enthroned as pontifex maximus. The clear implication—made explicit in the meandering, conspiratorial narrative that followed—was that Justice Barrett's confirmation was the culmination of an illiberal, shadowy Catholic plot to seize power, overthrow the Constitution, and impose traditional Catholicism from the bench.

Despite the blatant prejudice on display, the thrust of the article—that Barrett is just the most recent Justice who descends from what it calls "decades of Catholic influence on conservative legal circles"—does raise a legitimate question: just what *has been* the historical influence of natural law theory on the American legal system? And what prospects, if any, are there for its influence on jurisprudence going forward?

Happily, a book was published this year on just this topic: Stuart Banner's *The Decline of Natural Law*. Banner, a widely published legal scholar at UCLA and experienced counselor at the Supreme Court bar, traces natural law's career in the American legal system. Banner argues that natural law's influence was strong in the 18th and 19th centuries, but that over the past hundred years natural law has become increasingly irrelevant in the American legal system.

Banner's book is not a defense or critique of natural law, but an attempt to fill a gap in the scholarship by giving an objective report of the use of natural law by American lawyers and jurists in legal argument and decision. As such, it is a refreshing antidote to the anti-Catholic reactions and musings about natural law that followed Justice Barrett's nomination and confirmation. But it is more than that. His account of the influence of natural law is a significant contribution to our understanding of the history of the American legal system.

In my view, the book corroborates something that Banner may not have intended: that the American project is indebted in important ways to the classical, Christian, and even *Catholic* tradition of natural law theory. At the same time, the book reveals how natural law's actual influence on the legal system was understood to be continuous with the fundamental commitments of the polity, including nonestablishment, free exercise of religion and religious pluralism. Banner also tells a mostly compelling story explaining why the rhetoric of natural law declined in the American legal system.

I. Defining Natural Law

When G.K. Chesterton defined natural law as the "right reason in things which man with his unaided reason can see to be

1 Peter Hammond Schwartz, *Originalism is Dead. Long Live Catholic Natural Law.*, The New Republic, Feb. 3, 2021, https://newrepublic.com/article/161162/originalism-dead-long-live-catholic-natural-law.

right," he drew from a tradition that preceded his own Thomistic school of Catholic philosophy.[2] The core claim of natural law philosophy is that right reason—recta ratio—can discern the functions of things, and thereby judge whether human action at an individual, social, or legal plane accords with proper human functioning. This core claim can be traced to the teleological vision of nature articulated in classical antiquity by thinkers like Plato, Aristotle, and Cicero. Thomas Aquinas's achievement was to articulate a grand architecture of natural law that synthesized the insights not only of classical Greek and Roman antiquity, but also of Jewish and Muslim philosophy, all within the revealed principles of Christian doctrine. The power of Aquinas's theory rested in part on his contention that the metaphysical and moral propositions of natural law were compatible with, but did not presuppose, Christian faith in the mind of the knower. The natural law was knowable and in fact known from a wide range of non-Christian perspectives.

Yet natural law philosophy was metaphysically *theistic*. Aristotle had identified a range of exceptionless norms that he judged to be required for living a virtuous life. And while he favorably cited Antigone's civil disobedience to Creon's unjust law, the legal status of moral norms in Aristotle's thought was ambiguous at best. The ambiguity dissipated in Aquinas's thought, which wed Aristotelian teleology to a Judeo-Christian creational metaphysic, in which the world was seen as existentially dependent upon a first cause. In the order of being, the divine pedigree of nature and human reason secured the *legal* character of exceptionless moral norms.

As Banner points out, William Blackstone provided an influential definition of natural law that encapsulated the commonplace view of 18th and 19th century Anglo-American lawyers and judges. Blackstone defined law in the abstract as a "rule of action" imposed upon animate and inanimate matter alike. Blackstone sourced physical laws governing inanimate matter and moral laws governing rational animals in the same divine pedigree:

> When the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain laws of motion, to which all movable bodies must conform . . . Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being . . . so, when he created man, and endued him with free-will to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that free-will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.[3]

Blackstone's definition manifests what Yves Simon, one of the most influential 20th century Thomistic theorists of natural law, referred to as the three orders identified in classical natural law theory: order in the divine mind, order in nature, and order in the human mind.[4] Classical natural law theory saw these three orders, which spanned the orders of being and knowledge, as inherently connected, since nature and man were seen as existentially dependent upon an all-good and all-powerful God who created it and impressed his plan upon it. An analogy to the home can help illustrate this idea. Imagine a father of a home who is also the architect and builder of it. The order in the divine mind is like the blueprint of the home in the mind of the architect-father. The order in nature is like the house constructed with all of its particular parts—brick, wood, sheetrock, furniture, appliances, etc.—arranged according to the plan. The order in the human mind is apparent in each child in the home, who shares in the reason of their architect-father by grasping the reasons of things and persons who constitute the domicile, including both vertical relationships of child to parent and horizontal relationships amongst siblings, in light of his or her own desire for happiness.

Classical natural law conceived of human beings as members of a natural ecology that involved membership in social wholes—from the primordial cell of the family, up into more expansive concentric circles of membership, which progressively expanded the bonds of love and order toward the common good. The practical necessities that attached to the pursuit of the human good had the character of *laws* of nature.

Banner assembles wide and deep evidence that early American lawyers and jurists believed in classical natural law along the lines of the three orders. Was the natural law divinely pedigreed? Yes, said Boston lawyer Benjamin Oliver: "the only sure foundation of all right, is the will of the great Creator." Were human beings part of a world that is teleologically ordered? Yes, said lawyer-poet William Hosmer, who inferred from basic human needs of nourishment and community that the practical necessities attached to the pursuit of the goods of life and community were natural *laws* that regulated human conduct. Were the precepts of natural law—which direct human action to the common good—grasped by reason? Yes, said Cambridge professor Thomas Rutherford, author of the influential *Institutes of Natural Law*: "Although his own particular happiness be the end, which the first principles of his nature teach him to pursue; yet reason, which is likewise a principle of his nature, informs him, that he cannot effectually obtain this end without endeavoring to advance the common good of mankind."[5]

Hence, Americans recognized natural law as a pretheoretical *fact* that was grasped and presupposed by the common man. But they also taught and learned it *as theory* in the universities. Banner shows that natural law theory was pervasive in legal education. When Joseph Story began lecturing at Harvard, he announced he would begin with natural law, voicing the commonly held

2 G.K. Chesterton, *A Mild Remonstrance*, The American Rev., Sept. 1935, at 455.

3 2 William Blackstone, Commentaries 38-40 (J.B. Lippincott Co. 1893).

4 Yves Simon, The Tradition of Natural Law: A Philosopher's Reflections 139; 142 (Vikan Kuic ed. 1992). For an illuminating discussion, see Russell Hittinger, The First Grace: Rediscovering Natural Law in a Post-Christian Era, xvi ff., 4-8 (2003).

5 Stuart Banner, The Decline of Natural Law, 12-13, 16 (2021).

view that natural law "constitutes the first step in the science of jurisprudence."[6]

Because it was believed that all men were created equal, it followed that all persons with a functioning power of reason both knew and were bound by the unchanging principles of natural law. It is regarding this axiom of natural law that an objection is frequently raised: how could there be a universal common standard accessible by reason in the face of wide cultural, moral, and legal differences? The objection gets to the heart of the relationship of natural law to positive law.

II. The Relationship of Natural Law to Positive Law in the Early Republic

Some contemporary relativist philosophers infer from cultural and legal difference that natural law does not exist—but they often ignore Aquinas's solution to this puzzle.[7] Aquinas made two distinctions. First, between primary and secondary precepts. And second, between deductive and determinative relations between the precepts and positive human laws.

With regard to the first distinction, Aquinas pointed out that all human beings really know and are bound by the primary precepts. No one can claim not to know at least implicitly that good is to be done and evil is to be avoided; nor can anyone deny knowing the precepts that seem to follow nearly immediately upon it, such as do no harm, do not murder, etc. But secondary precepts can fail to be known and reflected in the positive law, due to erroneous theoretical beliefs or due to vicious customs and habits. For example, Aquinas pointed out that some Germanic tribes had been so corrupted by vicious habits and beliefs that they held that theft was morally acceptable. This is the first distinction that Aquinas deployed to make sense of how some tribes and even civilizations had social and legal requirements or permissions contrary to natural law precepts.

The second distinction also helps explain such differences, while also clarifying the relationship of natural law to positive law. Some positive laws are straightforward deductions from natural laws. From the moral precept *do not steal*, it is an easy deduction to denominate theft of expensive property as a felony. But how shall property theft be punished, and according to which specific amounts? This is a matter left to human freedom and prudence, in light of circumstances: the realm of determinatio.

While Banner does not discuss Aquinas's second distinction explicitly, his enlightening discussion of how natural law was deployed by legislators, lawyers, and jurists shows how they distinguished the modes of deduction and determination. The lawyer William Rawle in his *View of the Constitution of the United States in America* implicitly identified and distinguished the modes of deduction and determination this way: "When the period arrives for the formation of positive laws, which is after the formation of the original compact, the legislature is employed, not in discovery that these acts are unlawful, but in application of punishments to prevent them."[8] Banner finds extensive evidence that Americans distinguished between "fundamentals and details" in translating natural justice into positive right.

The widespread understanding of legislation as grounded on natural law also colored the use of natural law in courts. Banner persuasively argues that judges were "far more likely" in earlier centuries to interpret legislation in light of natural law principles and construe it accordingly, since judges supposed that legislators intended to secure natural rights. Judges thus rarely struck down legislation in the realm of determinatio because they respected the will of the legislature when primary precepts were not at stake.

Another way judges used natural law in the early republic was to fill in the gaps left by positive law's silence. Banner relates several examples of state and local courts directly appealing to natural law in cases touching on family, the rights of criminal defendants, property rights, and contract rights. For example, in *Wightman v. Wightman*, a New York chancery court had to decide whether a marriage was valid when one party to the marriage was insane, without statutory guidance. The court appealed to natural law to declare the marriage void.[9]

The pervasive influence of natural law on the early American legal system was also apparent in the common law. Banner convincingly shows that the later legal realist account or critique of the common law as a body of law created by judges was not how judges understood the common law in the 19th century. Rather, the common law, "based on both custom and reason," was the *discovery* of judges, rather than their invention. While jurists often saw custom and reason as harmonious, they did sometimes conflict, particularly when old English common law principles did not fit American circumstances. Reasonableness was the sieve by which the common law would be filtered into American jurisprudence. Since, as we have already seen, the heart of natural law is recta ratio, it isn't surprising that common law was understood to be the natural law applied by judges. As James Kent put it, the common law was "the application of the dictates of natural justice, and of cultivated reason, to particular cases."[10]

III. The Dispute over Juridical Appeal to First Principles

Following the failed nomination of Robert Bork to the Supreme Court, an interesting debate broke out between Bork and a few of his critics.[11] Bork defended a positivistic originalist approach in which judges have no authority to strike down legislative acts absent a clear violation of a specific textual provision of the Constitution as it was publicly understood by reasonable people when it was ratified. Hence, Bork opposed appeals to principles of natural justice in jurisprudence as ultra

6 *Id.* at 38 (citing Joseph Story, A Discourse Pronounced Upon the Inauguration of the Author, as Dane Professor of Law in Harvard University 42 (1829)).

7 *See, e.g.*, Jesse Prinz, *Morality is a Culturally Conditioned Response*, Philosophy Now (2011), *available at* https://philosophynow.org/issues/82/Morality_is_a_Culturally_Conditioned_Response.

8 Banner, *supra* note 5, at 21 (quoting and discussing William Rawle, A View of the Constitution of the United States 260 (1825)).

9 *Id.* at 27.

10 *Id.* at 65 (quoting Kent).

11 *See* Robert Bork, *Natural Law and the Constitution*, First Things (March 1992), *available at* https://www.firstthings.com/article/1992/03/natural-law-and-the-constitution; Hadley Arkes, William Bentley Ball, Robert H. Bork, Russell Hittinger, *Natural Law and the Law: An Exchange*, First Things (May 1992), *available at* https://www.firstthings.com/article/1992/05/natural-law-and-the-law-an-exchange.

vires and therefore a dereliction of judicial duty. Meanwhile, his natural lawyer critics contended that language in the Constitution points to deep moral principles beyond the text itself, and that the historic understanding of the Founders and practice of early American judges justifies appeal to first principles in judging. Echoes of that debate a generation ago can be heard today in the discussion and debate over "common good constitutionalism" and "common good originalism."[12]

Banner's book provides helpful historical context for anyone interested in assessing this debate. It turns out that the dispute over the authority and scope of judges' appeal to first principles has deep roots in the republic. It is well known that Samuel Chase and James Iredell debated whether judges were authorized to appeal to natural law to strike down legislation. Chase argued that legislative enactments contrary to first principles did not meet the essential moral conditions to *be* law and so were void. Iredell replied that jurists differed over the content and application of first principles, and that judges had no greater claim to competence than legislatures.[13]

Chief Justice John Marshall is an example of a judge who seemed to feel the pull of both perspectives. In *Fletcher v. Peck*, he intimated that a law annulling contracts was unlawful in part because it was contrary to natural law—but he ultimately relied on the Contract Clause for his ruling.[14] Meanwhile, in *The Antelope* case, Marshall acknowledged that slavery was contrary to natural law, but he held that the positive law of the Constitution permitted it to exist as a state institution, and that the Court's judgment was bound by the positive law notwithstanding its contravention of first principles.[15]

One of the signal achievements of Banner's book is to throw light on how judges and lawyers debated the question in state courts during the 19th century. Were there principles of natural right that limited state legislatures, even if not explicitly stated in the state constitutions? State judges came down differently as to whether unwritten principles of natural law limited state legislatures. One Tennessee judge struck down a retroactive statute, appealing to the "eternal principles of justice which no government has a right to disregard." Meanwhile, a California supreme court justice contended that judicial appeal to first principles amounted to a "usurpation of legislative power." Banner discusses a wide range of cases that raised the question, including "class legislation" granting special favors, and a variety of property rights cases. In short, across the 19th century republic, one could find "ample precedents on both sides" of the question debated by Chase and Iredell.[16]

Notably, much of the evidence indicates that there was widespread agreement as to the *existence* of natural law. The debate was more over the capacity of the judge to apply it. Banner contends that the upshot of the century of debate was that it laid the premises for later critiques of natural law, which included arguments that it was "too subjective, too ambiguous, too susceptible of multiple interpretations . . . [and] too close to policymaking, too close to legislation."[17]

For the sake of ease, let us call the former set of arguments regarding subjectivity, ambiguity, and susceptibility to multiple interpretations, the *multiplicity objection*; we can refer to the latter set of arguments about natural law judging as resembling policymaking as the *superlegislation objection*. We shall return to consider them in more detail below.

Banner thus shows that, even as natural law was woven into the legal fabric of 19th century jurisprudence, one of the causes of its decline was also sewn in. Banner identifies several other factors that contributed to natural law's decline in practical influence: the separation of law and religion, the explosion of law publishing, and the disputes over the content and application of natural law in matters of fundamental justice and public policy such as slavery.

IV. Natural Law's Decline

Christianity had been widely believed to be part of the common law in the 18th century, Thomas Jefferson's attacks on this idea notwithstanding. The *Ruggles* case is illustrative. After John Ruggles shouted in public that "Jesus Christ was a bastard, and his mother must be a whore," he was convicted of blasphemy, fined, and jailed. New York Supreme Court Chief Justice and former Columbia law professor James Kent contended that Christianity's role in the common law was to provide foundational religious justification for virtue, and that unpunished blasphemy would undermine the ground of moral sentiments necessary for the support of law.[18]

Yet, notice how Ruggles' speech act could not be adjudged by *unaided* reason to be or not be blasphemy against God. For the Christian belief in the Incarnation of the Second Person of the Trinity is a belief held by supernatural faith. Of course, Anglo-American jurisprudence inherited natural law from a long tradition in Christendom of theorizing and teaching from within a specific revelational tradition. Classical natural law conceived the natural virtue or duty of religion as requiring that the Creator

12 *See* Adrian Vermeule, *Beyond Originalism*, The Atlantic (March 2020), *available at* https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/; Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 4 Harv. J. L. & Pub. Pol'y 917 (2021), *available at* https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2021/06/Hammer-Common-Good-Originalism.pdf; Hadley Arkes, Josh Hammer, Matthew Peterson, & Garrett Snedeker, *A Better Originalism*, The American Mind (March 18, 2021), https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism/. For critiques, see Lee Strang, *Rejecting Vermeule's Right Wing Dworkinian Vision*, Law & Liberty (April 2, 2020), https://lawliberty.org/rejecting-vermeules-right-wing-dworkinian-vision/; John O McGinnis, *Adrian Vermeule: Unwitting New Originalist*, Law & Liberty (April 9, 2020), https://lawliberty.org/adrian-vermeule-unwitting-new-originalist/; John Grove, *The Bad History of Common Good Originalism*, The Public Discourse (July 25, 2021), https://www.thepublicdiscourse.com/2021/07/76750/; John Grove, *Against a Flight 93 Jurisprudence*, Law & Liberty (March 31, 2021) https://lawliberty.org/against-a-flight-93-jurisprudence/.

13 Calder v. Bull, 3 U.S. 386 (1798).

14 Fletcher v. Peck, 10 U.S. 87 (1810).

15 The Antelope, 23 U.S. 66 (1825).

16 Banner, *supra* note 5, at 81-83.

17 *Id*. at 95.

18 *Id*. at 99 (quoting People v. Ruggles, 8 Johns. 290, 291 (N.Y. 1811)).

be honored—but the details were left unspecified.[19] Kent thus did not offer an independent apologia for the Incarnation, but appealed to the de facto beliefs of the supermajority. Yet he also maintained that such an appeal was compatible with the principles of liberty of conscience, free exercise of religion, and religious pluralism:

> The free equal and undisturbed, enjoyment of religious opinion, whatever it may be, and free of decent discussions on any religious subject, is granted and secured . . . but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community is an abuse of that right.[20]

In other words, the *reason* Kent gave for upholding the blasphemy conviction was not the eternal good and the way thereto per se, over which, properly speaking, the church and not the state has direct cognizance. It was rather the temporal common good, which depended upon a religious "root of moral obligation," which strengthened "the security of social ties."[21] Indeed, as I have argued in these pages, the Founders' robust natural law theory of morality animated their view of free exercise of religion in a way that permitted states to proscribe conduct widely thought to be licentious and subversive of virtue and civil society in a republican form of government.[22] This "civic republican" view of the relationship of religion to virtue had broad support among the Founders.

Whatever the merits of Kent's argument, in fact, some courts began to express more doubts over time about Christianity's place in the common law. Exemplifying this shift was Associate Supreme Court Justice William Strong, who in 1875 adopted the civic republican reasoning of Kent to defend blasphemy laws, but asserted that such reasoning need not rest on any claim about Christianity being part of the common law. There were other signs of the separation of law and religion, such as the disestablishment of the remaining established churches and the decline in religious assessment of witnesses in court. These trends suggested religion was more and more seen as a private matter.[23]

Meanwhile, appeal to natural law principles increasingly was being replaced by appeals to precedent. There was simply less case law in the early republic for lawyers to appeal to in cases and controversies, so it was more likely that they would appeal to relevant natural law principles. Banner plausibly argues that the explosion of case law in the 19th century—by the 1830s there were around 500 volumes of case reports; by the end of the first decade of the 20th century there were approximately 8,000—led to "a shift in the profession's argument style . . . lawyers started emphasizing the precedents at the expense of the principles."[24] This tracked the transformation of the term "case-lawyer" from a term of opprobrium into the standard practice of the profession.

Banner provides some interesting evidence that could be taken to substantiate the success of the multiplicity objection to legal appeals to natural law principles. One could find appeals to natural justice on both sides of debates over the death penalty, private property rights, slavery, and women's rights.

Take the case of slavery, "among the most politically salient topics which natural law was applied in the 19th century, and . . . among the most contested."[25] It was characteristic of abolitionist arguments that slavery violated natural law. For example, John Quincy Adams famously argued before the Supreme Court in the Amistad case regarding his clients, the Mende people who had been kidnapped from their homes in Africa by Spanish slavers, had mutinied, and found themselves on American shores: "I know of no other law that reaches the case of my clients, but the law of nature and of Nature's God on which our fathers placed our own national existence."[26] But the content of the law of nature was contested. Adams took as one of his targets the proslavery argument from natural right:

> that property in man has existed in all ages of the world, and results from the natural state of man, which is war . . . This universal nature of man is alone modified by civilization and law. War, conquest, and force, have produced slavery, and it is state necessity and the internal law of self preservation, that will ever perpetuate and defend it.[27]

Adams replied:

> That DECLARATION says that every man is "endowed by his Creator with certain inalienable rights," and that among these are "life, liberty, and the pursuit of happiness." if these rights are inalienable, they are incompatible with the rights of the victor to take the life of his enemy in war, or to spare his life and make him a slave. If this principle is sound, it reduces to brute force all the rights of man. It places all the sacred relations of life at the power of the strongest. No man has a right to life or liberty, if he has an enemy able to take them from him. There is the principle. There is the whole argument of this paper.[28]

Adams went on to trace this idea to Hobbes's theory of natural law, which he believed was "utterly incompatible with any theory of human rights." As the words of Adams' interlocutor suggest—and as Banner recounts from other sources from antebellum Southern courts—the antislavery natural law tradition was contested by proslavery natural law arguments that sourced the institution in

19 *Cf.* Thomas Aquinas, Summa Theologiae, II-II, 81.1; James Madison, *Memorial and Remonstrance Against Religious Assessments*, §1, *available at* https://founders.archives.gov/documents/Madison/01-08-02-0163.

20 Quoted in Banner, *supra* note 5, at 100.

21 *Id.*

22 Kody W. Cooper, *How the Founders' Natural Law Theory Illuminates the Original Meaning of Free Exercise*, 22 Federalist Soc'y Rev. 42 (2021), *available at* https://fedsoc.org/commentary/publications/how-the-founders-natural-law-theory-illuminates-the-original-meaning-of-free-exercise.

23 Banner, *supra* note 5, at 111, 116.

24 *Id.* at 128, 121-22.

25 *Id.* at 159.

26 Oral Argument at 9, United States v. The Amistad, 40 U.S. 518 (1841), *available at* https://avalon.law.yale.edu/19th_century/amistad_002.asp.

27 *Id.* at 88.

28 *Id.* at 88-89.

power politics, war, its de facto prevalence, and/or a racist account of the supremacy and subordination of the white and black races.

Banner's takeaway is that "natural law appeared to be ambiguous enough to support the argument that slavery was forbidden *and* the argument that slavery was compelled," and this contributed to its decline as useful in the legal system. "If everyone had his own version of natural law, what good was it?"[29]

Banner deserves credit for finding evidence in the mid-19th century of lawyers and judges questioning the use of natural law because of its apparent susceptibility to multiple interpretations. And he makes a respectable case that the multiplicity problem contributed to natural law's decline in legal argumentation. Still, there are two points that need to be made, which help fill out the story more completely.

First, prominent Americans deployed classical natural law argumentation to offer a plausible explanation of the multiplicity problem. It was recognized that the capacity of human beings to proffer reasons to justify vicious institutions and practices was as natural as the law they purport to exposit. This was apparent at the Founding and in the next generation. Madison had identified passions and interests as principles in the human soul that could obscure right reason and produce faction, i.e., groups that threatened the rights of others and the common good. Thomas Jefferson wrote poignantly about the corrupting effects of slavery upon the souls of its practitioners and their children:

> The whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other. Our children see this, and learn to imitate it; for man is an imitative animal . . . The man must be a prodigy who can retain his manners and morals undepraved by such circumstances.[30]

Reflecting on John Calhoun's justification of slavery as the basis of white equality, John Quincy Adams wrote that "it is among the evils of slavery that it taints the very sources of moral principle . . . [and] [i]t perverts human reason." For "what can be more false and heartless than this doctrine which makes the first and holiest rights of humanity depend on the color of skin?"[31] In another place, he assessed the Southern conscience as "a perpetual agony of conscious guilt and terror attempting to disguise itself under sophistical argumentation and braggart menaces."[32] As Justin Dyer has argued, Adams believed that the defense of slavery required "suppression of moral knowledge and a prevarication of conscience."[33] The *capacity* of persons and societies to pervert their consciences to justify vicious passion and interest was a key feature of the classical natural law philosophical anthropology and its account of moral, cultural, and legal differences.

Second, the mere fact of multiplicity did not in and of itself indicate that there was not a specific argument available that was *truer* to the natural law tradition that informed the Founders. This was certainly a contested question. Southern courts that offered arguments for slavery's compatibility with natural law appealed to the Founders. For example, after citing Justice Roger Taney's opinion in *Dred Scott*—which held that the Declaration's principles "were not intended" to include "the enslaved African race"—Mississippi's High Court of Errors and Appeals declared that Southern chattel slavery was in accord with the law of nature, because blacks were "in the order of nature, an intermediate state between the irrational animal and the white man."[34]

But the abolitionists' claim that the Declaration tradition of natural law and natural rights included all persons regardless of skin color was at the heart of John Quincy Adams' antislavery argument—and Lincoln's. And that argument not only in fact won out but was decidedly more sound.[35]

Still, Banner convincingly shows that by the late 19th and early 20th century, natural law's career in American courts had reached a sort of senescence. One of the foremost critiques of natural law in this period was advanced by legal realism, and one of its greatest exponents was Oliver Wendell Holmes.

V. From Legal Realism to the Echoes of Natural Law in Substantive Due Process

For Holmes, diachronic and synchronic multiplicity, manifested in differences of values and the democratically enacted laws that reflect them, was evidence that there was no natural law. For Holmes, individual values and preferences were the product of pre-rational experiences, which differ from person to person. The error of the natural law theorist was rooted in a form of pride: a desire to make his own preferences into a transcendent standard. Objective truth was instead purely the product of social construction that grew out of an aggregation of subjective preferences, the "majority vote of that nation that could lick all others."[36]

Holmes conceded that certain commonalities across legal systems can be observed: "some form of permanent association between the sexes—some residue of property individually owned—some mode of binding oneself to specified future conduct—at the bottom of all, some protection for the person." But the individual desire for preservation or the general desire for preservation of the species were "arbitrary." Such desires were on par with a subjective love of granite rocks and barberry bushes. The rules that attached in legal systems in which collectively felt values were manifest were thus merely hypothetical imperatives: *if* you have such desires, *then* you must do such and such.[37]

Holmes thus adopted an instrumentalist account of practical reason, which had been characteristic of modern critics of natural law at least since David Hume. Practical reason could no longer

29 Banner, *supra* note 5, at 160.

30 Thomas Jefferson, Notes on the State of Virginia, Query XVIII.

31 5 John Quincy Adams, Memoirs of John Quincy Adams 11 (1875).

32 9 *Id.* at 349 (quoted in Justin Buckley Dyer, Natural Law and the Antislavery Constitutional Tradition 82 (2012)).

33 Dyer, *supra* note 32, at 82.

34 Banner, *supra* note 5, at 155 (discussing Dred Scott v. Sandford, 60 U.S. 393, 410 (1856); Mitchell v. Wells, 37 Miss. 235, 263 (1859)).

35 *See* Dyer, *supra* note 32, at 74-101.

36 Oliver Wendell Holmes, *Natural Law*, 32 Harv. L. Rev. 40, 40 (1918).

37 *Id.* at 41.

grasp non-instrumental or basic reasons for action that were objectively constitutive of human flourishing, because of the kind of being man is. Reason could only calculate the means to get whichever ends it happened to desire.

On this account, positive law came to be seen not as a deduction or determination from a prior objective moral reality that directed one's conduct toward ends constitutive of one's happiness. Rather, it was a blunt instrument of majority will, demanding conduct *if* one happens to desire to "live with others." "A right is only the hypostasis of a prophecy"—that is, law becomes simply a prediction of what the courts—the instruments of the majority's instrumental reason—will in fact do.[38]

Accordingly, the judge's work was not primarily a formalistic identification of legal principles and their logical application. Its work was better understood as ultimately attitudinal—and for Holmes, the question in *Lochner v. New York* was whether the judge would give effect to the preferences of the majority or to his or her own contrary preferences, when a reasonable man could see them as socially advantageous: "A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work."[39] And since a judge's assessment about the reasonability of a person's opinion on the social utility of some measure depended on the judge's own perception of social utility, this implied that judges at least implicitly weigh social utility in judging. Prominent legal realists writing in subsequent decades like Roscoe Pound, Karl Llewelyn, and Jerome Frank would argue that judges should embrace the truth that they were policymakers, filling in the penumbras of legal rules with their policy preferences. In short, lawyers and judges in practice were *making* the law rather than *finding* it.

Still, Banner argues persuasively that, while Holmes and the Legal Realists were prominent and influential scholarly expressions of this view of law, it had already become widespread among the educated legal class—even if they weren't as metaphysically and morally skeptical as Holmes. He provides ample evidence that, in the several decades leading up to the height of Legal Realism's prominence in the 1920s and 30s, legal professionals were already thinking about judges as makers of the law. By the 20th century, this had become "the conventional way lawyers think about the legal system."[40]

Banner throws light on what he calls the various other 20th century "substitutes" for natural law, including "historical jurisprudence," natural laws of economics, classical orthodoxy, and substantive due process. Here we only have space to focus in on substantive due process.

As Banner points out, *Lochner* was the "synecdoche" for substantive due process in what is sometimes called the "Laissez-faire Era" of the Court, between the 1870s and mid-1930s. Of heightened concern to the Court in this period was to check what it perceived as legislative threats to individual rights of property and contract. As Banner points out, "judges could implement natural law through the medium of due process, now that natural law, by itself, was no longer an acceptable vehicle."[41]

As is well known, various of FDR's New Deal policies conflicted with the Court's substantive due process precedents. The so-called "switch in time that saved nine," in which Justice Owen Roberts joined the liberal justices to uphold New Deal legislation, was occasioned by a due process case. Roberts voted to overturn precedent and uphold a minimum wage law as compatible with the 5th amendment's Due Process Clause.[42] The *Lochner* era was over.

Or was it? In 1965, the Supreme Court struck down a Connecticut law that banned the use of contraceptives. The Court differed over the textual ground for the holding. The majority opinion found it in the "penumbras formed by emanations" from the first eight amendments.[43] Yet Justices Harlan and White explicitly grounded their judgment in the Due Process Clause. And Justices Goldberg, Brennan, and Warren looked for additional support in the 9th Amendment in conjunction with the 14th.

Justice Black famously lambasted this reasoning as "natural law due process" philosophy. He echoed Justice Iredell's critique of appealing to extratextual principles, to a "mysterious and uncertain natural law concept."[44] Black channeled the superlegislation objection:

> The due process argument . . . indicate[s] . . . that this Court is vested with power to invalidate all state laws . . . that it considers to be [lacking a] "rational or justifying" purpose, or is offensive to a "sense of fairness and justice." If these formulas based on "natural justice," or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is, of course, that of a legislative body . . . no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies . . .[45]

Banner chides Justice Black insofar as his critique implied that the Court had revived old-timey natural law reasoning. Banner argues that the Court *did not* suggest that "a right to use contraception exists in nature or that such a right was created by God or that the right exists at all times and places."[46] Hence, Banner contends that Justice Black's use of the language of "natural law" did not imply his brethren had achieved a genuine revival of natural law jurisprudence. Rather, Black used natural law as a pejorative shorthand term to object to "interpretive methods that the critic

38 *Id.* at 42.

39 Lochner v. New York, 198 U.S. 45, 76 (1905).

40 Banner, *supra* note 5, at 190.

41 *Id.* at 210.

42 West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

43 Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

44 *Id.* at 524, 522.

45 *Id.* at 512.

46 Banner, *supra* note 5, at 233.

believes gives judges too much leeway" to effectively legislate their private notions of justice.[47]

It isn't altogether clear that Banner is right that Black's brethren had jettisoned theistic natural law and natural rights. For example, Justice Douglas had at least rhetorically conceded in *McGowan v. Maryland* that

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.[48]

Hence, it is possible that Douglas indeed did conceive of the right of privacy as a *natural* right.[49] What Banner does admit is that the language of the new wave of substantive due process cases in the areas of sexuality and personal lifestyle sometimes did echo the older natural law *style* of reasoning in appealing to first principles.

I would argue that there is evidence of this even in *Griswold*. The Court declared that marriage was a "sacred" institution for a "noble purpose," which preceded our written constitution. To a classical natural lawyer, this sort of reasoning looks like natural law without nature—an appeal to first principles of human freedom shorn of their setting within a teleological order of being. Indeed, the echoes of natural law have become fainter. Once severed from this prior order, the content of liberty was now to be filled in by the autonomous, expressive self and courts that are solicitous of psychological man.[50] This is apparent in the language of *Griswold*:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.[51]

The "way of life," elucidated by the terms "harmony in living" and "bilateral loyalty," indicated the traditional *unitive* feature of marriage. But the expressive self that chooses to marry does not choose a unitive bond that is permanent (which was also traditionally thought be a feature of the marital bond). It is now merely "hopeful" that the bond would endure because marriage is always subject to the changing desires of the expressive self. Meanwhile, terms like "political faith" and "commercial and social projects" seem to be not-so-cryptic allusions to the other purpose traditionally considered to be an essential feature of marriage (and promoted in various ways traditionally by the institutions of church, civil society, and the state): the *procreative* function. Marriage has thus become a transitory contract, entered and exited at will by autonomous individuals looking for companionship, with no *essential* connection to permanence or procreation.

Did the author of these words, Justice Douglas, thus conform the fundamental law to his own predilections regarding the marital bond? Banner does not consider this question. But a cursory glance at Douglas' biography—he was on his second of three childless marriages and the third of four total when he wrote the decision—leads one to at least suspect the affirmative.[52] Indeed, as Banner argues, Justice Black does not seem entirely off base to suspect the members of the Court were legislating their own "personal senses of justice."[53] Black channeled the spirit of the Holmesian critique in *Lochner*: the judge was bound to vindicate the majority will of state legislatures absent a plain violation of the constitutional text. In his view, the judge may very well have reasonable grounds to doubt the wisdom of the means selected by legislatures to advance orderly baking and the orderly reproduction of society over time—but *constitutionalizing* such conceptions was ultra vires.

What *wasn't* logically necessary to Holmes' and Black's critique was skepticism about the existence of natural law. For the natural lawyer could plausibly argue that natural law itself does not dictate a particular arrangement for translating principles of natural justice into positive law—and that in fact under our constitutional structure the *authority* to legislate over such matters was primarily reserved to legislative bodies.[54] Banner's book shows that such a view could find support in a tradition of jurisprudence going all the way back to Justice Iredell's opinion in *Calder v. Bull*.

As Banner suggests, the subsequent path of substantive due process in the area of personal sexual lifestyle rights was that the echoes of the *content* of natural law became fainter even as the *style* of first principles-based reasoning reverberated. A possible exception to this trend is *D.C. v. Heller* and its progeny, which appealed to a natural right of self-defense—but this was primarily invoked to flesh out the historical understanding of the Second Amendment.

VI. Conclusion

Is there any middle way between the judge who freewheelingly appeals to first principles and the strict constructionist who forswears any appeals beyond the four corners of the text and its historical understanding?

At one point, Banner relates one historical attempt to articulate such a way. Boston lawyer Joel Bishop argued that there were "pretty plainly" unwritten limitations on state legislatures, but also that "it is neither the province nor the right of a judge to decide any cause on his individual, private views." As Banner puts it, "Bishop, struggling to find a middle ground, had to distinguish

47 *Id*. at 234.

48 McGowan v. Maryland, 366 U.S. 420, 562 (1961).

49 For an argument along these lines, see Russell Hittinger, *Liberalism and the American Natural Law Tradition*, 25 Wake Forest L. Rev. 429 (1990).

50 For a recent account of the rise of the expressive self, see Carl Trueman, The Rise and Triumph of the Modern Self: Cultural Amnesia, Expressive Individualism, and the Road to Sexual Revolution (2020).

51 *Griswold*, 381 U.S. at 486.

52 Douglas had two children with his first wife Mildred Riddle, but then cheated on her, divorced her, and remarried Mercedes Hester Davidson in 1954. Continuing this pattern, he cheated again, divorced, and married a third time to Joan Martin in 1963. He had no children with his second and third wives. He was on his third marriage when he wrote *Griswold*—and only shortly thereafter he divorced yet again and married his fourth wife, Cathleen Heffernan, who was forty-five years his junior, and with whom he also had no children.

53 Banner, *supra* note 5, at 234.

54 *See* Robert P. George, A Clash of Orthodoxies ch. 10 (2014).

between natural law, which could invalidate a statute, and a judge's own understanding of natural law, which could not."[55] Banner assesses Bishop's attempt to find a middle way:

> But this was not middle ground at all. The content of natural law, like the content of any kind of law, could be identified only by human beings, so every assertion of the law was merely an assertion of the speaker's understanding of the law.[56]

Here is where the classical natural lawyer would disagree. It is of course trivially true that the content of a proposition known and asserted is in the mind of person who understands it. But it simply does not necessarily follow that it is *merely* his understanding of it. Take the law of noncontradiction (a law of logic). A thing cannot be and not be at the same time and in the same respect. I understand (and affirm) this law to entail something. It entails that the previous sentence cannot affirm and not affirm that I understand it to entail something, at the same time and in the same respect. Once *you*, *the person reading this sentence*, grasp this, you have grasped a principle that is common to human reason, not merely my understanding of it. Classical natural law theory stands or falls on the notion that that which governs the theoretical order, the principle of noncontradiction, has its analogate in the practical order, the first principle of practical reason: that good is to be done and evil avoided. If this principle is also common to human reason, it follows that theoretical, self-evident truths that presuppose the law of noncontradiction—"a whole is equal to the sum of its parts" and the like—are on par with practical truths that presuppose the self-evident first principle of practical reason—*primary* precepts like "do not murder," "don't punish the innocent," etc.

It seems then that Banner's assessment leaves undisturbed this possible middle way: judges are only authorized to appeal directly to first principles when the provision was historically understood to ratify the constitutional provision on the basis of natural justice *and* the law in question contravenes a *primary* precept. Meanwhile, legislation regarding *secondary* precepts and/or more remote deductions of the precepts are deserving of greater presumptive judicial deference.[57]

Banner's book is a tour-de-force, chock-full of supporting evidence for its contentions and rich with more interesting insights than I could possibly do justice to here. The ultimate conclusion—that natural law's decline dovetailed with the transformation of the role of a judge as a finder into a maker of law—is substantiated. This book should be considered a major achievement and singular contribution to the literature on natural law and American constitutionalism.

55 Banner, *supra* note 5, at 94-95 (quoting and discussing Joel Prentiss Bishop, The First Book of the Law 69-71 (1868).

56 *Id.* at 95.

57 For an argument along these lines, see J. Budziszewski, Natural Law for Lawyers 62-68 (2006).