

HARVARD JOURNAL
of
LAW & PUBLIC POLICY

VOLUME 40, NUMBER 2

MAY 2017

ARTICLES

THE SEXUAL INTEGRITY OF RELIGIOUS SCHOOLS AND TAX EXEMPTION <i>Johnny Rex Buckles</i>	255
SECONDARY EFFECTS AND PUBLIC MORALITY <i>Santiago Legarre & Gregory J. Mitcell</i>	321
MARRIAGE, THE COURT, AND THE FUTURE <i>Ryan T. Anderson</i>	361
THE POWER TO DEFINE OFFENSES AGAINST THE LAW OF NATIONS <i>Alex H. Loomis</i>	417

NOTES

HALF-COCKED: THE REGULATORY FRAMEWORK OF SHORT-BARREL FIREARMS.....	493
PROTECTING PRENATAL PERSONS: DOES THE FOURTEENTH AMENDMENT PROHIBIT ABORTION?.....	539

HARVARD JOURNAL *of* LAW & PUBLIC POLICY

Editor-in-Chief
PAUL VANDERSLICE

Deputy Editor-in-Chief
DAVID WEBB

Executive Editors
WILLIAM BERGSTROM
JAMES A. D'CRUZ
JOHN GREIL
CASON HEWGLEY
BRYCE JENSEN
KIRK JING
JOSIAH KOLLMAYER
JASON MANION
KARL WORSHAM

Managing Editors
AMANDA MUNDELL
JASON SHAFFER

Deputy Managing Editors
ANNE BROWN
STEPHEN HAMMER
GEORGE MALIHA
JAKE SUSSMAN

Chief Financial Officers
BOYD GARRIOTT
JASON SHAFFER

Communications Editor
GEORGE MALIHA

Articles Editors
TIERNAN KANE
BLAKE LANNING
CALEB WOLANEK

Articles Board
KELSEY CURTIS
BOYD GARRIOTT
NOAH HEINZ

Notes Editors
JOSHUA J. CRADDOCK
CHRIS GOODNOW

Technology Manager
KIRK JING

Senior Editors

JENNIFER BARROW
SARA BERINHOUT
KATHRYN BOLAS

MATTHEW BURTON
SAMUEL CLANON
JOSHUA J. CRADDOCK
KELSEY CURTIS

BOYD GARRIOTT
JASON HALLIGAN
FRANCES MANZO
LUKE MCGUIRE

MATTHEW REARDON
TAYLOR THOMPSON
ERIC VAN WART

Editors

BRAD BARBER
SIMON BARNICLE
KAITLYN BECK
ANNIKA BOONE
CASEY CONNOLLY
WILL COURTNEY

HAYLEY EVANS
DANIEL FAREWELL
AARON FENTON
MAX GOTTSCHALL
JORDAN GREENE
CHAD HARPER

DANIEL JOHNSON
PARKER KNIGHT
CASON KYNES
VINCENT LI
BRANTON NESTOR
ASHER PEREZ

CODY POPLIN
RYAN PROCTOR
DAWSON ROBINSON
JEREMY SAWYER
SAM WILLIAMS

BOARD OF ADVISORS

E. Spencer Abraham, Founder

Steven G. Calabresi
Douglas R. Cox
Jennifer W. Elrod
Charles Fried
Douglas H. Ginsburg
Orrin Hatch
Jonathan R. Macey
Michael W. McConnell
Diarmuid F. O'Scannlain
Jeremy A. Rabkin
Hal S. Scott
David B. Sentelle
Bradley Smith
Jerry E. Smith

THE *HARVARD JOURNAL OF LAW & PUBLIC POLICY* RECEIVES NO FINANCIAL SUPPORT FROM HARVARD LAW SCHOOL OR HARVARD UNIVERSITY. IT IS FUNDED EXCLUSIVELY BY SUBSCRIPTION REVENUES AND PRIVATE CHARITABLE CONTRIBUTIONS.

The *Harvard Journal of Law & Public Policy* is published three times annually by the Harvard Society for Law & Public Policy, Inc., Harvard Law School, Cambridge, Massachusetts 02138. ISSN 0193-4872. Nonprofit postage prepaid at Lincoln, Nebraska and at additional mailing offices. POSTMASTER: Send address changes to the Harvard Journal of Law & Public Policy, Harvard Law School, Cambridge, Massachusetts 02138. Yearly subscription rates: United States, \$55.00; foreign, \$75.00. Subscriptions are renewed automatically unless a request for discontinuance is received.

The *Journal* welcomes the submission of articles and book reviews. Each manuscript should be typed double-spaced, preferably in Times New Roman 12-point typeface. Authors submit manuscripts electronically to harvardjlp@gmail.com, preferably prepared using Microsoft Word. Views expressed are those of the authors and do not necessarily reflect the views of the Society or of its officers, directors, editors, members, or staff. Unless otherwise indicated, all editors are students at the Harvard Law School.

Copyright © 2017 by the Harvard Society for Law & Public Policy, Inc.

THE SEXUAL INTEGRITY OF RELIGIOUS SCHOOLS AND TAX EXEMPTION

JOHNNY REX BUCKLES*

INTRODUCTION	256
I. <i>BOB JONES</i> AND THE PUBLIC POLICY DOCTRINE	267
II. WHY THE PUBLIC POLICY DOCTRINE SHOULD BE CONSTRUED NARROWLY	271
A. Appreciating the Fundamental Requirement	272
B. Promoting Fair Notice and Doctrinal Clarity	276
C. Limiting Administrative Discretion	285
D. Ensuring the Diversity of the Nonprofit Sector	292
E. Narrowly Formulating the Public Policy Doctrine to Safeguard Core Public Policy Objectives	294
III. WHY THE PUBLIC POLICY DOCTRINE DOES NOT JEOPARDIZE THE TAX EXEMPTION OF RELIGIOUS SCHOOLS AFTER <i>OBERGEFELL</i>	300
A. <i>Obergefell v. Hodges</i>	300
B. <i>Obergefell</i> and the Public Policy Doctrine Framework	305
C. The Broader Dissimilarities between <i>Obergefell</i> and <i>Bob Jones</i>	314
IV. CONCLUSION	319

* Law Foundation Professor of Law, University of Houston Law Center. I gratefully acknowledge Professor Benjamin Leff, the participants in the Texas Tax Faculty Workshop hosted by Southern Methodist University, the participants in the South Texas College of Law's Faculty Workshop Series, the participants in the 2016 Conference of Religiously Affiliated Law Schools hosted by Regent University School of Law, and the participants in the 19th Annual Faculty Conference of the Federalist Society for helpful comments on prior drafts of this Article. I also thank Christopher Dykes for valuable assistance in obtaining sources; the University of Houston for funding the research of this Article; and my wife, Tami, for her constant support.

INTRODUCTION

Do two decisions of the highest court in the land jeopardize the federal income tax exemption of private schools that adhere to canonical principles of sexual morality widely embraced for millennia in their religious traditions? Answering this question requires reflection on the scope of charity, principles of the rule of law, unfolding constitutional doctrine, and the competence of the agency charged with administering federal tax laws. Merely formulating an approach to answering this question has far-reaching implications for the law of tax-exempt organizations.

The two decisions that take center stage in the theatrical presentation of this question are *Bob Jones University v. United States*¹ and *Obergefell v. Hodges*.² The issue in *Bob Jones* was whether two schools were entitled to exemption from federal income taxation by virtue of being “organized and operated exclusively for religious, charitable . . . or educational purposes” under section 501(c)(3) of the Internal Revenue Code (“the Code”).³ Each school maintained some type of racially discriminatory policy as to students. Bob Jones University prohibited interracial dating and marriage among its students and refused to admit applicants who had married interracially or who advocated interracial dating or marriage.⁴ Goldsboro Christian Schools admitted only persons of Caucasian descent. The Internal Revenue Service (“IRS”) revoked the schools’ federal tax exemptions. Approving of the IRS’s position on racially discriminatory schools,⁵ the Court held that neither school qualified for exemption from federal income taxation as an organization described in Code section 501(c)(3) because the racially discriminatory policy of each school violated established public policy.⁶

1. 461 U.S. 574 (1983).

2. 135 S. Ct. 2584 (2015).

3. I.R.C. § 501(c)(3) (2015).

4. For many years prior to the adoption of the policy in issue, the university denied admission to African-Americans. See *Bob Jones*, 461 U.S. at 580–81.

5. The agency relied on its 1971 revenue ruling stating that a private school lacking “a racially nondiscriminatory policy as to students” fails to qualify as “charitable” because its activities are “contrary to Federal public policy.” Rev. Rul. 71-447, 1971-2 C.B. 230.

6. *Bob Jones*, 461 U.S. at 585–605.

In *Obergefell*, the Supreme Court held that the right to marry is a fundamental right inherent in the liberty of a person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment same-sex couples may exercise this fundamental right.⁷ Accordingly, the Court invalidated state laws that excluded same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.⁸ Further, the Court held that a state may not refuse to recognize a lawful same-sex marriage performed in another state on the ground of its same-sex character.⁹

How do these two Supreme Court cases interrelate in evaluating the federal income tax exemption of charities, especially religious schools? The very question surfaced at oral argument in *Obergefell*, in the following exchange between Justice Samuel Alito and Solicitor General Donald B. Verrilli, Jr.:

JUSTICE ALITO: Well, in the Bob Jones case, the Court held that a college was not entitled to tax-exempt status if it opposed interracial marriage or interracial dating. So would the same apply to a university or college if it opposed same sex marriage?

GENERAL VERRILLI: You know, I—I don't think I can answer that question without knowing more specifics, but it's certainly going to be an issue. I—I don't deny that. I don't deny that, Justice Alito. It is going to be an issue.¹⁰

"It is going to be an issue," proclaimed the United States Solicitor General.¹¹ This ominous concession of Solicitor General Verrilli is surely on the minds of the students, faculty, administrators, overseers, and other stakeholders of private religious schools. Based on Biblical teaching and its interpretation within their religious traditions, many of these schools have long believed that pre-marital and extra-marital sexual activity is sinful and that God's view of marriage requires a union between a biological male and a biological female. Numerous schools require students or faculty (or both) to adhere to a code of conduct that reflects this religious

7. 135 S. Ct. at 2604–05.

8. *Id.* at 2605.

9. *Id.* at 2607–08.

10. Transcript of Oral Argument at 38, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_7148.pdf, [<https://perma.cc/QPW6-N9QE>].

11. *Id.* (emphasis added).

conviction. Exactly how many private secondary schools, colleges, universities, and seminaries maintain such sexual conduct policies is unknown. That this number is high, however, finds support in recent disclosures by the United States Department of Education (“DOE”),¹² which has identified well over 200 religious colleges that have sought and received exemptions under Title IX of the Education Amendments of 1972.¹³ The universe of educational institutions with such policies is likely much larger, for the DOE disclosures do not include institutions that receive no federal assistance (for example, private elementary and secondary schools).

Requests for Title IX exemption¹⁴ made publicly available by the DOE reveal the seriousness with which many private schools hold their religious convictions on sexual conduct and marriage. Consider the exemption request submitted by the President of Covenant College.¹⁵ The letter explains that the college is an

12. See, e.g., U.S. Dep’t of Educ., Office for Civil Rights, *Religious Exemptions Index Prior to 2009*, <http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/z-index-links-list-pre-2009.html> [https://perma.cc/XZ5R-9F2M]; U.S. Dep’t of Educ., Office for Civil Rights, *Religious Exemptions Index 2009-2016*, <http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/z-index-links-list-2009-2016.html> [https://perma.cc/7YYU-F6M6]. See generally Fernanda Zamudio-Suaréz, *U.S. Publishes Details on Religious Colleges Seeking Title IX Waivers*, CHRON. HIGHER ED. (April 29, 2016).

13. 20 U.S.C. §§ 1681–89 (2012). Under the general rule, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” *Id.* § 1681(a). Title IX sets forth a number of exceptions to the general rule, including one stating that “this section shall not apply to any educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization” *Id.* § 1681(a)(3). Some schools presumably have sought exemption from Title IX in part as a precautionary measure because they acknowledge the risk that sex discrimination may eventually be recognized to include discrimination on the basis of sexual orientation. To date, only one court has viewed sexual orientation discrimination as a form of sex discrimination for purposes of Title IX. See *Videckis v. Pepperdine Univ.*, 150 F.Supp.3d 1151, 1160 (C.D. Cal. 2015).

14. See 34 C.F.R. § 106.12 (2000) (“An educational institution which wishes to claim the exemption . . . shall do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.”).

15. Letter from J. Derek Halvorson, President, Covenant Coll., to Catherine Lhamon, Assistant Sec’y, U.S. Dep’t of Educ., Office for Civil Rights (May 28, 2015), <http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/covenant-college-request-05282015.pdf> [https://perma.cc/T5NZ-ZBMK] [hereinafter “Halvorson Letter”].

agency of the Presbyterian Church in America (PCA) and is governed by a board elected by the PCA's General Assembly. After affirming the college's adherence to the Bible and its doctrine as expressed in the Westminster Confession of Faith¹⁶ and the Westminster Larger¹⁷ and Shorter Catechisms,¹⁸ the letter states that the college has developed a Statement on Sexual Identity and Conduct. The Statement posits that gender is a divine gift from the Creator, not a cultural construct, and that marriage between one man and one woman is "the only proper context for all sexual relations."¹⁹ Actions inconsistent with this understanding, warns the Statement, "will result in disciplinary follow up."²⁰ The college sought acknowledgment of its exemption from Title IX to the extent that any DOE interpretations thereof would otherwise impede the college from responding in accordance with its theologically-grounded convictions to transgenderism or homosexual conduct.²¹ The DOE's Office of Civil Rights promptly acknowledged the college's exemption from Title IX for the reasons requested.²²

As of the publication of this Article, the DOE has not interpreted sex discrimination under Title IX to include disciplinary action for engaging in sexual relations outside the context of heterosexual monogamy.²³ Should the DOE's interpretation of sex discrimi-

16. The Westminster Confession of Faith, http://www.reformed.org/documents/wcf_with_proofs [<https://perma.cc/W44W-8QAS>].

17. The Westminster Larger Catechism, <http://www.opc.org/lc.html> [<https://perma.cc/6GFJ-DGJK>].

18. The Westminster Shorter Catechism, <http://www.opc.org/sc.html> [<https://perma.cc/K449-TTC8>].

19. Halvorson Letter, *supra* note 15.

20. *Id.*

21. *See id.*

22. Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Dr. J. Derek Halvorson, President, Covenant Coll. (July 29, 2015), <http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/covenant-college-response-07292015.pdf> [<https://perma.cc/6YX8-4Ytz>].

23. During the administration of former President Barack Obama, the DOE interpreted Title IX generally to prohibit discrimination based on gender identity. *See, e.g.,* "Dear Colleague" Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. and Vanita Gupta, Principal Deputy Assistant Att'y Gen. for Civil Rights, U.S. Dep't of Justice (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/775Q-54BD>]; U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, QUESTIONS & ANSWERS ON TITLE IX AND SINGLE-SEX ELEMENTARY AND SECONDARY CLASSES AND EXTRACURRICULAR ACTIVITIES (Dec. 1, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>

nation evolve to include such action, Title IX's religious exemption would surely protect those religious schools that qualify under its terms.²⁴ But whether Title IX's religious accommodation protects a school acting in accordance with its religious tenets from an IRS attack under the public policy doctrine of *Bob Jones* has not been tested in the courts. Additionally, as illustrated in the exchange between Justice Alito and Solicitor General Verrilli, courts must now think through *Obergefell's* implications for the tax exemption of religious schools.

The IRS is currently taking the position that *Obergefell* and *Bob Jones* do not in tandem jeopardize the federal income tax exemption of religious schools maintaining sexual conduct policies. In response to an inquiry from then-Oklahoma Attorney General Scott Pruitt,²⁵ IRS Commissioner John Koskinen ad-

[<https://perma.cc/WSE2-MYD8>]; U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, QUESTIONS & ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

[<https://perma.cc/LK3H-UJYQ>]. In the early days of the administration of President Donald Trump, the DOE withdrew the guidance reflecting that interpretation of Title IX. See, e.g., "Dear Colleague" Letter from Sandra Battle, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. and T.E. Wheeler, II, Acting Assistant Att'y Gen. for Civil Rights, U.S. Dep't of Justice (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/lgbt.html> [<https://perma.cc/MX9L-VS48>].

24. Not all religious schools qualify for the exemption. Only those "controlled by a religious organization" may apply for exemption. 20 U.S.C. § 1681(a)(3) (2012). Administrative guidance interprets the statute as follows:

An applicant or recipient will normally be considered to be controlled by a religious organization if one or more of the following conditions prevail: (1) It is a school or department of divinity; or (2) It requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the religion of the organization by which it claims to be controlled; or (3) Its charter and catalog, or other official publication, contains explicit statement that it is controlled by a religious organization or an organ thereof or is committed to the doctrines of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization or an organ thereof. The term "school or department of divinity" means an institution or a department or branch of an institution whose program is specifically for the education of students to prepare them to become ministers of religion or to enter upon some other religious vocation, or to prepare them to teach theological subjects.

HEW Form 639A, 42 Fed. Reg. 15,141, 15,142-43 (Mar. 18, 1977).

25. Letter from E. Scott Pruitt, Att'y Gen. of Okla., to John Koskinen, Comm'r, Internal Revenue Serv. (July 13, 2015), <http://www.ok.gov/oag/documents/AG%20Pruitt%20Letter%20to%20IRS%207-13-2015.pdf> [<https://perma.cc/86ZX-7TQ6>].

dressed the impact of *Obergefell* on tax-exempt organizations.²⁶ According to Commissioner Koskinen, the IRS does not believe that *Obergefell* has “changed the law applicable to section 501(c)(3) determinations or examinations,” and thus the IRS will not “change existing standards in reviewing applications for recognition of exemption under section 501(c)(3) or in examining the qualification of section 501(c)(3) organizations.”²⁷ Of course, the position of the IRS might change, as it did with respect to the admissions policies of schools such as Bob Jones University. Indeed, Chief Justice John Roberts anticipates that the Court will eventually face the issue of whether religious schools that oppose same-sex marriage can remain tax-exempt.²⁸ He is not alone.²⁹

This Article thoroughly analyzes this important and timely issue.³⁰ In doing so, this Article reflects a conscious decision to

26. Letter from John A. Koskinen, Comm’r, Internal Revenue Serv., to E. Scott Pruitt, Att’y Gen. (July 30, 2015), <http://www.ok.gov/oag/documents/IRS%20Response%20Letter%20Obergefell.pdf> [<https://perma.cc/M6SR-UF4Q>].

27. *Id.*

28. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625–26 (2015) (Roberts, C.J., dissenting).

29. See Scott Jaschik, *The Supreme Court Ruling and Christian Colleges*, INSIDE HIGHER EDUC. (June 29, 2015) (citing law professors who speculate that *Obergefell*’s effect on the federal income tax exemption of evangelical colleges will be litigated); see, e.g., Michael A. Lehmann & Daniel Dunn, *Obergefell and Tax-Exempt Status for Religious Institutions*, 7 COLUM. J. TAX L.—TAX MATTERS 7, 8 (2016) (“[I]n the long run the Internal Revenue Service is likely to move in the direction of regarding *Obergefell* as in fact changing standards in reviewing applications for exemption under section 501(c)(3) or in examining the qualification of section 501(c)(3) organizations and acting accordingly.”). The question of *Obergefell*’s impact on tax-exempt organizations is sufficiently pressing to have prompted four succinct entries in a recent issue of the *Columbia Journal of Tax Law*. See Glenn A. Adams, *Are Calls to Alter the Tax-Exempt Status of Organizations after Obergefell Premature?*, 7 COLUM. J. TAX L.—TAX MATTERS 3 (2016); Lehmann & Dunn, *supra*, at 7; Ray Wiacek et al., *Tax Exemptions and Same-Sex Marriage*, 7 COLUM. J. TAX L.—TAX MATTERS 14 (2016); Lawrence Zelenak, *Prompt on the Obergefell v. Hodges Case*, 7 COLUM. J. TAX L.—TAX MATTERS 1 (2016).

30. For additional commentary on this precise issue, see Adams, *supra* note 29, at 3; Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 103 (Douglas Laycock et al., eds. 2008); Lehmann & Dunn, *supra* note 29, at 7; Timothy J. Tracey, *Bob Jonesing: Same-Sex Marriage and the Hankering to Strip Religious Institutions of Their Tax-Exempt Status*, 11 F.I.U. L. REV. 85 (2015); Jonathan Turley, *An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra*, at 59, 62–69; Wiacek et al., *supra* note 29, at 14; Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from*

limit the scope of its inquiries. First, this Article offers no independent analysis of the merits of *Obergefell*.³¹ The Article takes *Obergefell* as the Supreme Court has handed it down, not as critics or supporters of the decision might have preferred the opinion to have been written. Accordingly, this article offers neither criticisms nor accolades of the *Obergefell* opinion and assumes for purposes of analyzing the issue under consideration that the majority opinion in *Obergefell* means what it says.

Second, this Article refrains from critiquing the premise of *Bob Jones* that the federal income tax exemption of every type of organization described in Code section 501(c)(3) and the charitable contributions deduction of Code section 170 constitute an indirect but purposeful governmental subsidy.³² The premise is debatable.³³ However, because subsidy theories of Code sec-

the Healthcare Context, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra*, at 77, 86–90.

31. Commentary on *Obergefell* abounds. See, e.g., Helen M. Alvaré, *Marriage and Family as the New Property: Obergefell, Marriage, and the Hand of the State*, 28 REGENT U. L. REV. 49 (2015); Elizabeth B. Cooper, *The Power of Dignity*, 84 FORDHAM L. REV. 3 (2015); Carl H. Esbeck, *A Post-Obergefell America: Is a Season of Legal and Social Strife Inevitable?*, CHRISTIAN LAW., Dec. 2015, at 3; Cynthia Godsoe, *Marriage Equality and The "New" Maternalism*, 6 CALIF. L. REV. CIRCUIT 145 (2015); Suzanne B. Goldberg, *Obergefell at the Intersection of Civil Rights and Social Movements*, 6 CALIF. L. REV. CIRCUIT 157 (2015); Donald H. J. Hermann, *Extending the Fundamental Right of Marriage to Same-Sex Couples: The United States Supreme Court Decision in Obergefell v. Hodges*, 49 IND. L. REV. 367 (2016); Joseph Landau, *Roberts, Kennedy, and the Subtle Differences that Matter in Obergefell*, 84 FORDHAM L. REV. 33 (2015); Ethan J. Leib, *Hail Marriage and Farewell*, 84 FORDHAM L. REV. 41 (2015); Peter Nicolas, *Obergefell's Squandered Potential*, 6 CALIF. L. REV. CIRCUIT 137 (2015); Catherine Powell, *Up from Marriage: Freedom, Solitude, and Individual Autonomy in the Shadow of Marriage Equality*, 84 FORDHAM L. REV. 69 (2015).

32. See, e.g., *Bob Jones*, 461 U.S. at 588–92 (reasoning that, in enacting Code sections 170 and 501(3), "Congress sought to provide tax benefits to charitable organizations," that the provisions are "intended to aid" charities, and that "the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors'"). One commentator argues that the *Bob Jones* Court "treated the religious exemption in Section 501(c)(3) as being constitutionally compelled, rather than as a matter of government subsidy." Tracey, *supra* note 30, at 123. Professor Tracey reasons that, had the Court embraced the subsidy theory, "then the Court need not have considered" the schools' Free Exercise claims insofar as the government need not subsidize the exercise of constitutional rights. *Id.* This argument probably assumes too much coherence in the Court's analysis. As Professor Tracey notes in the same paper, "[a] review of the relevant Supreme Court cases shows that the Court's treatment of religious tax exemptions has been, at best, erratic." *Id.* at 103.

33. See, e.g., William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972) (arguing that the charitable contributions deduction comports with a proper conception of income); Boris I. Bittker & George K.

tions 501(c)(3) and 170(c) are held by many,³⁴ including numerous academic commentators³⁵ and some United States Supreme Court Justices,³⁶ this Article analyzes the application of the

Rahdert, *The Exemption of Nonprofit Organizations from the Federal Income Taxation*, 85 YALE L.J. 299 (1976) (advancing an “income measurement theory” to justify the exemption of many nonprofit entities from federal income tax); Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 I. CORP. L. 585 (1998) (arguing that section 501(c)(3) reflects a governmental recognition of a charity’s sovereign prerogative to operate free from governmental intrusion); Johnny Rex Buckles, *The Community Income Theory of the Charitable Contributions Deduction*, 80 IND. L.J. 947 (2005) (explaining that the charity income tax exemption and the charitable contributions deduction may reflect a decision not to tax income attributed to the community in general); John K. McNulty, *Public Policy and Private Charity: A Tax Policy Perspective*, 3 VA. TAX REV. 229, 241–43 (1984) (discussing the “endogenous” argument that a charitable contribution enables a donor to deflect income to another); Tracey, *supra* note 30, at 120 (arguing that “religious tax exemptions are not subsidies, because they implement, rather than deviate from, the normative tax base”); Edward A. Zelinsky, *Are Tax “Benefits” for Religious Institutions Constitutionally Dependent on Benefits for Secular Entities?*, 42 B.C. L. REV. 805, 807 (2001) (“[T]ax exemption does not subsidize churches, but leaves them alone.”).

34. See Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 873 (2001) (“[G]overnment policymakers have viewed the charitable contribution deduction from its beginning as an incentive and a subsidy”); John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 682 (2001) (“[T]he most widely accepted rationale for the section 170 deduction remains that the deduction helps subsidize the activities of charitable organizations.”); Zelinsky, *supra* note 33, at 808 (“Perhaps the most common characterization of tax exemptions, exclusions, and deductions is that they subsidize.”). For a summary of the major theories supporting the exemption of charitable organizations from federal income taxation, see Johnny Rex Buckles, *The Case for the Taxpaying Good Samaritan: Deducting Earmarked Transfers to Charity Under Federal Income Tax Law, Theory and Policy*, 70 FORDHAM L. REV. 1243, 1284–96 (2002).

35. See Miranda Perry Fleischer, *Libertarianism and the Charitable Tax Subsidies*, 56 B.C. L. REV. 1345, 1351 (2015) (“[M]ost tax theorists consider sections 170(c) and 501(c)(3) subsidies for the charitable sector.”); see, e.g., Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501 (1990); Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 FLA. L. REV. 419 (1998); Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO ST. L.J. 1379 (1991); Henry B. Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54 (1981). Since publishing his altruism theory, Professor Rob Atkinson has now largely renounced it. See, e.g., Rob Atkinson, *Tax Favors for Philanthropy: Should Our Republic Underwrite de Tocqueville’s Democracy?*, 6 WM. & MARY POL’Y REV. 1, 48–49 (2014) [hereinafter Atkinson, *Tax Favors*].

36. In addition to embracing subsidy theory in *Bob Jones*, the Supreme Court viewed federal income tax exemption as a form of subsidy in *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983). In the latter case, the Court reasoned as follows:

public policy doctrine to religious schools under the assumption that a court examining the issue would embrace some type of subsidy theory.

Third, this Article abstains from disputing that Congress has the authority to condition federal income tax exemption on a charity's compliance with various statutory requisites.³⁷ Such conditions include those that limit the exercise of constitutional rights.³⁸ Even if the precise scope of the power of Congress to condition tax exemption on the non-exercise of certain rights is debatable,³⁹ the issue under consideration can be resolved without engaging in that debate. The issue discussed in this Article is whether a court should apply the public policy doctrine to deny or revoke a school's federal income tax exemption on account of its sexual

Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions. The system Congress has enacted provides this kind of subsidy to nonprofit civic welfare organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying. In short, Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare.

Regan, 461 U.S. at 544 (internal citations omitted).

37. However, this Article does not concede that Congress has the authority to condition tax exemption on compliance with whatever acts or omissions Congress may legislate.

38. See, e.g., *Regan*, 461 U.S. at 550 (holding that section 501(c)(3)'s prohibition against substantial attempts to influence legislation is constitutional).

39. Compare, e.g., Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 544–45 (2012) (arguing that the limitations on the political speech of charitable organizations under Code section 501(c)(3) "are grossly unconstitutional"), with Miriam Galston, *When Statutory Regimes Collide: Will Citizens United and Wisconsin Right to Life Make Federal Tax Regulation of Campaign Activity Unconstitutional?*, 13 U. PA. J. CONST. L. 867, 929 (2011) ("A direct attack on the constitutionality of the tax law prohibition on 501(c)(3) groups' political campaign activity is very unlikely to succeed.").

An interesting related question is whether certain statutory conditions for federal income tax exemption under Code section 501(c)(3) run afoul of the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.* (2012). For a discussion, see Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. LEGIS. 145 (2006); Zachary Cummings, Note, *Prophetic Speech and the Internal Revenue Code: Analyzing I.R.C. § 501(c)(3) in Light of the Religious Freedom Restoration Act*, 20 REGENT U. L. REV. 151 (2008); see also Wiacek *et al.*, *supra* note 29, at 16 ("An IRS ruling that purported to eliminate an institution's exemption because of its religious opposition to same-sex marriage would be subject to the RFRA.").

conduct policy. The premise that Congress could condition tax exemption on a charity's agreement to jettison its sexual conduct policy does not compel the conclusion that a court should impose the same condition in the absence of congressional action.⁴⁰ The two issues must not be confused.

Finally, this Article assumes that the religious schools in question maintain policies that address sexual *conduct*, not sexual orientation in general. Sexual conduct policies typically are grounded in a theological belief system surrounding the divine purposes for sex, marriage, and procreation.⁴¹ They also typically apply to students regardless of sexual orientation. A school that would deny admission to a student merely because of the student's sexual orientation is not the type of school contemplated in this Article.

This Article proceeds as follows. Part I reviews *Bob Jones* and surveys the application of the public policy doctrine⁴² by the

40. Cf. Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1927 (2006) (arguing that decisions of whether to extend public benefits to individuals and groups exercising constitutional rights "are discretionary choices for legislators, not judges").

41. See, e.g., Halvorson Letter, *supra* note 15.

42. Commentary on *Bob Jones*, the constitutional and statutory issues surrounding the case, and the public policy doctrine generally is extensive. See, e.g., David L. Anderson, *Tax Exempt Private Schools Which Discriminate on the Basis of Race: A Proposed Revenue Procedure*, 55 NOTRE DAME L. REV. 356 (1980); Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514 (1979); David A. Brennen, *Charities and the Constitution: Evaluating the Role of Constitutional Principles in Determining the Scope of Tax Law's Public Policy Limitation for Charities*, 5 FLA. TAX REV. 779 (2002) [hereinafter Brennen, *Charities*]; David A. Brennen, *The Power of the Treasury: Racial Discrimination, Public Policy, and "Charity" in Contemporary Society*, 33 U.C. DAVIS L. REV. 389 (2000) [hereinafter Brennen, *Treasury*]; Johnny Rex Buckles, *Bob Jones University v. United States*, in *LAW & RELIGION: CASES IN CONTEXT* 85 (Leslie C. Griffin ed., 2010); Johnny R. Buckles, *Do Law Schools Forfeit Federal Income Tax Exemption When They Deny Military Recruiters Full Access to Career Services Programs? The Hypothetical Case of Yale University v. Commissioner*, 41 ARIZ. ST. L.J. 1 (2009) [hereinafter *Law Schools*]; Johnny R. Buckles, *Reforming the Public Policy Doctrine*, 53 U. KAN. L. REV. 397 (2005) [hereinafter Buckles, *Reforming*]; John D. Colombo, *Why Is Harvard Tax-Exempt? (And Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 ARIZ. L. REV. 841, 853–55 (1993); Wilfred F. Drake, *Tax Status of Private Segregated Schools: The New Revenue Procedure*, 20 WM. & MARY L. REV. 463 (1979); Miriam Galston, *Public Policy Constraints on Charitable Organizations*, 3 VA. TAX REV. 291 (1984); Charles O. Galvin & Neal Devins, *A Tax Policy Analysis of Bob Jones University v. United States*, 36 VAND. L. REV. 1353 (1983); Olatunde Johnson, *The Story of Bob Jones University v. United States: Race, Religion, and Congress' Extraordinary Acquiescence*, in *STATUTORY INTERPRETATION STORIES* 127 (William N. Eskridge, Jr., et al. eds., 2011) [hereinafter Johnson, *The*

IRS and the courts following *Bob Jones*. Part II develops the argument that, regardless of the factual context of a controversy in which the IRS seeks to invoke *Bob Jones* to deny or revoke federal income tax exemption, the public policy doctrine should be narrowly construed. Part II.A identifies and explains the concept of the “fundament requirement” advanced in *Bob Jones*. Part II.B explores the lack of doctrinal clarity emerging from *Bob Jones* and explains why a broad, minimalist formulation of the public policy doctrine would raise vagueness prob-

Story]; Lindsay Kreppel, *Will the Catholic Church's Tax Exempt Status Be Threatened under the Public Policy Limitation of § 501(c)(3) if Same-Sex Marriage Becomes Public Policy?*, 16 DUQ. BUS. L.J. 241 (2014); Jerome Kurtz, *Difficult Definitional Problems in Tax Administration: Religion and Race*, 23 CATH. LAW. 301 (1978); Douglas Laycock, *Observation, Tax Exemptions for Racially Discriminatory Religious Schools*, 60 TEX. L. REV. 259 (1982); Paul S. Milich, *Racially Discriminatory Schools and the IRS*, 33 TAX LAW. 571 (1980); Nicholas A. Mirkay, *Globalism, Public Policy, and Tax-Exempt Status: Are U.S. Charities Adrift at Sea?*, 91 N.C. L. REV. 851 (2013) [hereinafter Mirkay, *Globalism*]; Nicholas A. Mirkay, *Is It “Charitable” to Discriminate?: The Necessary Transformation of Section 501(c)(3) into the Gold Standard for Charities*, 2007 WIS. L. REV. 45 [hereinafter Mirkay, *Transformation*]; Amy Moore, *Rife with Latent Power: Exploring the Reach of the IRS to Determine Tax-Exempt Status According to Public Policy Rationale in an Era of Judicial Deference*, 56 S. TEX. L. REV. 117 (2014); Thomas Stephen Neuberger & Thomas C. Crumplar, *Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration*, 48 FORDHAM L. REV. 229 (1979); Karla W. Simon, *Applying the Bob Jones Public-Policy Test in Light of TWR and U.S. Jaycees*, 62 J. TAX’N 166 (1985); Paul E. Truesch, *Bob Jones—Where Now?*, 62 TAXES 43 (1984); David Asaki et al., *Comment, Racial Segregation and the Tax-Exempt Status of Private Educational and Religious Institutions*, 25 HOW. L.J. 545 (1982); William Chamblee, *Case Note, IRS Acted Within Its Authority in Determining that Racially Discriminatory Non-Profit Private Schools Are Not “Charitable” Institutions Entitled to Tax-Exempt Status*, 15 ST. MARY’S L.J. 461 (1984); Robert J. Christians, *Note, The IRS, Discrimination, and Religious Schools: Does the Revised Proposed Revenue Procedure Exact Too High a Price?*, 56 NOTRE DAME L. REV. 141 (1980); Colleen K. Connell, *Comment, The Tax-Exempt Status of Sectarian Educational Institutions that Discriminate on the Basis of Race*, 65 IOWA L. REV. 258 (1979); William A. Drennan, *Note, Bob Jones University v. United States: For Whom Will the Bell Toll?*, 29 ST. LOUIS U. L.J. 561 (1985); Daniel L. Johnson, Jr., *Note, Federal Taxation—Bob Jones University v. United States: Segregated Sectarian Education and IRC Section 501(c)(3)*, 62 N.C. L. REV. 1038 (1984); Joe W. Miller, *Note, Applying a Public Benefit Requirement to Tax-Exempt Organizations*, 49 MO. L. REV. 353 (1984); Richard S. Myers, *Note, The Internal Revenue Service’s Treatment of Religiously Motivated Racial Discrimination by Tax Exempt Organizations*, 54 NOTRE DAME L. REV. 925 (1979); Ricki J. Schweizer, *Comment, Federal Taxation—Exempt Organizations—Constitutional Law—First Amendment—Right to Free Exercise of Religion—Bob Jones University v. United States*, 30 N.Y. L. SCH. L. REV. 825 (1985); *Note, The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools*, 93 HARV. L. REV. 378 (1979); Sherri L. Thornton, *Case Note, Taxation in Black and White: The Disallowance of Tax-Exempt Status to Discriminatory Private Schools—Bob Jones University v. United States*, 27 HOW. L.J. 1769 (1984).

lems and fail to provide fair notice to charities of what behavior is and is not consistent with maintaining tax exemption. Part II.C argues that a broad, minimalist formulation of the public policy doctrine would vest too much discretion in a single agency that lacks the expertise required to exercise such discretion. Part II.D suggests another reason to reject an expansive formulation of the public policy doctrine: to promote the beneficial diversity of the charitable sector. Part II.E then articulates and expounds upon a suggested framework for limiting the public policy doctrine in a sensible manner.

Having established a coherent justification for limiting the sweep of the public policy doctrine, this Article next applies the suggested refinement of the doctrine to the question at hand. Part III.A briefly reviews the Court's analysis in *Obergefell*. Part III.B argues that schools maintaining sexual conduct policies that prohibit sexual conduct inconsistent with their religiously informed, traditional view of marriage remain tax-exempt after *Obergefell*. This conclusion holds true under my proposed framework for applying the public policy doctrine and a more expansive version of the framework. Next, adopting an even broader perspective, Part III.C explains why *Obergefell's* analytical approach, language, and tone are inconsistent with applying *Bob Jones* to the disadvantage of religious schools that maintain sexual conduct policies of the type examined in this Article. Part IV concludes.

I. *BOB JONES* AND THE PUBLIC POLICY DOCTRINE

Examining the rationale of *Bob Jones* is a predicate to ascertaining its essential meaning, force, and reach. The case required the Court to consider a nuanced interpretation of Code section 501(c)(3).⁴³ Code section 501(c)(3) describes the following organizations:

Corporations, and any community chest, fund, or foundation, [1] organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or

43. Code Section 501(a) exempts from federal income taxation organizations described in Code section 501(c).

for the prevention of cruelty to children or animals, [2] no part of the net earnings of which inures to the benefit of any private shareholder or individual, [3] no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and [4] which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.⁴⁴

The *Bob Jones* opinion grapples with dimensions of the term “charitable” in the first bracketed phrase of Code section 501(c)(3) excerpted above. *Bob Jones* rests largely on the proposition that Congress exempted Code section 501(c)(3) “charitable” organizations from income tax to promote the growth of entities that serve a salutary public purpose.⁴⁵ The Court discerned this intent by invoking the statute’s “framework” and “the background of the congressional purposes.”⁴⁶ Noting parallels between Code sections 501(c)(3) and 170(c)⁴⁷ and observing that section 170 authorizes a deduction for “charitable contributions,” the *Bob Jones* Court found that, through section 501(c)(3), Congress sought to advantage only organizations serving “charitable” purposes—whether or not their precise charitable purposes are further specified in Code section 501(c)(3) (for example “educational” or “religious”).⁴⁸ Moreover, the relevant background of federal tax exemption for all section 501(c)(3) entities is the common law concept of charity,⁴⁹ which is limited to trusts

44. I.R.C. § 501(c)(3) (bracketed numbers added for clarity).

45. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 588 (1983) (“Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind.”).

46. *Id.* at 586.

47. Code section 170(a)(1) authorizes a deduction for a “charitable contribution,” which is defined in Code section 170(c). Under section 170(c)(2), a “charitable contribution” includes a gift to “[a] corporation, trust, or community chest, fund, or foundation” that satisfies certain requirements. I.R.C. § 170(c)(2). Such requirements include those set forth in Code section 501(c)(3). See *id.* § 170(c)(2)(A)–(D).

48. *Bob Jones*, 461 U.S. at 586–88.

49. For an insightful critique of the Court’s analysis of the common law of charitable trusts and its relationship to Code section 501(c)(3), see Galston, *supra* note 42, at 297–308.

that benefit the community.⁵⁰ The Court observed that at common law, “the purpose of a charitable trust may not be illegal or violate established public policy.”⁵¹

The Court concluded that an educational institution maintaining racially discriminatory policies as to students violates this public policy stricture that inheres in the term “charitable.” Beginning with *Brown v. Board of Education*,⁵² preeminent authorities of every branch of the federal government “attest a firm national policy to prohibit racial segregation and discrimination in public education. . . . An unbroken line of cases following *Brown v. Board of Education*” establish the Supreme Court’s judgment that “racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals.”⁵³ By enacting Titles IV and VI of the Civil Rights Act of 1964,⁵⁴ Congress likewise affirmed “that racial discrimination in education violates a fundamental public policy.”⁵⁵ The Court sought further confirmation of public policy from the Executive Branch, which through its Executive Orders has consistently sought to eradicate racial discrimination.⁵⁶ The Court concluded that racially discriminatory schools do not exercise “beneficial and stabilizing influences in community life”⁵⁷ and should not be promoted “by having all taxpayers share in their support by way of special tax status.”⁵⁸ Consequently, such institutions “cannot be viewed as conferring a public benefit within the ‘charitable concept’” or within the legislative intent of Code section 501(c)(3).⁵⁹

Judicial and administrative application of the public policy doctrine following the decision in *Bob Jones* has been scant and far

50. *Bob Jones*, 461 U.S. at 588–89. Further, the legislative history of sections 170 and 501(c)(3) reveals lawmakers’ remarks that assume the public usefulness of charities. *See id.* at 589–90.

51. *Id.* at 591.

52. 347 U.S. 483 (1954).

53. *Bob Jones*, 461 U.S. at 593–94 (citing *Norwood v. Harrison*, 413 U.S. 455, 468–69 (1973); *Cooper v. Aaron*, 358 U.S. 1, 19 (1958)).

54. 42 U.S.C. §§ 2000c–2000c-9, 2000d–2000d-4 (2012).

55. *Bob Jones*, 461 U.S. at 594.

56. *Id.* at 594–95.

57. *Id.* at 595 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 673 (1970)).

58. *Id.*

59. *See id.* at 595–96.

from illuminating.⁶⁰ Courts have found violations of the doctrine by organizations that operate illegally⁶¹ or that promote illegal activity.⁶² Similarly, the IRS has invoked the doctrine to deny exemption to entities that violate federal law⁶³ or promote the violation of state law.⁶⁴ The IRS has also applied the doctrine to deny exemption to a racially discriminatory testamentary trust⁶⁵ and has suggested that acting illegally under foreign law may disqualify an organization from federal income tax exemption.⁶⁶ The IRS may even have toyed with denying exemption to an organization that operates in a manner deemed inconsistent with the then-presidential administration's policies directly affecting Israel.⁶⁷ In

60. For a discussion, see Terri Lynn Helge, *Rejecting Charity: Why the IRS Denies Tax Exemption to 501(c)(3) Applicants*, 14 PITT. TAX REV. (forthcoming 2017) (manuscript at 16–18, 43–45) (on file with author).

61. See, e.g., *Church of Scientology v. Comm'r*, 83 T.C. 381, 466, 503–09 (1984) (upholding the revocation of an entity's tax exemption on numerous grounds, including that it committed a criminal offense by impeding the collection of taxes by the IRS), *aff'd*, 823 F.2d 1310 (9th Cir. 1987).

62. See, e.g., *Mysteryboy, Inc. v. Comm'r*, 99 T.C.M. (CCH) 1057 (2010) (finding an organization not to qualify for exemption when it was formed to legalize sex between adults and children; stating, without citing *Bob Jones*, that “petitioner proposes to operate in a manner that promotes activities which are prohibited by Federal and State laws, violate public policy as reflected in those laws, and tend to promote illegal activities”).

63. See, e.g., I.R.S. Priv. Ltr. Rul. 201615018 (Jan. 15, 2016) (determining, without citing *Bob Jones*, that an organization is non-exempt because it distributes cannabis in violation of federal law); I.R.S. Priv. Ltr. Rul. 201333014 (May 20, 2013) (same, but relying in part on *Bob Jones*); I.R.S. Gen. Couns. Mem. 39,862 (Nov. 22, 1991) (advising that a hospital jeopardizes its federal income tax exemption by violating legislation designed to curb Medicaid and Medicare fraud and abuse; opining, without citing *Bob Jones*, that all charities “are subject to the requirement that their purposes or activities may not be illegal or contrary to public policy”).

64. See, e.g., I.R.S. Priv. Ltr. Rul. 201323025 (Mar. 14, 2013) (ruling an entity non-exempt for promoting polygamy, which violates state law); I.R.S. Priv. Ltr. Rul. 201310047 (Dec. 11, 2012) (same).

65. See, e.g., I.R.S. Tech. Adv. Mem. 89-10-001 (Nov. 30, 1988).

66. See, e.g., I.R.S. Priv. Ltr. Rul. 201405022 (Nov. 8, 2013).

67. For a discussion, see Mirkay, *Globalism*, *supra* note 42, at 853–58. The organization, Z Street, alleged that the IRS had delayed the processing of its application for exemption because it held political views on Israel that were inconsistent with those of the Obama administration. After the lawsuit by Z Street was allowed to proceed, see *Z Street v. Koskinen*, 791 F.3d 24 (D.C. Cir. 2015), the IRS determined that the organization was exempt from federal income taxation. See Jerry Gordon, *IRS Sent up a White Flag of Surrender on the Z Street v. Koskinen Case*, NEW ENGLISH REV. (Oct. 31, 2016), http://www.newenglishreview.org/blog_direct_link.cfm/blog_id/65287/IRS-Sent-up-a-White-Flag-of-surrender-on-Z-Street-v-Koskinen-Case [<https://perma.cc/5YPM-TMT7>].

short, authorities since *Bob Jones* have hardly clarified the public policy doctrine's scope.

II. WHY THE PUBLIC POLICY DOCTRINE SHOULD BE CONSTRUED NARROWLY

The language of *Bob Jones* strongly suggests that the missile of the public policy doctrine should remain in the government's silo in most tax exemption battles. The Court expounded on the doctrine by announcing that a charitable organization's "purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred."⁶⁸ That comparative addendum to the general formulation of the doctrine itself suggests the extraordinary showing that the Court required as a prerequisite to applying the doctrine.⁶⁹ Further, the Court opined that an entity should fail the test of charitableness "only where there can be no doubt that the activity involved is contrary to a fundamental public policy."⁷⁰ If one analogizes this threshold of "no doubt" to other common evidentiary burdens, such as that of proving the guilt of a criminal defendant "beyond a reasonable doubt,"⁷¹ the hurdle for establishing a violation of the public policy doctrine is exceptionally high, indeed. The *Bob Jones* Court thus instructs the IRS not to invoke the public policy doctrine hastily. This Part argues that the *Bob Jones* Court correctly signaled that the public policy doctrine should be used parsimoniously.

68. *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983).

69. Cf. Shannon Weeks McCormack, *Taking the Good with the Bad: Recognizing the Negative Externalities Created by Charities And Their Implications for the Charitable Deduction*, 52 ARIZ. L. REV. 977, 1012 (2010) (stating that the holding of *Bob Jones* "seems purposefully narrow").

70. *Bob Jones*, 461 U.S. at 592; see also Tracey, *supra* note 30, at 128 ("The Court [in *Bob Jones*] underscored the limited circumstances in which the IRS and the courts may even consider the effect of public policy.").

71. See, e.g., *In re Winship*, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

A. *Appreciating the Fundament Requirement*

Bob Jones deems an entity's violation of public policy incompatible with federal income tax exemption only if the organization has contravened "established"⁷² or "fundamental"⁷³ public policy. This Article refers to the "fundamental" or "established" quality of the public policy that an entity must be shown to have violated as the fundament requirement. To formulate the public policy doctrine with this fundament requirement is to suggest the rarity of its applicability. Not just any violation of "public policy" triggers the doctrine. The violation apparently must contravene some core national objective plainly manifested in governmental actions.

Just how this national, governmental objective must be manifested is unclear, but one can readily deduce what the fundament requirement does not mean. The public policy doctrine on its face can apply to legal activities, a point logically flowing from *Bob Jones*' observation that charitable trust purposes "may not be illegal or violate established public policy."⁷⁴ Thus, the fundament requirement does not mean that an entity forfeits its federal income tax exemption under *Bob Jones* only if it directly violates the letter of public policies passed by Congress and signed by the President. An entity can be operating within the letter of non-tax law and still fail to qualify under Code section 501(c)(3).

To the question of what the fundament requirement affirmatively means, the opinion offers clues but no precise answers. *Bob Jones* fastidiously chronicles the consistent actions of all three branches of the federal government in advancing a national policy against racial discrimination in education over a significant period of time: "Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education."⁷⁵ Specifically, the Court found the fundament requirement satisfied under the facts of *Bob Jones* by citing numerous sources of law and regulation and recognizing the contribution of all three branches of the federal government to the

72. *Bob Jones*, 461 U.S. at 586, 591.

73. *Id.* at 592, 593, 594, 596 n.21, 598.

74. *Id.* at 591 (emphasis added).

75. *Id.* at 593.

public policy in question.⁷⁶ Also notable is the supremacy of the contributing authorities cited by the Court: the Supreme Court (not just lower courts);⁷⁷ federal statutory law (not just common law, and not state law);⁷⁸ and Congress and the President (not merely administrative agencies).⁷⁹ The Court further observed consistency in the public policy against racial discrimination, both within each branch of the federal government and among the various branches of the federal government.⁸⁰ Additionally, the Court noted the temporal length of the public policy against racial discrimination.⁸¹

Thus, if the analysis of *Bob Jones* provides a template for applying the public policy doctrine announced by the Court, one could reasonably interpret the fundament requirement to subsume the following elements: (1) the governmental policy in question has been advanced by the federal government, not merely state governments; (2) each branch of the federal government has advanced the public policy in question; (3) the manner in which each branch of the federal government has advanced the public policy in question is consistent, both within each branch and among the three branches; (4) the consistency with which the federal government has advanced the policy in question spans a significant period of time, that is, multiple decades; (5) the highest authorities within each branch of the federal government have advanced the public policy in question, that is, the Supreme Court, the United States President, and both houses of Congress; and (6) the public policy in question arises from the imperative of protecting a right guaranteed by the United States Constitution.

To interpret the fundament requirement in this manner is to understand the rationale of *Bob Jones* as setting forth a set of conditions for applying the public policy doctrine when an entity is properly found to have “violated” public policy. For ease of discussion, this Article refers to these six conditions as the “fundament factors.” Unfortunately for those who favor clarity, the *Bob*

76. See *id.* at 592–96; Buckles, *Reforming*, *supra* note 42, at 433; Mirkay, *Transformation*, *supra* note 42, at 64–65.

77. *Bob Jones*, 461 U.S. at 593–94.

78. *Id.* at 594–95.

79. *Id.* at 594–96.

80. See *id.* at 593–95; Buckles, *Reforming*, *supra* note 42, at 433.

81. See *Bob Jones*, 461 U.S. at 593–95.

Jones opinion itself does not explicitly state whether the fundament factors are necessary for applying the public policy doctrine, sufficient for applying the public policy doctrine, or both necessary and sufficient for applying the public policy doctrine, when a violation of public policy has occurred.⁸²

If the fundament factors are necessary but not sufficient conditions, then the fundament requirement is established only if the fundament factors are accompanied by additional compelling facts establishing the gravity of the public policy in question. For example, fostering discrimination-free public education may constitute a fundamental public policy because (1) the fundament factors are present and (2) vestiges of the nation's shameful history of slavery would exist if schools remained racially segregated. If the fundament factors are merely sufficient conditions, then the fundament requirement could be established if not all of the fundament factors are present.⁸³ Indeed, if the fundament factors are merely sufficient conditions, conceivably none of the fundament factors is essential; perhaps entirely different factors would suffice to satisfy the fundament requirement in other cases. If the fundament factors are necessary and sufficient conditions, then the fundament requirement is established if and only if the fundament factors are present; additional compelling facts establishing the gravity of the public policy in question need not be present.

If the fundament factors are necessary but not sufficient conditions, or if they are merely sufficient conditions, one is left with a host of additional, unanswered questions (depending on which understanding prevails). Which conditions carry the greatest weight in the analysis?⁸⁴ Which conditions are dispen-

82. Nor does the opinion state whether any public policy of the United States other than prohibiting racial discrimination in education satisfies the fundament requirement.

83. For example, Professor Miriam Galston has opined that "a clearly defined public policy is manifest in legislative, constitutional and judicial declarations." Galston, *supra* note 42, at 316. Professor Karla Simon would look to recent congressional acts, all judicial decisions, and multiple federal agencies. See, e.g., Simon, *supra* note 42, at 166 ("The proper method of discerning whether there is a fundamental public policy in favor of or against particular actions is by analysis of recent legislation, court decisions on both the state and the Federal levels, and, to some extent, administrative interpretation by other agencies of laws they are required to enforce . . .").

84. For example, one may plausibly argue that longstanding, detailed federal legislation is entitled to the greatest weight, insofar as it is the product of the

sable entirely?⁸⁵ How does partial fulfillment of one or more conditions affect analysis?⁸⁶ What additional conditions are relevant?⁸⁷ Even if the fundament requirement is best interpreted to prescribe conditions that are both necessary and sufficient for applying the public policy doctrine when an organization has violated public policy, a nagging question remains: what actions short of illegality “violate” that policy?⁸⁸

branch of the federal government most directly responsible for declaring the nation’s public policy. *See, e.g.,* Wiacek et al., *supra* note 29, at 14.

85. To illustrate, if Congress has enacted a detailed statute that clearly articulates a federal policy, its constitutionality is so obvious that it has not been challenged judicially, and its language is so clear that all disputes about its meaning have been consistently resolved by the lower courts, it is difficult to discern why the policy should fail the fundament requirement merely because the Supreme Court has never ruled on the constitutionality or meaning of the statute.

86. For example, if federal legislation was enacted thirty years prior to the time that the Supreme Court upholds its constitutionality, would the policy satisfy the fundament requirement immediately after the Court hands down its decision? Or would it take another thirty years before the public policy is considered fundamental? Would a shorter lapse of time suffice?

87. For example, in *Bob Jones*, the nation’s appalling history of slavery and its vestiges—namely, racial segregation—was clearly on the minds of the justices. *See infra* notes 266–71 and accompanying text.

88. Professor Lawrence Zelenak’s questions in his recent *Prompt* illustrate that the concept of “violating” public policy lacks clarity in the aftermath of *Obergefell*:

If the IRS got it wrong, what sort of organizational behavior should lead to denial of tax-exempt status? Is mere expression of opposition to same-sex marriage enough? If not, what about a church that refuses to perform or recognize same-sex marriages? If that is still not enough, what about an organization that urges county clerks not to register same-sex marriages? What about an organization that declines to provide spousal benefits to the same-sex spouse of an employee? Or what about the married student housing and adoption agency hypotheticals of Chief Justice Roberts?

Zelenak, *supra* note 29, at 1–2. Decades earlier, other commentators made a similar point in critiquing the developing public policy doctrine:

The Supreme Court has declared that another public policy prohibits states from regulating abortions during the first trimester of pregnancy. Will the IRS seek to enforce this policy against religious schools that teach that abortion is morally wrong? Also, municipal ordinances have been passed banning discrimination on the basis of sexual preference, and litigation has been initiated seeking to have churches adhere to this public policy. If the IRS embraces a developing policy in this area not to discriminate against homosexual behavior, should it enforce this policy against religions that consider homosexuality sinful? Although the compelling state interest in racial harmony can outweigh religious claims to engage in racial discrimination, none of the above policies would be likely to survive the prohibitions of the religion clauses. . . .

One may advance arguments in favor of each of these alternative interpretations of the fundament requirement. Interpreting *Bob Jones* as specifying conditions that are necessary, or perhaps both necessary and sufficient, for applying the public policy doctrine when an organization has violated public policy has the advantage of reigning in a potentially sweeping, imprecise standard. Moreover, interpreting the fundament factors as necessary conditions, or perhaps even necessary and sufficient conditions, is faithful to the Court's admonition that the public policy doctrine should be applied "only where there can be no doubt" that the fundament requirement is satisfied.⁸⁹ Interpreting the fundament factors as merely sufficient conditions has the advantage of reinforcing public policies that appear firmly entrenched, notwithstanding that some of the highest levels of government have lacked an opportunity to affirm them.⁹⁰ But if the fundament factors are interpreted merely as sufficient conditions, we are left with very little doctrinal clarity under the public policy doctrine unless it is further limited. This Article suggests a principled manner to so limit the doctrine below.⁹¹

B. Promoting Fair Notice and Doctrinal Clarity

The foregoing discussion exposes some of the vagueness of the public policy doctrine.⁹² *Bob Jones* does not explicitly set forth a test for determining whether public policy is "established" or "fundamental," that is, whether the fundament requirement has been satisfied.⁹³ Not everyone may agree that the fundament requirement should be interpreted to require the presence of all fundament factors discussed in *Bob Jones*. But surely everyone will

Neuberger & Crumplar, *supra* note 42, at 273 (footnotes omitted) (citations omitted).

89. *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983).

90. See, e.g., *supra* note 85.

91. See *infra* Part II.E.

92. The void of clarity in the public policy doctrine has been observed by others. See, e.g., Brennan, *Treasury*, *supra* note 42, at 410; Colombo, *supra* note 42, at 855; Drennan, *supra* note 42, at 574-75, 578; Galvin & Devins, *supra* note 42, at 1373; Mirkay, *Transformation*, *supra* note 42, at 67-68; Schweizer, *supra* note 42, at 855-56; Simon, *supra* note 42, at 166; Truesch, *supra* note 42, at 52-53.

93. For a discussion, see Buckles, *Reforming*, *supra* note 42, at 432-37.

agree that the fundament requirement must be interpreted.⁹⁴ That the Court sets forth the fundament requirement without clearly explaining when it is satisfied creates uncertainty.⁹⁵

Moreover, several other issues raised but not resolved by *Bob Jones* contribute to the public policy doctrine's lack of clarity. I have previously discussed in depth a number of them⁹⁶ and will not here rehash them extensively. A brief review of several of the issues not yet specifically identified in this Article suffices.⁹⁷ First, the Court in *Bob Jones* did not settle even the basic issue of whether an organization's outright violation of non-tax law necessarily prevents it from qualifying under Code section 501(c)(3).⁹⁸ Second, when an organization's activities do not violate the letter of non-tax statutory law, it is unclear how analogous lawful but suspect behavior must be to behavior that plainly violates statutory law before a court will find the former to violate public policy under *Bob Jones*.⁹⁹ Third, and relatedly, it is unclear how similar the activities of an organization seeking federal income tax exemption must be to the activities proscribed by the Executive Branch before the organization is properly found to have contravened public policy. Fourth, and related to each of the previous two points, *Bob Jones* provides little guidance on how broadly or how narrowly "public policy" should be conceptualized¹⁰⁰ before a court analyzes whether that policy is fundamental, and then whether it has been violated.¹⁰¹ Fifth, *Bob Jones* creates uncertainty as to whether

94. See, e.g., *Church of Scientology v. Commissioner*, 83 T.C. 381, 466 (1984) ("This Court construed the public policy requirement to prohibit substantial activity in violation of well-defined public policy such as may be evidenced by a civil or criminal statute."), *aff'd*, 823 F.2d 1310 (9th Cir. 1987).

95. See Drennan, *supra* note 42, at 578 ("A great number of questions remain concerning the amount of support needed for a public policy to be fundamental or to be a form of a fundamental public policy.").

96. See Buckles, *Law Schools*, *supra* note 42, at 27-35; Buckles, *Reforming*, *supra* note 42, at 407-37.

97. For another list of issues raised by *Bob Jones*, see Truesch, *supra* note 42, at 52-53; Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 30, at 77, at 88-90 (discussing questions raised by the public policy doctrine).

98. For a discussion, see Buckles, *Reforming*, *supra* note 42, at 409-15.

99. See *id.* at 415-18.

100. See Buckles, *Law Schools*, *supra* note 42, at 27-29.

101. To illustrate, in *Bob Jones*, the Court concluded that racial discrimination in education contravenes established public policy. The conclusion is consistent with the view that the public policy of the United States is to ensure that educational

constitutional norms limiting state action should to some degree govern the same action by would-be charitable organizations under the public policy doctrine.¹⁰² Sixth, although the major thrust of *Bob Jones* ignores state law in determining whether an entity has violated established public policy, the opinion does not explicitly moot state law. For reasons I have explained elsewhere, one may argue that state law is at least minimally relevant under the public policy doctrine.¹⁰³ It is unclear, however, that the *Bob Jones* Court would agree.

The vagueness of the doctrine announced in *Bob Jones* and the resultant vacuum of notice given charities as to when they may run afoul of the doctrine are unacceptable.¹⁰⁴ Because of the opacity of the doctrine, charities do not have fair notice of when their existing or contemplated activities will be found inconsistent with the requirements imposed by Code section 501(c)(3). But deeply rooted in the values of a nation governed by the rule of law¹⁰⁵ is the conviction that the law must provide fair notice to those bound to obey it.¹⁰⁶ Fair notice requires clari-

institutions do not discriminate on the basis of race. But the conclusion is also consistent with the view that the public policy of the United States is to ensure that (1) no charity engages in racial discrimination; (2) no educational institution engages in discrimination in various (but perhaps not all) forms, including race; or (3) no charity engages in discrimination in various (but perhaps not all) forms, including race. The rationale of *Bob Jones* focuses specifically on racial discrimination in education, and therefore the Court in *Bob Jones* appeared to narrowly define the public policy that the schools in issue had violated. But the doctrine announced in *Bob Jones* does not explicitly require courts to define public policy narrowly before determining (1) whether the policy is fundamental, and (2) whether the policy has been violated.

102. For a discussion, see Buckles, *Reforming*, *supra* note 42, at 418–22.

103. *See id.* at 426–32.

104. *Cf.* Galvin & Devins, *supra* note 42, at 1367 (“[T]he vagueness of both the common community conscience and the public benefit standards creates the danger that the IRS may overzealously enforce the standards, resulting in unwanted social homogeneity.”). *But cf.* Simon, *supra* note 42, at 166 (stating that, although a “more concrete standard” might be superior, “there should be no mystery about the meaning of the public policy test of *Bob Jones*”).

105. *See* Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1990 (2015) (“The rule of law retains a place at the center of our political morality; it is an ideal, like democracy, that sits among a small cluster of our most basic commitments.”).

106. *See id.* (reviewing the principles of the rule of law and stating that “law should give private parties adequate notice and be of a form that they can make sense of so that they can conform their conduct to its requirements”); *id.* at 1992 (“Many of the most commonly identified features of the rule of law pertain to a cluster of characteristics that help to ensure that law has the capacity to be practi-

ty,¹⁰⁷ and fair notice is imperative in applying federal income tax exemption law, just as it is in applying other law. The principle of fair notice is especially compelling when constitutional values are at stake.

A case that illustrates this point is *Big Mama Rag, Inc. v. United States*.¹⁰⁸ Big Mama Rag was a nonprofit that claimed exemption from federal income tax as an educational organization described in Code section 501(c)(3). Maintaining what the court characterized as a “feminist orientation,” Big Mama Rag published a monthly newspaper containing articles, editorials, calendars of events, and other information. The IRS denied its application for federal income tax exemption.¹⁰⁹ When Big Mama Rag sought declaratory relief in the United States District Court for the District of Columbia, that court upheld the adverse IRS determination upon the grounds that the organization did not satisfy the definition of “educational” under the relevant section of the United States Treasury regulations.¹¹⁰

The key regulatory section at issue in the case defines “educational” under Code section 501(c)(3) as relating to “[t]he instruction or training of the individual for the purpose of improving or developing his capabilities,” or, in the alternative, “[t]he instruction of the public on subjects useful to the individual and beneficial to the community.”¹¹¹ The regulations permit educational organizations to “advocate[] a particular position or view-

cal in the sense of providing guidance to an individual’s actions and allowing individuals to plan with some knowledge of the law.”).

107. *See id.* at 1992 (“The principles of publicity, clarity, consistency, prospectivity, and stability are among the most important of these [rule of law] values.”).

108. 631 F.2d 1030 (D.C. Cir. 1980). For a discussion of *Big Mama Rag*, see Comment, *Tax Exemptions for Educational Institutions: Discretion and Discrimination*, 128 U. PA. L. REV. 849 (1980).

109. *Big Mama Rag*, 631 F.2d at 1033. The entity’s application for federal income tax exemption was initially denied by the IRS District Director, and this denial was upheld by the IRS National Office on three separate grounds: (1) the commercial nature of the newspaper; (2) the political and legislative commentary found throughout the newspaper; and (3) the articles, lectures, editorials, and other activities of the entity that promoted lesbianism. The District Director then issued a final determination letter denying tax exemption because the newspaper’s content was not educational, and the manner of its distribution was that of commercial publishing organizations. *See id.*

110. *See Big Mama Rag, Inc. v. United States*, 494 F. Supp. 473, 478–81 (D.D.C. 1979).

111. Treas. Reg. § 1.501(c)(3)–1(d)(3)(i) (1959).

point,"¹¹² but only if it "presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion."¹¹³ The regulations further state that an entity fails to be educational "if its principal function is the mere presentation of unsupported opinion."¹¹⁴ According to the district court, Big Mama Rag failed the test of "educational" under the regulations because it had "adopted a stance so doctrinaire" that it fell short of the "full and fair exposition" standard of the regulations.¹¹⁵

The United States Court of Appeals for the District of Columbia Circuit reversed.¹¹⁶ Holding the Treasury regulation unconstitutionally vague,¹¹⁷ the court first observed that "tax law and constitutional law are not completely distinct entities."¹¹⁸ The court then sounded a note in constitutional originalism by recounting one evil that the First Amendment was intended to check: imposing "taxes on knowledge."¹¹⁹ Those taxes were designed "to limit the circulation of newspapers and therefore the public's opportunity to acquire information about governmental affairs."¹²⁰ The framers had experienced these taxes and grasped that "(t)he power to tax the exercise of a privilege is the power to control or suppress its enjoyment."¹²¹ The D.C. Circuit acknowledged that the government need not subsidize First Amendment activities.¹²² Nonetheless, just as "the discriminatory denial of tax exemptions can impermissibly infringe free speech,"¹²³ "regulations authorizing tax exemptions may not be so unclear as to afford latitude for subjective application by IRS officials."¹²⁴ According to the court, the "full and fair exposition" test set forth in

112. *Id.*

113. *Id.*

114. *Id.*

115. *Big Mama Rag*, 494 F. Supp. at 479.

116. *Big Mama Rag v. United States*, 631 F.2d 1030, 1040 (D.C. Cir. 1980).

117. *Id.* at 1034–35, 1039–40.

118. *Id.* at 1034.

119. *Id.*

120. *Id.* (citing *Grosjean v. American Press Co.*, 297 U.S. 233, 246–49 (1936)).

121. *Id.* (quoting *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943)).

122. *See id.*

123. *Id.* (citing *Speiser v. Randall*, 357 U.S. 513, 518 (1958)).

124. *Id.*

the Treasury regulations' definition of "educational" "is so vague as to violate the First Amendment."¹²⁵

A detailed examination of the D.C. Circuit's analysis of the vagueness doctrine in *Big Mama Rag* is instructive. The court recognized two reasons for rejecting vague laws under the vagueness doctrine. First, and most obviously, "the vagueness doctrine incorporates the idea of notice—informing those subject to the law of its meaning."¹²⁶ I will refer to this purpose simply as the "fair notice function." Second, the vagueness doctrine provides "officials with explicit guidelines in order to avoid arbitrary and discriminatory enforcement."¹²⁷ I will refer to this purpose as the "principled enforcement function" of the vagueness doctrine.

The court next articulated the legal standards for applying the vagueness doctrine. According to the court, the vagueness doctrine invalidates laws that are "wholly lacking in 'terms susceptible of objective measurement.'"¹²⁸ Further, the vagueness doctrine requires greater specificity when a law's uncertain meaning may suppress the exercise of First Amendment rights.¹²⁹ This specificity is necessary because vague laws overly restrict the governed by compelling them to behave in a way that is so plainly within the realm of lawfulness that nobody could plausibly challenge them.¹³⁰ A clear law, in contrast, can afford actors greater latitude in exercising constitutional rights because the boundary of lawfulness is easy to perceive. They can exercise their rights to the maximum degree by fully approaching, but not crossing, the legal boundary.¹³¹

125. *Id.* Since losing in *Big Mama Rag*, the IRS has promulgated a "methodology test" for determining whether an organization is educational. *See, e.g.*, Rev. Proc. 86-43, 1986-2 C.B. 729.

126. *Big Mama Rag*, 631 F.2d at 1035 (citing *Smith v. Goguen*, 415 U.S. 566, 572 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972)).

127. *Id.* (citing *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976); *Goguen*, 415 U.S. at 572-73; *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972)).

128. *Id.* (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967)).

129. *See id.* (citing *Hynes*, 425 U.S. at 620; *Goguen*, 415 U.S. at 573; *NAACP v. Button*, 371 U.S. 415, 432-33 (1963)).

130. *See id.*

131. As Professor Jeremy Waldron observes:

There may be no escaping legal constraints in the circumstances of modern life, but freedom is nevertheless possible if people know in advance how the law will operate, and how they must act to avoid its

The court in *Big Mama Rag* then held that the Treasury regulation at issue violated the vagueness doctrine. The regulation's "full and fair exposition" test, held the court, fails the vagueness doctrine because (1) it does not sufficiently identify which applicant organizations are subject to the test; and (2) the test's substantive requirements lack clarity.¹³² As to the former deficiency, the court noted that the full and fair exposition test applies only to an organization that "advocates a particular position or viewpoint,"¹³³ and that the Treasury regulations are unclear as to which organizations so qualify.¹³⁴ Further, the Treasury Department's Exempt Organizations Handbook has interpreted this language¹³⁵ to apply to an entity advocating a "controversial" position.¹³⁶ But determining what is "controversial" is so subjective that it cannot withstand First Amendment scrutiny.¹³⁷ Consequently, the Treasury regulation defining "educational" is unconstitutionally vague in that it "does not clearly indicate which organizations are advocacy groups and thereby subject to" the full and fair exposition test.¹³⁸

As to the second deficiency of the regulation, the court opined that it offers no clue for interpreting the test. The court pondered the following questions:

What makes an exposition "full and fair"? Can it be "fair" without being "full"? Which facts are "pertinent"? How does one tell whether an exposition of the pertinent facts is "sufficient . . . to permit an individual or the public to form an independent opinion or conclusion"? And who is to make all of these determinations?¹³⁹

The court especially objected to the regulation's inquiry into whether an organization's speech would "permit an individual

having a detrimental impact on their affairs. Knowing in advance how the law will operate enables one to plan around its requirements.

Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6 (2008).

132. *Big Mama Rag*, 631 F.2d at 1036 (1980).

133. *Id.* (analyzing Treas. Reg. §§ 1.501(c)(3)-1(d)(2), 1.501(c)(3)-1(d)(3)(i)).

134. *See id.*

135. *See* 3 Int. Rev. Manual-Admin. (CCH) pt. 7751, § 345.(12), at 20,572 (Apr. 28, 1977).

136. *Big Mama Rag*, 631 F.2d at 1036.

137. *Id.*

138. *Id.* at 1037.

139. *Id.* at 1037.

or the public to form an independent opinion or conclusion."¹⁴⁰ That determination "is expressly based on an individualistic—and therefore necessarily varying and unascertainable—standard: the reactions of members of the public."¹⁴¹

Further, the regulation cannot be salvaged by reading it to distinguish fact from opinion,¹⁴² or "appeals to the emotions" from "appeals to the mind."¹⁴³ Such distinctions are not supported by the language of the regulations, and even if they were, distinguishing the two types of appeals would be difficult.¹⁴⁴ Moreover, even if one could make such distinctions, they "would be inadequate definitions of 'educational' because material often combines elements of each."¹⁴⁵ The regulations are therefore unconstitutionally vague, ruled the court.¹⁴⁶

Big Mama Rag should impel courts to interpret the public policy doctrine narrowly. To see why this is so, imagine that the Treasury regulations were rewritten to state that any organization formed for purposes described in Code section 501(c)(3) must "not be contrary to established public policy," and that an organization ceases to be described in that section when "there is no doubt that the organization's activities violate fundamental public policy." The quoted language is lifted directly from *Bob Jones*.¹⁴⁷ One can easily imagine a court reciting verbatim the language of *Big Mama Rag* excerpted above and substituting the skeletal, formulaic test of *Bob Jones* to strike down the test on vagueness grounds, as follows:

140. Treas. Reg. § 1.501(c)(3)-1(d)(3) (1959).

141. *Big Mama Rag*, 631 F.2d at 1037. Adding to the vagueness problem was that the relationship between the two sentences comprising the "full and fair exposition" test is unclear. *Id.*

142. The court also rejected the position of the IRS, accepted by the district court, that the full and fair exposition test was "capable of objective application" because "it asks only whether the facts underlying the conclusions are stated." *Id.* at 1038. The appellate court countered that distinguishing fact from opinion is hardly an objective way to ascertain whether a position is educational. *See id.*

143. *Id.* at 1038–39.

144. *See id.* at 1039.

145. *Id.* The court was unimpressed with the argument of the IRS that one could approach the distinction between fact and opinion, or emotional appeals and appeals to the mind, quantitatively. The Treasury regulations supply no quantitative test, and even if they did, it is unclear how much factual content or appeals to the mind would be required, or who would apply the test. *See id.*

146. *See id.*

147. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 586, 598 (1983).

What makes a [public policy] ["fundamental" or "established"]? Can it be "[established]" without being "[fundamental]"? Which [remote uncertainties, if any] are [consistent with having "no doubt"]? How does one tell whether "[activities violate fundamental policy]"? And who is to make all of these determinations?¹⁴⁸

To these questions, framed in the rhetoric of *Big Mama Rag*, one may add a litany of others catalogued in the beginning of this Part.

My argument is not that *Bob Jones University* advances a doctrine that, were it set forth explicitly in the Treasury regulations, would necessarily fail under *Big Mama Rag* on vagueness grounds. Rather, my point is that the public policy doctrine announced in *Bob Jones* should be interpreted in such a way that it survives scrutiny under the vagueness doctrine. The bare, skeletal formulation of the public policy doctrine—that a charity must “not be contrary to established public policy,” and that a charity forfeits exemption when there is “no doubt that the organization’s activities violate fundamental public policy”—is devoid of meaningful content.¹⁴⁹ This minimalist formulation provides a charity with no clear notice of whether, or at what point, a contemplated course of action will be found to violate the doctrine. It thus fails to serve the fair notice function of the vagueness doctrine. This state of affairs is especially problematic when a charity’s activity involves the exercise of First Amendment rights,¹⁵⁰ including freedom of speech, the free exercise of religion, and freedom of intimate and expressive association.

Interpreting the fundament requirement of *Bob Jones* as specifying conditions that are both necessary and sufficient for applying the public policy doctrine would help the doctrine survive scrutiny under the vagueness doctrine. Even interpreting the fundament requirement of *Bob Jones* as specifying conditions that are merely sufficient for applying the public policy doctrine could alleviate vagueness concerns if the doctrine is further limited by a concrete standard consistent with the rationale of *Bob Jones*. But either of these approaches does not

148. *Big Mama Rag*, 631 F.2d at 1037.

149. The same objection applies to the Court’s “common community conscience” dictum. See Galvin & Devins, *supra* note 42, at 1373 (characterizing this standard as “open-ended and beclouded”).

150. See *Big Mama Rag*, 631 F.2d at 1035.

alone suffice. When the fundament requirement is established, one must still determine whether an organization has “violated,” or whether it is “contrary to,” the public policy found to be fundamental. Because *Bob Jones* contemplates that an organization’s actions may “violate” public policy even when the charity has not transgressed the law, articulating the conditions that must be present before the public policy doctrine is applied is important. Anything less hardly serves fair notice.

In conclusion, in order to comport with the clarity of law that is constitutionally required, especially in the case of laws that potentially hinder the exercise of First Amendment rights, the public policy doctrine should be interpreted with much more specificity than that which inheres in its skeletal formulation.

C. Limiting Administrative Discretion

The preceding discussion raises additional concerns with the public policy doctrine. *Bob Jones* requires the IRS, or, perhaps more generally, the Treasury Department, to exercise discretion in ascertaining the existence and prominence of public policies. This discretion is required even when Treasury and IRS agents and officials have little or no expertise in either advancing the public policies at issue or determining what public policies are fundamental. This section explains why the doctrine announced in *Bob Jones* is thus problematic on two distinct grounds: (1) it confers unusual discretion upon revenue agents and officials; and (2) it relies on an administrative agency to apply the public policy doctrine in the first instance, notwithstanding that the agency lacks the competence to do so.

That the public policy doctrine confers discretion on the Treasury Department (and the IRS specifically) strikes many observers as abundantly apparent.¹⁵¹ The Treasury is charged with publishing regulations under the Code,¹⁵² and the IRS

151. See, e.g., Colombo, *supra* note 42, at 855; Drennan, *supra* note 42, at 591–92, 596; Galvin & Devins, *supra* note 42, at 1372–73; Mirkay, *Transformation*, *supra* note 42, at 68; cf. Brennen, *Treasury*, *supra* note 42, at 407 (discussing how Treasury might apply the public policy doctrine to affirmative action). For a discussion of the deference that a court would likely extend to the IRS in its exercise of discretion in applying the public policy doctrine, see Moore, *supra* note 42, at 139–55.

152. Under Title 26 of the United States Code, “the Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any altera-

administers and interprets the Code and regulations published under the Code.¹⁵³ Of special relevance, the IRS decides whether to grant or deny recognition of federal income tax exemption to applicants, and whether to revoke favorable determination letters previously issued.¹⁵⁴ Who else, then, bears primary responsibility for ensuring that organizations claiming exemption under Code section 501(c)(3) satisfy its every condition, including the mandate that they not “violate fundamental public policy?”¹⁵⁵ The point that the doctrine conveys considerable discretion on the Treasury Department and the IRS nonetheless merits elaboration, if for no reason other than that the *Bob Jones* majority was reluctant to admit it.

In his concurring opinion in *Bob Jones*, Justice Powell wrote of his unwillingness “to join any suggestion that the Internal Revenue Service is invested with authority to decide which public policies are sufficiently ‘fundamental’ to require denial of tax exemptions.”¹⁵⁶ The majority responded by asserting that Justice Powell “misreads” its opinion, which “does not warrant” his interpretation of its notion of the authority with which the IRS is vested.¹⁵⁷ It is difficult to fathom just how Justice Powell misread the majority’s opinion, but perhaps the majority’s perspective hinges on the meaning of the term “decide.” In explaining its objection to Justice Powell’s characterization of the decision, the majority opinion observes that Justice Powell recognized the fundamental national policy against racial discrimination in education, as well as congressional acquiescence in the position of the IRS.¹⁵⁸ On whether the policy against racial discrimination in education is fundamental, Justice Burger’s majority opinion basically reasons that the policy’s fundamental nature is self-evident. Justice Burger’s rejoinder to Justice Powell may mean

tion of law in relation to internal revenue.” I.R.C. § 7805(a) (2012). The “Secretary” of the Treasury includes his or her delegate. See I.R.C. § 7701(a)(11)(B) (2012).

153. For a discussion of the myriad forms of guidance published by the IRS, see Kristin E. Hickman, *IRB Guidance: The No Man’s Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239.

154. See Treas. Reg. § 601.201(n) (1969); Rev. Proc. 2017-5, 2017-1 I.R.B. 230.

155. See Simon, *supra* note 42, at 166 (stating that *Bob Jones* does not clarify “how the IRS, whose job it is to grant or deny exempt status, should go about” determining fundamental public policy).

156. *Bob Jones Univ. v. United States*, 461 U.S. 574, 611 (1983) (Powell, J., concurring in part and concurring in the judgment).

157. *Id.* at 598 n.23 (majority opinion).

158. See *id.*

only that the IRS does not “decide” fundamental public policy in the sense that the agency lacks the power to infuse a public policy with fundamental status, to elevate the significance of a relatively minor policy. Instead, *Bob Jones* tasks the agency with recognizing the intrinsically fundamental nature of certain public policies in administering tax exemption.

This reading of the majority opinion in *Bob Jones* explains why it can claim not to vest the IRS with authority to elevate minor public policies to fundamental status. However, Justice Powell’s essential protest remains powerful. In the first instance, the agency administering the Code must determine whether an ostensibly charitable entity claiming tax exemption violates fundamental public policy.¹⁵⁹ That this determination takes the form of declaring a pre-existing essence, rather than elevating otherwise mundane public policies to fundamental status, in no way negates the vast discretion that the IRS possesses under the skeletal formulation of the public policy doctrine. When an applicant for exemption conducts activities that some bureaucrats might think “controversial” or inconsistent with the perspective of the public good embraced as orthodoxy under the then-current presidential administration, the IRS stands as initial magistrate on the question of whether the organization is violating fundamental public policy.

The type of discretion that the IRS exercises under the skeletal formulation of the public policy doctrine—determining whether an entity “is contrary to established public policy” or “violates fundamental public policy”—fares poorly under the rationale of *Big Mama Rag*. As observed in *Big Mama Rag*, the vagueness doctrine serves not just the fair notice function, but also the principled enforcement function. With respect to the latter, the vagueness doctrine ensures that government officials are bound by “explicit guidelines in order to avoid arbitrary and discriminatory enforcement.”¹⁶⁰ The general formulation of

159. See Drennan, *supra* note 42, at 591 (“[W]hile it is true that the pronouncements of the legislative, judicial, and executive branches will determine public policy, the IRS will weigh these pronouncements and decide when a particular public policy is fundamental.” (internal citations omitted)); cf. Galvin & Devins, *supra* note 42, at 1354 (stating that *Bob Jones* “assigns to the IRS primary authority to develop rules governing the implementation of the tax exemption laws and assigns to the courts and Congress secondary authority to oversee the IRS.”).

160. *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035 (D.C. Cir. 1980) (citing *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976); *Smith v. Goguen*, 415

the public policy doctrine is wanting under these standards.¹⁶¹ It provides the IRS with no “explicit guidelines” in recognizing the fundamental nature of public policies, or in ascertaining when they have been violated. As a result, when the agency invokes the public policy doctrine (1) to deny an applicant’s request for a determination of exempt status, or (2) to revoke a charitable entity’s existing federal income tax exemption, nobody knows for certain whether the IRS has acted arbitrarily or in a discriminatory manner.¹⁶²

Consider, for example, a homeless shelter that has frequently violated a public health law. Another charity, a charitable hospice, has repeatedly failed to comply fully with laws governing the use of medical marijuana. The IRS revokes the tax exemption of the homeless shelter, but not the hospice, purportedly because only the former has violated “fundamental” public policy. The vagueness of the skeletal formulation of the public policy doctrine enables the IRS to exercise discretion in reaching these determinations, and it may do so without any clear evidentiary trail determining whether the IRS has acted arbitrarily or in a discriminatory fashion. Perhaps the IRS agents disliked the political perspective of the outspoken executive director of the homeless shelter and favored the libertarian motivations of the hospice administrator. The absence of clear guidance on what it means to violate fundamental public policy fosters the type of administrative misfeasance that *Big Mama Rag* contemplates in articulating the principled enforcement function of the vagueness doctrine.

One partial solution to this problem is to restrict the procedural manner in which the government administers tax exemptions after *Bob Jones*. One could imagine a system under which the IRS does not decide whether a specific charity has violated fundamental public policy entirely on a case-by-case, *ex post* basis. Rather, before denying exemption to any charity on the basis of *Bob Jones*, the IRS could first do what it did in the actual

U.S. 566, 572–73 (1974); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972)).

161. See Drennan, *supra* note 42, at 595 (“A major problem with granting the IRS the authority to perform the *Bob Jones* test is that the IRS may apply the rule selectively—only revoking the exempt status of politically unpopular organizations.”).

162. Cf. Galvin & Devins, *supra* note 42, at 1372 (“The [*Bob Jones*] majority’s interpretation, however, poses several problems. First, the danger exists that the Service may selectively enforce its regulations.”).

Bob Jones controversy—publish a revenue ruling stating exactly what course of conduct will henceforth be deemed to violate fundamental public policy in a circumscribed context. A revenue ruling setting forth a set of factual prerequisites for invoking the public policy doctrine in specific contexts could provide fair notice to charities and limit the discretion of agents reviewing individual tax exemption cases following the promulgation of the ruling.¹⁶³

Although this method of applying *Bob Jones* would address one type of problem relating to administrative discretion, case-by-case arbitrariness, it would not solve another. Specifically, it would not allay the concern of Justice Powell in *Bob Jones* that the doctrine announced in the case requires the IRS to identify which public policies meet the fundamental requirement. Public policies run the gamut of substantive content, addressing such matters as the war on terror, urban stability, immunization, access to justice, funding of pre-natal decisions, prison reform, agricultural subsidies, global warming, and immigration (to name a few). Identifying which of the policies addressing these issues are “fundamental” subsumes no small exercise of discretion. So does the task of deciding whether an organization’s conduct, even lawful activity, “violates” the policy identified as “fundamental,” such as in the case of a private university’s declaration that it is a “sanctuary” for persons residing in the United States illegally. Even if the IRS must issue a revenue ruling before applying the public policy doctrine against a would-be tax-exempt charity, the process of deciding which policies justify such a ruling, and which private actions violate the policies so identified, involves the exercise of discretion on a grand scale.

Also stretching the imagination is *Bob Jones*’s assumption that an agency is capable of reliably weighing the gravity of a violation of public policy against the public benefit that the offender otherwise provides. According to the majority opinion, an “institution’s purpose must not be so at odds with the common community conscience as to undermine any public benefit that

163. Cf. Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1481 (1992) (“By informing the public how the agency intends to carry out an otherwise discretionary task, publication rulemaking permits important efficiencies to those who must deal with government.”).

might otherwise be conferred.”¹⁶⁴ By “undermine,” the court apparently intended to denote “outweigh.” The Court opined that “racially discriminatory private schools violate fundamental public policy and cannot be deemed to confer a benefit on the public.”¹⁶⁵ The import of deeming Bob Jones University not to confer a public benefit reduces to the following: the Court surmised that the negative externalities of maintaining a racially discriminatory admissions policy outweigh whatever positive externalities the school’s operations generated.¹⁶⁶ The Court contemplated the possibility that an entity could violate public policy and still provide a public benefit, but declined to explain how it would resolve such a case.¹⁶⁷ Precisely how the IRS can or should employ any element of this calculus in other factual contexts is a mystery.

That the agency conducting these policy assessments is the one responsible for administering revenue laws is nothing short of remarkable.¹⁶⁸ The Treasury Department generally, and the IRS specifically, lack the competence to make these difficult, often highly sensitive, judgment calls on fundamental public policy.¹⁶⁹ The tax collector lacks field-specific expertise in determining whether fundamental public policy has been violated when a charity operates on assumptions contrary to

164. *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983).

165. *Id.* at 596 n.21.

166. See Atkinson, *Tax Favors*, *supra* note 35, at 66; cf. Drennan, *supra* note 42, at 577 (“The majority has adopted a balancing test—if the organization’s objectional acts are so substantial as to outweigh the benefits provided, the organization will be deemed not to confer a public benefit and will be denied exempt status.”). The Court’s calculus reflects a Kaldor-Hicks notion of efficiency. A charitable contribution exhibits Kaldor-Hicks efficiency when the net benefits of the donation exceed the amount of harm caused by the transfer. See McCormack, *supra* note 69, at 981. Most subsidy theories of the charitable contributions deduction rely on the Kaldor-Hicks concept of efficiency. See *id.*

167. See *Bob Jones*, 461 U.S. at 596 n.21.

168. Cf. Neuberger & Crumplar, *supra* note 42, at 275 (“The mandate of the Internal Revenue Service is to collect the tax revenues of the United States. To the extent it seeks to become the enforcer of a varying public policy against religious schools, it exceeds the scope of its authority and breaches the constitutionally protected religious freedom of American citizens.”).

169. Cf. Drennan, *supra* note 42, at 596 (“[T]he legislature is more qualified than the IRS to determine what policies are sufficiently fundamental to tip the scale.”); Moore, *supra* note 42, at 156 (“Instead of abandoning the public-policy doctrine entirely, it makes more sense to leave the finer points of what qualifies as a public policy and the weighing of interests to Congress, as opposed to leaving it to complete agency discretion.”).

those implicit in governmental initiatives relating, for example, to sex education, stem cell research, counseling women experiencing crisis pregnancies, drug addiction, healthcare for undocumented immigrants, adoption, marriage, and divorce.¹⁷⁰ One may advance rational arguments for congressional delegations of authority to discern fundamental public policy on a number of social issues to various agencies with relevant expertise.¹⁷¹ But the tax collecting agency is not the one to which such authority is sensibly delegated on a broad scale.¹⁷² As Justice Powell eloquently wrote in his concurrence in *Bob Jones*:

[The IRS's] business is to administer laws designed to produce revenue for the Government, not to promote "public policy." As former IRS Commissioner Kurtz has noted, questions concerning religion and civil rights "are far afield from the more typical tasks of tax administrators—determining taxable income." . . . This Court often has expressed concern that the scope of an agency's authorization be limited to those areas in which the agency fairly may be said to have expertise, and this concern applies with special force when the asserted administrative power is one to determine the scope of public policy.¹⁷³

In summary, *Bob Jones* should not be read to import into the Code or Treasury regulations language vesting in the IRS broad discretion to revoke or deny federal income tax exemption whenever the IRS believes that an entity "is contrary to established public policy" or "violates fundamental public policy"—with no further limitation on the discretion that the IRS may exercise. Reading *Bob Jones* in that manner conveys too

170. Cf. Galvin & Devins, *supra* note 42, at 1354 ("Congress is better suited than either the courts or the IRS to determine tax policy because it is institutionally organized to gather social and economic data, to define policy objectives, and to legislate to achieve these objectives, which often have repercussions beyond the circumstances of a particular case.").

171. One common argument supporting broad delegations of rulemaking power by Congress to agencies is the greater relative expertise of the latter. See, e.g., James R. Hines & Kyle D. Logue, *Delegating Tax*, 114 MICH. L. REV. 235, 241–43 (2015).

172. Cf. *id.* at 256 ("While the IRS is designed to police compliance with the tax code and to issue regulations to fill in gaps where the Code is ambiguous or unclear, it is not so well suited to make policy in the areas of research and experimentation, education, or health care.").

173. *Bob Jones Univ. v. United States*, 461 U.S. 574, 611 (1983) (Powell, J., concurring in part and concurring in the judgment) (footnote omitted) (citations omitted).

much discretion on a single agency, and one that utterly lacks the expertise to exercise such discretion. Instead, the opinion should be interpreted to limit the discretion of the IRS in some meaningful, principled fashion.

How to limit IRS discretion remains to be discussed. Before doing so, this Article offers yet another reason to reject a broad formulation of the public policy doctrine.

D. Ensuring the Diversity of the Nonprofit Sector

A final reason to apply the public policy doctrine sparingly is to preserve the salutary character of the charitable sector. Others have long recognized that the nonprofit sector is extremely diverse.¹⁷⁴ Diversity exists across many planes in the sector, with organizations differing in religious commitments, political philosophies, social priorities, scientific theories, economic assumptions, educational methods, medical approaches, and historical perspectives. Most recognize that this diversity is reason for celebration, not lamentation.¹⁷⁵ Diversity promotes experimentation, competition, testing of ideas, community, collaboration, a sense of individual and group meaning, and other virtues of civil society.¹⁷⁶

174. See, e.g., Elizabeth T. Boris, *The Nonprofit Sector in the 1990s*, in PHILANTHROPY AND THE NONPROFIT SECTOR IN A CHANGING AMERICA 9 (Charles T. Clotfelter & Thomas Ehrlich eds., 1999) ("The nonprofit sector is characterized primarily by the diversity of its more than one million organizations."); Albert M. Sacks, *The Role of Philanthropy: An Institutional View*, 46 VA. L. REV. 516, 524 (1960) ("Wherever initiative of thought and action is valued, wherever a diversity of views and approaches is thought necessary, wherever experimentation in new untried ventures is sought, the many-centered, disorderly, and even 'irresponsible' private groups must be relied upon."); see also Peter J. Wiedenbeck, *Charitable Contributions: A Policy Perspective*, 50 MO. L. REV. 85, 96 (1985) (noting that the charitable contributions deduction promotes pluralism).

175. See, e.g., Bittker & Rahdert, *supra* note 33, at 335; David A. Brennen, *A Diversity Theory of Charitable Tax Exemption—Beyond Efficiency, Through Critical Race Theory, Toward Diversity*, 4 PITT. TAX REV. 1, 14–15 (2006) ("This article asserts that diversity is also the driving force behind the charitable tax exemption. The diversity made possible by the charitable tax exemption breeds creativity, ingenuity, and other things that stimulate society and, in turn, market growth and development."); see also Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 407 (1998) ("[T]he tax deduction scheme leaves decisionmaking largely in the hands of a set of taxpayers, and the government may wish to encourage particular programs that these (otherwise trusted and encouraged) decisionmakers would be unlikely to identify on their own.")

176. For an overview of the benefits of the nonprofit sector's diversity, see Buckles, *Reforming*, *supra* note 42, at 464–65; Galston, *supra* note 42, at 304 ("Pluralism is desirable because it leads to a diversity of experiences, to experimentation, and to progress through the exchange of ideas."); Sacks, *supra* note 174, at 529, 531 (argu-

Applying the public policy doctrine broadly would jeopardize this beneficial diversity of the sector.¹⁷⁷

To apply the public policy doctrine expansively is to pressure private charitable entities to conform to an administratively (or judicially) conceived notion of the public good—even when Congress has not seen fit to pursue that good by rendering the activity in question illegal, or even taxable.¹⁷⁸ Consistent with the court’s discussion of the vagueness doctrine in *Big Mama Rag*, legal uncertainty, including that associated with the public policy doctrine, tends to promote conformity to behaviors that plainly comport with all plausible administrative interpretations of a vague rule. Failing to so conform risks governmental condemnation. The broad, skeletal formulation of the public policy doctrine thereby goads charities to mimic entities that have garnered IRS favor and to shun approaches that have not earned government endorsement. This impetus for conformity exists notwithstanding that charting an alternative course is legal, even when doing so is constitutionally protected. Such a system of regulating nonprofits through administrative tax law strongly discourages deviations from the norms embraced by the tax gatherer.

Dictum in *Bob Jones* magnifies the potential assault on diversity.¹⁷⁹ According to the opinion, a charitable organization’s “purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.”¹⁸⁰ Invoking “the common community

ing that diversity of thought and nonconformity to the approaches of government are important aspects of the role of philanthropy).

177. Cf. Colombo, *supra* note 42, at 855 (stating that *Bob Jones* “could reach organizations with unpopular ideas that contribute to diversity of viewpoint essential to a pluralistic society”); Galvin & Devins, *supra* note 42, at 1367 (“[T]he majority in *Bob Jones University* ignored the public benefits of a heterogeneous society.”).

178. See Buckles, *Reforming*, *supra* note 42, at 463; cf. Drennan, *supra* note 42, at 588 (describing the “chilling effect” of *Bob Jones* and observing that “organizations seeking exempt status may be discouraged from engaging in controversial practices”); *id.* at 591 (“In light of the importance of obtaining exempt status, query whether controversial organizations would change their operations to curry the taxman’s favor.” (internal citation omitted)); Turley, *supra* note 30, at 69 (arguing that tax exemption poses a danger of “a forced acquiescence of diverse groups to follow majoritarian values”).

179. See Galvin & Devins, *supra* note 42, at 1355 (“[M]ost significantly, the ‘public benefit’ and ‘community conscience’ standards may discourage organizations that provide a healthy diversity of views in a pluralistic society.”).

180. *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983).

conscience" as a touchstone not only approximates one defect of the regulations scorned in *Big Mama Rag*,¹⁸¹ but also needlessly squelches diversity within the charitable sector.¹⁸² As Justice Powell wrote in his *Bob Jones* concurrence, this and other language in the majority opinion in *Bob Jones* reflects a troubling "element of conformity" that "ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints."¹⁸³ Viewing an organization's operations in light of the "common community conscience" compromises the ability of the nonprofit sector to "limit[] the influence of governmental orthodoxy on important areas of community life" and tends to slight our nation's "tradition of pluralism."¹⁸⁴

For the sake of preserving the diversity of the charitable sector, as well as for other reasons previously discussed, the public policy doctrine should be applied narrowly.¹⁸⁵ The question is how to do that. The next subpart discusses one suggested approach.

E. *Narrowly Formulating the Public Policy Doctrine to Safeguard Core Public Policy Objectives*

One way of remediating the problems of the policy doctrine is to nullify or limit it legislatively. But since this Article is written primarily for judges, lawyers, and scholars who must wrestle with *Bob Jones* until Congress statutorily supplants or clarifies it, I discuss an approach for applying the public policy doctrine in a sensible manner. This approach limits the public policy doctrine so as to avoid the worst of the problems it raises in its vague form, but remains sensitive to the context of *Bob Jones* and the governmental interests that the decision seeks to protect.

181. See *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1037 (D.C. Cir. 1980) (finding as vague certain language in the Treasury regulations that "is expressly based on an individualistic—and therefore necessarily varying and unascertainable—standard: the reactions of members of the public").

182. For a critique of this standard, see Galvin & Devins, *supra* note 42, at 1366–67, 1370.

183. *Bob Jones*, 461 U.S. at 609 (Powell, J., concurring in part and concurring in the judgment).

184. *Id.* at 609–10.

185. Cf. Drennan, *supra* note 42, at 596 ("Although the *Bob Jones* test could be used to start a witch hunt designed to purge all unpopular organizations from the ranks of the tax exempt, the IRS and the courts should resist this temptation.").

On the latter point, *Bob Jones* may fairly be read to assume that, in certain circumstances, an organization that is engaged in an activity constituting a traditional government function should be subjected to legal constraints governing state actors and publicly funded private actors. Always subjecting a tax-exempt entity to restrictions on government bodies is foolish, however. Doing so would eviscerate the distinction between the nonprofit sector and government. There must be something more to justify treating private charities as though they were governmental units. Subjecting a tax-exempt charity to a regime governing state actors is most defensible when operating the charity in its desired manner both competes with the state and significantly precludes the state from advancing compelling governmental interests.

This insight finds affirmation in the historical context of *Bob Jones. Brown v. Board of Education*,¹⁸⁶ cited by *Bob Jones*¹⁸⁷ and central to its rationale, correctly identifies public education as an important government function.¹⁸⁸ Further, *Bob Jones* properly observes that government has sought diligently to eliminate racial discrimination and segregation in education.¹⁸⁹ If private schools could receive the benefits of tax exemption and yet discriminate on the basis of race, they might very well undermine the state's goals in public education.¹⁹⁰ The collection of tax-free tuition and receipt of tax-deductible contributions could swell the coffers of discriminatory schools established by financially secure, white parents entirely opposed to the government's effort to end segregation in public schools.¹⁹¹ Such private

186. 347 U.S. 483 (1954).

187. See *Bob Jones*, 461 U.S. at 593 (majority opinion).

188. See *Brown*, 347 U.S. at 493 ("Today, education is perhaps the most important function of state and local governments.").

189. See *Bob Jones*, 461 U.S. at 592-96.

190. See Galston, *supra* note 42, at 319 ("To the extent that granting tax-exempt status to private discriminatory schools will undermine this command to desegregate by enabling private schools to drain white students out of the public school system, racially discriminatory private schools should be precluded from gaining tax-exempt status on public policy grounds.").

191. Far from being idle speculation, the point is grounded in historical reality. Professor Atkinson has observed the following:

All across the South, in counties with white majorities and large African American minorities, a more or less similar pattern repeated itself. Affluent white parents formed private schools, leaving poorer whites and most African Americans in poorly funded public schools. The new

schools, especially in certain geographic regions of the country, could (and did) facilitate white flight from public schools so dramatically that public schools would (and did) remain largely segregated.¹⁹² Permitting private schools with racist policies to qualify for tax exemption could thus incentivize behavior diametrically opposed to a compelling government interest.¹⁹³

The public policy doctrine can be crafted to reflect this analysis. It should also be sculpted with an appreciation for the diversity of the charitable sector, the need for doctrinal clarity, the limited expertise of the IRS and the courts, and the preference of the *Bob Jones* majority for applying the doctrine only when it is certain that the doctrine should apply.

Moreover, the ability of the IRS and the courts to apply the public policy doctrine so as to penalize the exercise of constitutional rights should be strictly confined.¹⁹⁴ The public policies

academies were often formally segregated, but not always; at most, the ones that were nominally non-discriminatory could expect to enroll a tiny handful of African American children from relatively affluent professional or entrepreneurial families.

Atkinson, *Tax Favors*, *supra* note 35, at 86–87.

192. See Johnson, *The Story*, *supra* note 42, at 131 (arguing that, because of white flight from public schools, the end of legal segregation did not end de facto school segregation).

193. Cf. Tracey, *supra* note 30, at 91 (“Denying tax-exempt status was the only way to curb the growth of these schools.”).

194. Denying an organization tax-exempt status for failure to comply with a governmental notion of normalcy, when the organization otherwise qualifies under a broadly worded exemption statute, is properly viewed as a form of penalty, even if one assumes that the broad exemption statute is the product of governmental magnanimity. Professor Douglas Laycock nicely makes this point in discussing a hypothetical organization that engages in discriminatory conduct:

The denial of tax exemptions to discriminatory churches is a penalty. The claim is not that churches have a free exercise right to general tax exemptions; the United States need not grant tax exemptions to churches at all. But once it chooses to do so, it must grant them neutrally; it cannot penalize or deter the free exercise of religion by denying exemptions only to those churches it disapproves. There can be no claim that denying generally available tax exemptions to a church that discriminates racially is a neutral attempt to reflect income more accurately. Plainly, it is a monetary penalty inflicted upon disfavored religious conduct.

Laycock, *supra* note 42, at 271 (footnote omitted). Professor Laycock wrote these words prior to the Supreme Court’s decision in *Bob Jones*, and well before the Supreme Court altered its free exercise jurisprudence in *Employment Division v. Smith*, 494 U.S. 872, 878–82 (1990) (holding that the Free Exercise Clause of the United States Constitution is not violated merely because a religiously motivated practice is burdened by the application of a neutral, generally applicable and oth-

underlying the United States Constitution are the most fundamental of all. True, private actions enjoying constitutional protection, for example, refusing to salute and pledge allegiance to the flag,¹⁹⁵ protesting military conscription,¹⁹⁶ and defying compulsory public education attendance mandates,¹⁹⁷ may undermine specific governmental objectives. But the right to engage in these protected activities is so fundamental that courts have held that the competing governmental interests advanced in state policies do not justify infringing these rights. Moreover, it is no objection that Congress has been held to have the power to withhold tax exemptions from organizations violating statutory limitations on activities that are constitutionally protected.¹⁹⁸ One may concede the existence of this power, and even agree with it, and still recognize the wisdom of limiting the application of the public policy doctrine when constitutional rights are at stake. The question is not whether Congress can expressly condition tax exemption on refraining from exercising constitutional rights. The issue is when, if ever, the courts and the IRS should find a violation of the public policy doctrine by an organization exercising constitutional rights in a manner that Congress has not expressly determined to disqualify the organization from tax exemption.¹⁹⁹ If Congress has not chosen to burden the exercise of constitutionally protected rights expressly through tax legislation, the default construction of tax exemption requirements should favor liberty, not its suppression.

erwise valid law). Nonetheless, Professor Laycock's characterization of the ad hoc denial of tax exemption as a penalty remains appropriate.

195. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

196. See *Cohen v. California*, 403 U.S. 15 (1971). For a discussion of major Supreme Court cases construing legislative accommodations for conscientious objectors to military service, see Johnny R. Buckles, *Military Conscientious Objection Legislation/Cases*, in 4 *ENCYCLOPEDIA OF CHRISTIANITY IN THE UNITED STATES* 1516 (George T. Kurian & Mark A. Lamport eds., 2016).

197. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). For a discussion, see Johnny R. Buckles, *Pierce v. Society of Sisters*, in 4 *ENCYCLOPEDIA OF CHRISTIANITY IN THE UNITED STATES* 1800 (George T. Kurian & Mark A. Lamport eds., 2016).

198. See, e.g., *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (holding that section 501(c)(3)'s prohibition against substantial attempts to influence legislation is constitutional).

199. Other scholars have recognized the distinction between the desirability of enacting legislation to achieve a desired policy goal and the advisability of expanding the public policy doctrine to achieve that goal. See, e.g., Mirkay, *Transformation*, *supra* note 42, at 73–74, 83–88.

To these ends, and as I have argued elsewhere,²⁰⁰ the public policy doctrine should be construed to distinguish between activities and purposes that are constitutionally protected from outright governmental prohibition and those that are not. For these purposes, an activity is “constitutionally protected from outright governmental prohibition” if it consists of the exercise of constitutional rights by a private organization that the government cannot forbid under the applicable standard of constitutional review.²⁰¹ Such rights include the right to free speech, including both discourse and expressive association; the right of intimate association; and the right to the free exercise of religion. Hence, under my proposal, as a threshold test, if the government’s attempt to prohibit the exercise of these rights would fail under the appropriate standard of constitutional review, the public policy doctrine should not apply to deny tax exemption to an organization on account of its having engaged in such constitutionally protected activities.²⁰²

If its legal activity²⁰³ does not involve the exercise of constitutional rights, or if its constitutionally protected legal activity could actually be prohibited under my threshold test of hypothetical constitutional review, an otherwise charitable entity should fail the test of federal income tax exemption under the

200. See Buckles, *Reforming*, *supra* note 42, at 468–77.

201. See *id.* at 475.

202. *Bob Jones* does not clearly answer whether the federal government’s direct prohibition of discrimination against students on the basis of race would violate the schools’ rights to engage in the free exercise of their religion. The opinion arguably suggests that the Court regarded the governmental interest to be so compelling that even the direct prohibition of the racist activities in question would have been constitutional under the free exercise jurisprudence of the day. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (explaining that some governmental interests are so compelling that regulations prohibiting religiously motivated conduct may survive constitutional challenge). If so, the case unremarkably holds that engaging in an activity that would not find protection under my threshold test of hypothetical constitutional review may violate the public policy doctrine. However, *Bob Jones* also noted that denying tax benefits to private religious schools would not prevent them “from observing their religious tenets.” *Id.* at 603–04. This observation arguably implies that the Court was willing to find a violation of the public policy doctrine regardless of whether the schools were engaging in behavior that Congress could not constitutionally preclude. The most reasonable assessment is that *Bob Jones* does not decide when, if at all, an activity that Congress cannot constitutionally prohibit nevertheless may run afoul of the public policy doctrine.

203. For a discussion of how to address illegal activities and purposes, see Buckles, *Reforming*, *supra* note 42, at 468–73.

public policy doctrine only when the following two conditions exist: (1) the organization carries out the activities in issue within a sphere of operations that substitute for state-operated or state-funded programs; and (2) the organization's continued engagement in these activities, considered not in isolation, but along with the operations of other organizations that may behave likewise, significantly undermines the ability of the federal government to advance its compelling interests through such state-operated or state-funded programs.²⁰⁴

The suggested approach for limiting the application of the public policy doctrine is faithful to the historical context of *Bob Jones* and deferential to its rationale. It also focuses analysis on what public policies are fundamental, and what private actions violate them. Public policies are considered fundamental only if they advance compelling government interests, as evidenced by the factors relied upon in *Bob Jones*, and only when they pertain to state-operated or state-funded programs. An organization will be deemed to have violated these policies only when it and other organizations following suit both engage in activities that substitute for state-operated or state-funded programs, and act so as to significantly undermine the government's ability to advance its compelling interests.²⁰⁵

This refinement of the public policy doctrine obviously requires the exercise of judgment in applying the threshold test of hypothetical constitutional review and in determining when an entity's activities significantly undermine the ability of the federal government to advance its compelling interests.²⁰⁶ Un-

204. *See id.* at 473–75. In determining whether a compelling government interest exists, courts should consider the conditions discussed in Part II.A, *supra*, that are relevant in establishing the fundament requirement.

205. Professor Laycock proffered a similar analysis before the Supreme Court decided *Bob Jones*:

[A]s the church schools enroll an increasing share of the student population, they take over more and more of the public education function. If they preclude the state from offering a desegregated public education, church schools become more than just an option; they become the only possible source of a desegregated education. A church that thus exclusively takes over a state function should become subject to the state's obligation not to discriminate on the basis of race.

Laycock, *supra* note 42, at 275.

206. My proposal requires the IRS to apply constitutional standards of review initially. The agency is not especially well-suited to this task. *See* Brennan, *Charities*, *supra* note 42, at 822–25 (arguing that the IRS lacks the expertise “to make

der my approach, the IRS and the courts must evaluate the impact of a charity's activities upon government programs and analyze the gravity of the relevant governmental interests. It provides a standard, rather than a bright-line rule, that is informed by the fundamental factors of *Bob Jones*. Moreover, the proposal invites the type of analysis that courts frequently employ and focuses the attention of the IRS and courts alike on what it means to violate fundamental public policy in a way that is sensible under the facts and rationale of *Bob Jones*. It gives substance to the skeletal formulation of the public policy doctrine in *Bob Jones*, thereby adding clarity and serving the purposes of the vagueness doctrine (fair notice and principled enforcement). The suggested refinement of the public policy doctrine also prevents organizations from receiving the benefits of tax exemption when they hinder the ability of the federal government to implement important goals. The suggested approach possesses these virtues without decimating the diversity of the charitable sector. In sum, this proposed refinement of the public policy doctrine avoids the worst of the problems presented by the doctrine's expansive, general formulation, but remains faithful to the rationale of the Supreme Court decision that embraced it.

III. WHY THE PUBLIC POLICY DOCTRINE DOES NOT JEOPARDIZE THE TAX EXEMPTION OF RELIGIOUS SCHOOLS AFTER *OBERGEFELL*

A. *Obergefell v. Hodges*

In *Obergefell v. Hodges*,²⁰⁷ members of same-sex unions sought to marry their partners or to receive state recognition of the lawfulness of their same-sex marriages on the same grounds applicable to marriages between opposite-sex persons. The pe-

proper constitutional law determinations about racial discrimination"). However, my proposed approach is more administrable than commissioning the IRS to determine the nation's "established public policy" or "fundamental public policy" without additional qualification. See Buckles, *Reforming*, *supra* note 42, at 477. Moreover, the conditions that must be established under the proposal to justify denial or revocation of tax exemption will likely exist so rarely that the IRS should be expected to seldom invoke the doctrine. See *id.* Furthermore, the courts routinely apply constitutional standards of review, and they will ultimately judge whether the IRS has applied the suggested test properly. See *id.*

207. 135 S. Ct. 2584 (2015).

tioners resided in states with laws defining marriage as a union between one man and one woman. The Court framed the controversy as presenting two issues. The first was whether the Fourteenth Amendment requires a state government “to license a marriage between two people of the same sex.”²⁰⁸ The second was whether the Fourteenth Amendment compels a state “to recognize a same-sex marriage licensed and performed in a State which does grant that right.”²⁰⁹

In a majority opinion written by Justice Kennedy, the Court concluded that “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same-sex [sic] may not be deprived of that right and that liberty.”²¹⁰ The Court held invalid the state laws in question “to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”²¹¹ Because of its holding that same-sex couples in all states may exercise the right to marry, the Court further held that a state may not “refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”²¹²

To reach its decision, the Court cited “four principles and traditions” that “demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.”²¹³ According to the majority opinion, the first premise of relevant Supreme Court precedent “is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”²¹⁴ The Court cited *Loving v. Virginia*²¹⁵ as recognizing the “abiding connection between marriage and liberty,”²¹⁶ and noted the intimacy that inheres in marital and family life and the freedoms experienced through

208. *Id.* at 2593.

209. *Id.*

210. *Id.* at 2604.

211. *Id.* at 2605.

212. *Id.* at 2608.

213. *Id.* at 2599.

214. *Id.*

215. 388 U.S. 1 (1967). The *Loving* Court invalidated a state law prohibiting interracial marriage as a violation of both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. *See id.* at 2, 11–12.

216. *Obergefell*, 135 S. Ct. 2584, 2599 (citing *Loving*, 388 U.S. at 12).

marriage.²¹⁷ A second principle emerging from prior decisions, reasoned the Court, “is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”²¹⁸ On this point, the opinion discusses the intimate association, sacredness, dignity, companionship, and security that marriage offers.²¹⁹ The third basis cited by the Court for its decision is that the right to marry “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”²²⁰ Here the opinion focuses on the “recognition,” and “stability and permanency” marriage offers families, thereby benefiting the children of same-sex couples.²²¹ Fourth, the Court invoked both precedent and tradition to argue that “marriage is a keystone of our social order.”²²² Characterizing marriage as “a building block of our national community,”²²³ *Obergefell* opines that state governments “have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities.”²²⁴ By doing so, reasoned the Court, states have “contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.”²²⁵ The Court concluded that statutes limiting marriage to a man and woman are inconsistent “with the central meaning of the fundamental right to marry,” and found that “laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.”²²⁶

Obergefell clearly sought to protect the marital rights of individuals against governmental infringement. After observing the “decent and honorable religious or philosophical premises”²²⁷ of many proponents of traditional marriage, the Court reasoned that when “sincere, personal opposition becomes en-

217. *See id.*

218. *Id.*

219. *See id.* at 2599–2600.

220. *Id.* at 2600.

221. *Id.*

222. *Id.* at 2601.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 2602.

227. *Id.*

acted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."²²⁸ The opinion thus focused on the "legal treatment"²²⁹ of same-sex partners desiring to be married, including the extension of government benefits to them.²³⁰ It is this force of law—this action by the state—that drove the Court to extend recognition of the fundamental right to marry to same-sex couples.²³¹ *Obergefell* views the denial of the right to marry *by the state* as a deprivation of individual dignity. Underpinning this point is the Court's concern with the power of the state: "[T]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power."²³² This power of majoritarian government is limited by constitutional protections of individual rights, which are vindicated by the Court.²³³

Even as *Obergefell* expanded the scope of the constitutional right to marry to persons of the same sex, the opinion expressed an awareness of religious perspectives on marriage, and spiritual purposes for marriage. In reviewing the history of marriage, *Obergefell* observed that "[m]arriage is sacred to those who live by their religions."²³⁴ The opinion spoke of marriage as providing a bond by which "two persons together can find other freedoms," including "spirituality."²³⁵ It cited *Griswold v. Connecticut*²³⁶ for the latter's description of marriage as "intimate to the degree of being sacred."²³⁷ The opinion recognized that "religious doctrines" and

228. *Id.*

229. *Id.*

230. *See id.* at 2604.

231. *See id.* at 2606 ("The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.")

232. *Id.* at 2605 (quoting *Schuette v. Coal. To Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014)).

233. *See id.* at 2605–06 ("The idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'" (quoting *W. Va. Bd. Of Educ. v. Barnette*, 319 U.S. 624, 638 (1943))).

234. *Id.* at 2594.

235. *Id.* at 2599.

236. 381 U.S. 479 (1965). In *Griswold*, the Court held a state ban on the use of contraceptives an unconstitutional invasion of privacy. *See id.* at 485–86.

237. *Obergefell*, 135 S. Ct. at 2599 (quoting *Griswold*, 381 U.S. at 486).

views of “divine precepts” bear upon the question of same-sex marriage.²³⁸ And in discussing deliberations on same-sex marriage in the public square, *Obergefell* posited that “many of the central institutions in American life,” including “religious organizations,” have focused on the issue.²³⁹

Obergefell also conceded that various religious perspectives of marriage may differ from the sentiments of those whose constitutional right to marry is recognized by the Court. After acknowledging “untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths,”²⁴⁰ the Court deemed it “fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.”²⁴¹ But the Court did not condemn these religious perspectives. Immediately after recognizing the traditional understanding of the nature of marriage, the opinion states that the traditional view “long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.”²⁴² The Court also wrote that “[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.”²⁴³ Further, the Court took pains to recognize the constitutional rights of those who embrace a traditional view of marriage as a union of one man and one woman:

[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.²⁴⁴

238. *Id.* at 2607.

239. *Id.* at 2605.

240. *Id.* at 2594.

241. *Id.*

242. *Id.*

243. *Id.* at 2602.

244. *Id.* at 2607.

B. *Obergefell and the Public Policy Doctrine Framework*

Under the formulation of the public policy doctrine advanced in this article—the basic framework of which I proposed for the first time just over a decade ago²⁴⁵—schools maintaining sexual conduct policies that prohibit sexual conduct inconsistent with their religiously informed, traditional view of marriage remain tax-exempt after *Obergefell*. Any attempt by the IRS to revoke such a school's federal income tax exemption or deny such a school's application for exemption would fail at every major analytical step.

My proposed threshold test asks if the government's attempt to prohibit the conduct in question directly, rather than through revoking tax exemption, would fail under the appropriate standard of constitutional review. If so, the public policy doctrine should not apply to deny tax exemption to an organization on account of its having engaged in such constitutionally protected activities. On this question, the Supreme Court has already spoken, in an opinion joined by Justice Kennedy, the author of the majority opinion in *Obergefell*. In *Boys Scouts of America v. Dale*,²⁴⁶ the Court struck down a New Jersey public accommodations law interpreted by a state court to require Boys Scouts of America ("BSA") to readmit an adult scoutmaster whom BSA had expelled on account of his open homosexuality. BSA asserted inconsistency between homosexual conduct and the values BSA seeks to instill in youth.²⁴⁷ Concluding that BSA engages in expressive association,²⁴⁸ the Court held that applying the state law to require readmission "would significantly burden the organization's right to oppose or disfavor homosexual conduct."²⁴⁹ This burden infringed BSA's First Amendment right to freedom of expressive association.²⁵⁰ Because New Jersey's interests embodied in its public accommodations anti-discrimination statute "do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive

245. See Buckles, *Reforming*, *supra* note 42, at 468–77.

246. 530 U.S. 640 (2000).

247. *See id.* at 659.

248. *See id.* at 648–53.

249. *Id.* at 659.

250. *See id.* at 656, 659.

association,"²⁵¹ BSA could not constitutionally be compelled to readmit the expelled scoutmaster.²⁵²

Under *Dale*, any attempt by the IRS to invoke the public policy doctrine to deny tax exemption to private religious schools maintaining a sexual conduct policy of the type discussed in this Article would likely fail the proposed threshold test of hypothetical constitutional review.²⁵³ To enjoy the protection of the First Amendment's expressive associational right, *Dale* first requires an organization to engage in "expressive association."²⁵⁴ Religious schools that publish sexual conduct policies and enforce them consistently would surely satisfy this criterion. Scores of religious schools seek to inculcate values at least to the same degree as does BSA, and making students, faculty members, and others aware of the schools' policies is more expressive than what BSA did in *Dale*.²⁵⁵ *Dale* also requires a showing that the state has infringed the right of expressive association. According to *Dale*, forcing inclusion of someone in a group infringes the group's freedom of association if the person's presence significantly affects "the group's ability to advocate public or private viewpoints."²⁵⁶ The court must give deference to the institution's assessment of "what would impair its expression."²⁵⁷ For many religious schools, the conduct of one's life speaks as loudly as, or even more loudly than, the words

251. *Id.* at 659. The Court recognized that the freedom of expressive association is not absolute. *See id.* at 648. It may be infringed upon "to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

252. *See id.* at 659.

253. I emphasize that this prong of my framework invites only an analysis of *hypothetical* constitutional review of an outright prohibition against exercising the right in question. To resolve the inquiry in favor of an organization under my framework is not to assume that a congressional decision to tax the organization for exercising the right in question would necessarily violate the organization's constitutional rights.

254. *Id.* at 648.

255. In *Dale*, the BSA's general mission statement was somewhat unclear as to the organization's view of homosexual conduct. Clarity appeared in sources unlikely to be reviewed by local troops, including position statements provided to BSA's Executive Committee and assertions made in litigation. *See id.* at 651–53.

256. *Id.* at 648.

257. *Id.* at 653.

from one's mouth.²⁵⁸ A religious school that expects the members of its community to "practice what it preaches" in order to maintain a credible witness of its values has a strong claim that admitting students or professors who violate its sexual conduct policy impairs the school's expression. Indeed, the school's claim is probably stronger than that of the BSA's in *Dale* insofar as many schools typically strive for a transformative authenticity of faith that impacts every aspect of the lives of their students and those who mold them.²⁵⁹

Resolution of the threshold test against the government ends the inquiry under the public policy doctrine under my proposed framework. But because my suggested approach for applying the public policy doctrine is just that—suggested—it is instructive to examine how religious schools would fare under additional steps in the analysis. Again, my conclusion is that they would prevail against any attempt by the government to deny them exemption.

If the government prevails under the threshold test, I have argued that a charitable entity should fail to qualify for exemption under the public policy doctrine only when the following two conditions exist: (1) the organization carries out the activities in issue within a sphere of operations that substitute for state-operated or state-funded programs; and (2) the organization's continued engagement in these activities, considered not in isolation, but along with the operations of other organizations that may behave likewise, significantly undermines the ability of the federal government to advance its compelling interests through such state-operated or state-funded programs. The first condition is satisfied because, like Bob Jones University, a religious school offers a program of education that substitutes for that of-

258. Cf. *Matthew* 7:21–23 (New Am. Standard) ("Not everyone who says to Me, 'Lord, Lord,' will enter the kingdom of heaven; but he who does the will of My Father, who is in heaven. Many will say to Me on that day, 'Lord, Lord, did we not prophesy in Your name, and in Your name cast out demons, and in Your name perform many miracles?' And then I will declare to them, 'I never knew you; DEPART FROM ME, YOU WHO PRACTICE LAWLESSNESS.'").

259. See Neuberger & Crumplar, *supra* note 42, at 260 (quoting *Meek v. Pittinger*, 421 U.S. 349, 366 (1975) for the proposition that many religious schools exist "to provide an integrated secular and religious education," and that "the teaching process is, to a large extent, devoted to the inculcation of religious values and belief").

ferred by state-run and state-funded schools. But the second condition of my proposed framework is not satisfied.

To justifiably limit the public policy doctrine, I have recommended that courts look to the fundament factors²⁶⁰ to establish the presence of a compelling government interest.²⁶¹ If the fundament factors are analyzed in the case of religious schools maintaining sexual conduct policies in the same manner that the factors were analyzed in *Bob Jones*, religious schools remain exempt from tax. The United States lacks long-standing, consistent policies announced by the highest institutions and offices of the three branches of the federal government that attempt to stamp out efforts by schools to discourage pre-marital sex or to promote traditional marriage.²⁶²

Let us first consider the judiciary. Only one court, a federal district court, has interpreted sex discrimination to include distinctions based on sexual orientation-related sexual conduct for purposes of Title IX.²⁶³ The question has never even

260. See *supra* Part II.A.

261. See *supra* Part II.E.

262. See Kmiec, *supra* note 30, at 109 (stating that the consistent efforts to eradicate racial discrimination cited in *Bob Jones* have no parallel in the context of same-sex marriage); cf. Kreppel, *supra* note 42, at 262 (“[I]n order for same-sex marriage to become well-established public policy, there must be judicial, legislative, and executive statements of laws prohibiting the refusal to recognize same-sex marriages.”); Mirkay, *Transformation*, *supra* note 42, at 74 (reasoning, pre-*Obergefell*, that attempting to apply the public policy doctrine to marital-status or sexual-orientation discrimination “is futile because such discrimination does not violate any ‘established’ public policy”); Tracey, *supra* note 30, at 92 (“Nor have ‘all three branches of the Federal Government’ been ‘unmistakably clear’ in condemning sexual orientation discrimination.”); *id.* at 133 (“No similar unanimity exists within the three branches of the federal government with regard to sexual orientation discrimination in education.”). This observation does not ignore the legal trend of eliminating governmental discrimination based on sexual orientation in various contexts. For a discussion of this trend prior to *Obergefell*, see Moore, *supra* note 42, at 154–55.

263. See *Videckis v. Pepperdine Univ.* 2015 WL 8916764 (C.D. Cal. Dec. 15, 2015). As for the analogous context of employment, decisions of the United States Courts of Appeals, with one exception, have thus far rejected the view that Title VII prohibits harassment or discrimination because of sexual orientation. See, e.g., *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (*per curiam*). The exception is *Hively v. Ivy Tech. Cmty. Coll.*, 2017 U.S. App. LEXIS 5839 (7th Cir. 2017). For a discussion of district courts reaching conclusions contrary to the weight of authority in the courts of appeals, see *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, at 10

been considered by the Supreme Court. As for the Executive Branch, the DOE has not (or not yet) interpreted Title IX to equate sex with sexual orientation.²⁶⁴

Most significant is the failure of the legislative branch to advance a policy that jeopardizes the tax exemption of religious schools.²⁶⁵ Congress has never amended Title IX to expressly equate sex with sexual orientation or sexual conduct correlating with sexual orientation.²⁶⁶ Further, even if Congress were to do so, a continuing statutory exemption from the general rule for certain religious schools²⁶⁷ strongly indicates that religious schools with traditional sexual conduct policies do not contravene established public policy. The same conclusion holds if, in the absence of legislative action, the DOE and the Supreme Court eventually interpret Title IX generally to prohibit educational institutions receiving federal funding from discouraging

n.10 (July 15, 2015), <https://www.eeoc.gov/decisions/0120133080.pdf> [<https://perma.cc/VHY2-L8SU>].

264. The Obama administration's position under Title IX should be contrasted with its position in certain other contexts. The Equal Employment Opportunity Commission has opined that sexual orientation-based employment discrimination is unlawful. See *Baldwin v. Foxx*, EEOC Appeal No. 0120133080 (July 15, 2015), <https://www.eeoc.gov/decisions/0120133080.pdf> [<https://perma.cc/VHY2-L8SU>]. The ruling concluded that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." *Id.* at 6. Moreover, like former President Clinton, former President Obama used executive action to prohibit the federal government and its contractors from engaging in sexual orientation discrimination. See Tracey, *supra* note 30, at 92 & n.45.

265. Other commentators have made essentially the same point:

As a threshold matter, there can be a public policy justifying denial of a tax exemption only if a statute duly enacted by Congress establishes such a policy. When the Supreme Court in *Bob Jones* inferred a public policy against racial discrimination in private education, it did not rely on its own or the Internal Revenue Service's beliefs about the evils of racism, but instead rested on congressional enactments such as the Civil Rights Acts of 1964 and 1968 and the Voting Rights Act of 1965.

Wiacek et al., *supra* note 29, at 14 (citation omitted); see also *id.* at 15 ("[T]here are no congressional enactments establishing a public policy against private opposition to same-sex marriage. In fact, Congress has never enacted any law specifically prohibiting discrimination on the basis of sexual orientation in education, employment, housing, public accommodation, or similar areas.").

266. Cf. Mirkay, *Transformation*, *supra* note 42, at 82 (observing that current civil rights laws do not address actions based on sexual orientation); Tracey, *supra* note 30, at 92–93 ("Congress has repeatedly declined to pass the Employment Non-Discrimination Act (ENDA), which would ban discrimination on the basis of sexual orientation in employment nationwide.").

267. See 20 U.S.C. § 1681(a)(3) (2012).

or disciplining pre-marital sex or sex between members of the same sex. One reason for this conclusion is obvious: if Congress continues to treat the educational programs of religious schools maintaining sexual conduct policies as worthy of public funding, the plain implication is that these schools are on balance serving public purposes, not contravening them.²⁶⁸

Concededly, not all courts may embrace my preference for examining the fundament factors relied upon in *Bob Jones*. They may be willing to apply the public policy doctrine more expansively, notwithstanding the many reasons for constraining its application.²⁶⁹ Thus, for the sake of discussion, I will relax the feature of my proposed test that looks to the fundament factors to determine the presence of a compelling government interest. I will further assume, under an extension of the rationale of *Obergefell*, that at some point in the future a court applying my framework will find the government to have a compelling interest in ensuring that all persons, regardless of their sexual conduct, have equal access to public education.²⁷⁰ But even under these relaxed assumptions, religious schools maintaining sexual conduct policies prohibiting sex outside of heterosexual, monogamous marriage should remain exempt because they would not significantly undermine the ability of the federal government to advance any such compelling interest.

268. Further, it is not at all clear that a school's failure to conduct operations in a manner that entitles it to receive federal funding triggers the revocation of federal income tax exemption under the public policy doctrine. I have developed this point previously in the context of the practices of law schools that disqualified them from receiving federal funds under the Solomon Amendment. See Buckles, *Law Schools*, *supra* note 42, at 34–35.

269. See *supra* Part II.A–E.

270. *Obergefell* does not go this far. Cf. Hermann, *supra* note 31, at 396 (“[T]he opinion in *Obergefell* provides no explicit authority for further claims to rights by homosexuals (gays and lesbians). There was little attention to establishing a class subject of discrimination thus eligible to make claims for other rights or protections.”); Landau, *supra* note 31, at 38 (stating that neither of Justice Kennedy’s “majority opinions in *Windsor* nor *Obergefell* addresses (let alone resolves) the question whether governmental distinctions based on sexual orientation trigger heightened judicial scrutiny or are subject to existing sex discrimination protections”); Nicolas, *supra* note 31, at 138 (“Yet, despite having the opportunity in each of the four preceding gay rights cases, Justice Kennedy declined to declare sexual orientation a suspect or quasi-suspect classification.”); Tracey, *supra* note 30, at 93 (observing that *Obergefell* “did not hold that sexual orientation is a suspect or quasi-suspect class”).

In thinking through the proper scope of the public policy doctrine, the courts should take judicial notice of one solemn fact. The history of race-based slavery in this country, and the pattern of systematic racial discrimination that followed formal emancipation systematically and with official sanction in public institutions, including schools, have no true parallel.²⁷¹ This observation does not minimize the severity of the pain inflicted on gays and lesbians who have been ostracized, demeaned, bullied, mocked, or otherwise mistreated. Nor does the observation imply approval of either such reprehensible conduct or subtle tolerance of such behavior by government agents who engage in it or fail to stop it.²⁷² But the widespread system of state-sponsored racial segregation in vast regions of this country, a blight that persisted for much of the nation's history, thoroughly corrupted numerous enterprises, including public education.²⁷³ It is no wonder that the *Bob Jones* Court hearkened back to the discredited "separate but equal" doctrine of a by-gone era in analyzing whether the schools in issue violated fundamental public policy.²⁷⁴ Even decades after *Brown v. Board*, private schools maintaining racially discriminatory policies undermined the goal of providing a racially integrated education for American youth.²⁷⁵ The policy concern was not

271. Cf. Adams, *supra* note 29, at 4 ("By 1983, racial discrimination in an educational setting was of the utmost importance to the *Bob Jones* court and, arguably, at the present time, a religious or other organization's failure to condone same-sex marriage is not analogous."); Tracey, *supra* note 30, at 133 (observing that religious colleges were not formed to segregate homosexuals from heterosexuals).

272. Cf. Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999) ("We hold no brief for harassment because of sexual orientation; it is a noxious practice, deserving of censure and opprobrium.").

273. As Professor David Brennan observes,

[W]hen faced with the issue of the permissibility of invidious racial discrimination by tax-exempt charities, a careful consideration of the context of this type of racial preference reveals that mere racial preference was not the problem in *Bob Jones University v. United States*. The problem, as Critical Race Theory teaches us, was a problem of unjustified inequality—the continued racial subordination of blacks long after the end of legalized slavery.

Brennan, *supra* note 175, at 19.

274. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 592–93 (1983) ("Prior to 1954, public education in many places still was conducted under the pall of *Plessy v. Ferguson* . . .").

275. See Johnson, *The Story*, *supra* note 42, at 131–32 (describing the proliferation of white, segregated southern schools after the enactment of Title VI); Laycock, *supra* note 42, at 265 (stating that "many private schools were established for the

simply that the private schools operated in a “politically incorrect” manner. Rather, allowing private schools to maintain racially discriminatory policies and simultaneously receive the benefits of tax exemption, at least in some geographic areas, would have been tantamount to a government-fostered race to the bottom in education. Private schools would have received tax benefits for subverting the racially diverse public schools that the country had battled mightily to foster.²⁷⁶

Private religious schools that maintain sexual conduct policies reflecting traditional views of marriage and sexuality do not pose a comparable threat to the achievement of government interests in public education.²⁷⁷ There is no credible risk of massive “heterosexual flight” from public schools to private schools that expect students to remain celibate unless and until they marry someone of the opposite sex.²⁷⁸ Nor do sexual conduct policies otherwise meaningfully undermine government interests that find support in *Obergefell*. *Obergefell* requires states to issue marriage licenses to married same-sex partners; the sexual conduct policies of private religious schools have little or nothing to do with that process.²⁷⁹

express purpose of creating a segregated alternative to forcibly integrated public schools”); Neuberger & Crumplar, *supra* note 42, at 231 (stating that, simultaneously with public school desegregation, “an increasing number of private schools have been established by parents of white children for the purpose of providing education in an all-white school environment”); Tracey, *supra* note 30, at 124 (“In the aftermath of *Brown*, thousands of white children in the South fled the newly integrated public schools.”).

276. Cf. Laycock, *supra* note 42, at 274 (“If segregated church schools draw so many whites from the public schools that meaningful desegregation of the public schools becomes impossible, then the church schools have inflicted real harm on outsiders.”); *id.* at 276 (“[W]hen private schools drain off most of the whites in a school system, as has happened in some cities, they preclude any meaningful public school desegregation.”).

277. Commentators observe that *Bob Jones* “rested on the unique history of race discrimination in American education” and that “[t]here is not now a comparable ‘fundamental, overriding interest’ in prohibiting private opposition to same sex marriage.” See Wiacek et al., *supra* note 29, at 16.

278. Cf. Tracey, *supra* note 30, at 92 (“Unlike the history that gave rise to *Bob Jones*, thousands of private schools did not spring up as a means to avoid attending school with gays and lesbians. In fact, many private schools actively recruit gay men and lesbians.”). Frankly, and at the risk of sounding flippant, unless students seriously share the moral values of a religious institution maintaining a sexual conduct policy, one would expect heterosexual flight *away from* these schools.

279. As one commentator writes:

Our government should be able to continue to allow religious and other organizations which may not condone same-sex marriage to qualify for

Similarly, *Obergefell* seeks to ensure that government benefits given to opposite-sex married persons are not withheld from same-sex married persons. The policies of private religious schools do not impair the ability of government to extend public benefits to all married persons.

Nor are sexual conduct policies that reflect traditional, religious understandings of marriage inconsistent with *Obergefell*'s emphasis on the dignity of all Americans under the law. The legal status of adherents to different religions illustrates this point well. A church does not forfeit tax exemption by accepting as members only those who adhere to its doctrine. For example, an orthodox church that requires a prospective member to confess the divinity²⁸⁰ and resurrection of the Lord Jesus Christ²⁸¹ does not forfeit federal income tax exemption by denying membership to a practicing Muslim who insists that Jesus was merely a human prophet. The church's exclusion of a Muslim from membership is entirely consistent with the Muslim's equal dignity under the law. The same is true in the case of a Christian school.²⁸² *Obergefell* no more compels a religious or-

tax-exempt status when they otherwise meet the requirements of Internal Revenue Code section 501(c)(3). This policy does not have to be contrary to the right of same-sex couples to marry legally under the laws of our government.

Adams, *supra* note 29, at 6. Some conflate the practice struck down in *Obergefell*—withholding the issuance of marriage licenses by state governments to same-sex couples—with refusals by churches to perform same-sex weddings. See, e.g., Lehmann & Dunn, *supra* note 29, at 8. This conflation ignores the distinction between state action and private action. By the same logic, a church could not teach Calvinism as truth and remain tax-exempt merely because the government is prohibited from promoting Calvinism. That view is mistaken. See Wiacek et al., *supra* note 29, at 16 (“[C]onstitutional rules that restrict state action do not translate into public policies restricting private action.” (emphasis omitted)); cf. Galston, *supra* note 42, at 311 (“If . . . it is conceded that taxation does not transform a private organization into a public one, then the proponents of the legality standard could argue that tax exemption does not affect such a metamorphosis, since the Supreme Court itself declared that tax exemption entails less government involvement than does taxation.”). Nor can it be argued persuasively that a couple is deprived of the franchise of marriage if a church refuses to bless their union. State actors can do the job just fine.

280. See, e.g., *John* 1:1, 4; *Colossians* 1:15–17; *Hebrews* 1:1–13; *2 Peter* 1:1.

281. See, e.g., *Matthew* 28:1–10; *John* 20:1–29; *Acts* 2:22–36; *1 Corinthians* 15:1–8; *Ephesians* 1:18–23.

282. Professor Laycock argued similarly over three decades ago. Although he was offering a constitutional analysis, albeit prior to *Employment Division v. Smith*, 494 U.S. 872 (1990), the more general policy preference remains the same:

ganization to accept prevailing cultural norms concerning premarital sex, divorce, or same-sex marriage against its tenets than the Constitution requires a Christian church or school to accept the tenets of Islam. Both the Muslim and the person who disagrees with the religious entity's view of sex and marriage have full dignity under the law. Their dignity co-exists with the dignity of persons who insist upon living their lives authentically by their faiths. Once again, this analysis resolves the inquiry under the public policy doctrine, even under a more expansive version of my framework, in favor of religious schools.

C. *The Broader Dissimilarities between Obergefell and Bob Jones*

Even if one remains unconvinced that any version of my proposed framework is the best way to apply the public policy doctrine announced in *Bob Jones*, the better view is that *Obergefell* does not support extension of *Bob Jones* to schools on account of their sexual conduct policies.²⁸³ As discussed above, *Obergefell* speaks deferentially and respectfully of those whose religious views lead them to understand marriage as a union of one man and one woman. *Obergefell* considers these people "reasonable and sincere," and recognizes the "good faith" with which they hold their views.²⁸⁴ Moreover, *Obergefell* opines that the religious premises of those embracing the traditional understanding of marriage are "decent and honorable."²⁸⁵ The Court appreciates the meaningfulness of the principles of marriage that inform their views by speaking of these principles as "fulfilling" and "central to their lives and faiths."²⁸⁶ The opinion even assures the

The goal is to protect schools that are so religious that attending them is constitutionally equivalent to joining the church. If a school requires certain religious beliefs as a condition of admission, or gives preference to persons with those beliefs, or if it makes a concerted effort to integrate religious instruction into the entire curriculum, the persons who apply for admission submit themselves to the school's religious authority and cannot complain if they are discriminated against.

Laycock, *supra* note 42, at 269–70.

283. See Adams, *supra* note 29, at 4 (surveying the language of *Obergefell* and stating that, "when read in conjunction with *Bob Jones*, *Obergefell* does not require or even allow the IRS to deny tax-exempt status to religious or other institutions which do not condone same-sex marriages, including those which might refuse to perform same-sex marriages").

284. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

285. *Id.* at 2602.

286. *Id.* at 2607.

reader that the Court's decision does not disparage these religious views or the people who hold them dear.²⁸⁷ *Obergefell* also observes that the First Amendment protects "religious organizations and persons" as they "teach the principles" of marriage that are central to "their own deep aspirations to continue the family structure they have long revered."²⁸⁸

Obergefell's language, so respectful of the perspectives of religious people and so cognizant of their First Amendment rights to contend for their religiously informed, traditional view of marriage,²⁸⁹ is hardly indicative of a Court eager to impose any particular view of marriage on religious organizations, or anyone else for that matter. This observation is important for at least two reasons.

First, and probably most significantly, *Obergefell* is about limiting the monopoly power of the state in its regulation of marriage, not bestowing monopoly power on the state to define marriage.²⁹⁰ *Obergefell* prevents government from limiting the franchise of civil marriage, and its associated governmental benefits, to heterosexual couples. *Obergefell* recognizes individual rights without imposing a conception of marriage on anyone, including religious organizations. The case essentially vests in every adult individual the right to compel the government to recognize his or her choice of a spouse—whether or not that spouse is of the same sex as the individual in question—once the government has decided to confer marriage with legal status.²⁹¹

287. See *id.* at 2602.

288. *Id.* at 2607.

289. See *id.*

290. Cf. Esbeck, *supra* note 31, at 5 ("*Obergefell* is a Fourteenth Amendment case. It operates only against the government.").

291. See Hermann, *supra* note 31, at 379 ("[I]f the state creates an institution such as marriage with its many legal entitlements, it must extend access to that institution to all citizens unless it has a compelling justification for excluding a class of citizens from that institution or denying them its benefits."); *id.* (stating that *Obergefell* "implicitly found no compelling justification to exclude same-sex couples from the benefits of marriage"). It does not follow, however, that *Obergefell* requires the government to license marriages. See Leib, *supra* note 31, at 43 ("[T]he Court ultimately comes shy of establishing that states have a constitutional obligation to provide some package of relational privileges and burdens called marriage, which is another way to understand what it would really mean for each individual to have a fundamental right to marriage." (emphasis omitted)).

To assert that *Obergefell* is grounds for extending the public policy doctrine to disqualify religious schools from tax exemption on account of maintaining policies reflecting traditional views of marriage and sexuality is to betray the analysis of *Obergefell*. *Obergefell* provides a shield to individuals against state aggression, not a sword²⁹² to the government to attack individuals and groups who hold to a traditional view of marriage and sexuality.²⁹³ *Obergefell* does not purport to vest in any individual or government the right to compel private organizations and persons to conform their religiously informed views and conduct to the contrary perspectives of those whose rights are protected under *Obergefell*. *Obergefell* respects the rights of both.²⁹⁴ The decision respects the rights of same-sex couples to marry, as well as the rights of individuals and organizations that embrace a traditional view of marriage to teach, advocate and live their convictions. Any attempt by the IRS to use the public policy doctrine to punish religious schools for their deeply held religious convictions on marriage and sexuality would contravene the language of *Obergefell*, which plainly recognizes both the right to embrace and live out traditional views of marriage, and the decency of those who hold them.²⁹⁵

Obergefell's respect for the perspectives of those who hold to a traditional view of marriage, its recognition of their constitutional right to advance their religious views and its attribution of good faith to such religious people are noteworthy for a second reason. It is unthinkable that the Supreme Court, for at

292. Cf. Adams, *supra* note 29, at 5 (“[A]lthough some individuals may wish to alter the tax-exempt status of religious or other organizations that do not condone same-sex marriage, it is premature to use *Obergefell* as a ‘sword’ to revoke or deny the tax-exempt status of an organization that otherwise meets the requirements of Internal Revenue Code section 501(c)(3).”).

293. See Wiacek et al., *supra* note 29, at 15 (stating that *Obergefell* and *United States v. Windsor*, 133 S. Ct. 2675 (2013), “are about restricting state action,” and that they “do not preclude private entities—such as churches and religious universities—from opposing same-sex marriage” (emphasis omitted)).

294. This respect for the rights of those holding opposing views of marriage is legally coherent. See Esbeck, *supra* note 31, at 5 (“The civil law can protect the right of same-sex couples to marry while at the same time safeguard the right of religious persons and organizations not to recognize these marriages.”).

295. See Wiacek, et al., *supra* note 29, at 15 (stating that, given the language of *Obergefell* that respects the rights of those who disagree with same-sex marriage, “it would be erroneous for the IRS to conclude that *Obergefell* either compels or permits it to deny tax exemptions to private organizations on the basis of their opposition to same-sex marriage for ‘religious’ or ‘other’ reasons”).

least the past four decades, would shower such gracious words on private parties who practice or advocate racial discrimination. For example, one will search the *Bob Jones* opinion in vain for any suggestion that the Court considered any aspect of the admissions policy at issue as noble, meaningful, or potentially fulfilling. Perhaps the reason is that the members of the Court silently suspect pretext in the case of various forms of racial discrimination, but recognize the sincerity of those holding religious, race-neutral convictions about sexual conduct. Or perhaps the Court properly views actions motivated by racial bias as particularly harmful because of the nation's odious history of slavery and state-sanctioned segregation. Conceivably, the Court appreciates the distinction between race-neutral policies based primarily on a person's conduct, such as engaging in sex or entering into a sexual union, and policies based primarily on biological characteristics, such as racial phenotypes.²⁹⁶ Whatever the explanation, the tone of *Obergefell* towards those who hold religious views about sex and marriage that differ from the views of those whose rights *Obergefell* vindicates is a far cry from the tone of the *Bob Jones* Court toward schools that maintain racially discriminatory admissions policies.

Finally, it is illuminating to observe the case relied upon in *Obergefell* that did not directly influence the *Bob Jones* Court's determination that racially discriminatory admissions policies violate established public policy. That case is *Loving v. Virginia*.²⁹⁷ The Court in *Loving* struck down a state law criminalizing interracial marriages involving a white person as a violation of the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.²⁹⁸ In so holding, the Court characterized the law as the product of "invidious racial discrimination,"²⁹⁹ and observed that penalties for miscegenation "arose as an incident to slavery."³⁰⁰ Notwithstanding *Loving's* strong condemnation of governmentally

296. The admissions policy of Bob Jones University was both conduct- and status-related. Because of the history of race-based oppression and segregation in the United States, and the effort that many have expended to preserve race-based distinctions, it is no wonder that the courts have viewed the suppression of interracial association as a form of racial discrimination.

297. 388 U.S. 1 (1967).

298. *See id.* at 11–12.

299. *Id.* at 11.

300. *Id.* at 6.

imposed bans on interracial marriage, *Bob Jones* cites *Loving* only for the proposition that “discrimination on the basis of racial affiliation and association is a form of racial discrimination.”³⁰¹ *Bob Jones* did not include *Loving* in the string of cases establishing that racial discrimination in education violates fundamental public policy.³⁰²

The reason for this lack of reliance on *Loving* by *Bob Jones* in ascertaining fundamental public policy is plain enough. *Loving* is about a state limitation on marriage, but not in an educational context.³⁰³ That distinction is important, for the same is true of *Obergefell*. If the *Bob Jones* Court did not include *Loving* as a source of judicial authority establishing the fundamental public policy that Bob Jones University was held to violate, it is difficult to invoke *Bob Jones* for the proposition that *Obergefell* establishes a fundamental public policy that tax-exempt religious schools violate by maintaining sexual conduct policies. Given *Bob Jones*’s non-reliance on *Loving* as a source establishing fundamental public policy, attempting to somehow marry *Bob Jones* and *Obergefell* would produce something far less than a legal match made in heaven.

301. *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983).

302. See, e.g., *id.* at 593–94. This point is easily underappreciated. One commentator, then a law student (now a law professor) who generally offers an excellent analysis of *Bob Jones*, remarks as follows:

[I]n holding that Bob Jones’ practice after May 1975 of expelling students who engaged in interracial dating, or who were partners of an interracial marriage, violated a fundamental public policy, the majority relied on two cases that considered the constitutionality of state statutes calling for imprisonment of the partners to an interracial marriage.

Drennan, *supra* note 42, at 594. However, *Bob Jones* did not rely on decisions striking down state anti-miscegenation statutes as sources directly bearing on whether racial discrimination in education violates fundamental public policy. The decisions were relied upon only for the ancillary proposition that discrimination based on racial affiliation and association constitutes a type of racial discrimination. Professor Drennan appreciates the broader point that *Loving* should not have any bearing on an organization’s tax-exempt status. See *id.*

303. Cf. *id.* at 594 (“[I]n *Loving v. Virginia*, it is unlikely that the Supreme Court intended a private school to lose its tax-exempt status when it held Virginia’s miscegenation statute, which called for imprisonment of one to five years, unconstitutional.” (footnote omitted)); Tracey, *supra* note 30, at 132 (observing that the federal government’s interest in *Bob Jones* “was specific as to education”).

IV. CONCLUSION

Obergefell begins with these words: “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”³⁰⁴ Religious schools that require members of their community to adhere to standards of sexual conduct based strictly on their faith are exercising this liberty. They seek to avail themselves of the right “to define and express their identity.”³⁰⁵

The public policy doctrine of *Bob Jones* should not be extended to impair the exercise of this liberty by religious schools. Sound reasons counsel against applying the public policy doctrine expansively. These reasons are grounded in the language of *Bob Jones* itself, the imperative of providing fair notice to charities of the sphere of lawful activity, the need to channel the discretion of an administrative agency with limited expertise, and the value of ensuring a diverse charitable sector.

A framework that I proposed several years prior to *Obergefell* is faithful to the *Bob Jones* decision and consistent with the reasons for narrowly construing the public policy doctrine. Under this framework as proposed, and even as relaxed, *Obergefell* does not support the extension of the public policy doctrine to deprive private schools of tax exemption merely on account of their decision to adopt sexual conduct policies upholding their traditional religious convictions about sexuality and marriage. Indeed, more generally, to deny or revoke the tax exemption of these private schools would contravene the thrust and rationale of *Obergefell*. Unless and until Congress addresses this issue legislatively, the IRS and the courts should leave the matter of sexual conduct policies solely to the private religious schools that care about them, free from any threat by the state to influence their religious positions through taxation.

304. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

305. *Id.* Indeed, Professor Carl Esbeck similarly observes that “Justice Kennedy has characterized religious liberty in terms strikingly similar to his description of gay rights.” Esbeck, *supra* note 31, at 4 (comparing *Obergefell*’s language with that of *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)).

SECONDARY EFFECTS AND PUBLIC MORALITY

SANTIAGO LEGARRE* & GREGORY J. MITCHELL**

INTRODUCTION

When may the state regulate constitutionally protected activity in the interests of public morality? In *Barnes v. Glen Theatre, Inc.*,¹ *City of Erie v. Pap's A.M.*,² and *City of Los Angeles v. Alameda Books, Inc.*,³ the Supreme Court considered First Amendment challenges to three state regulations of adult businesses. The controversial subject matter of the cases, against the backdrop of expanding First Amendment protections and changing societal mores, exposed a philosophical knot within the Court's jurisprudence. And a difficult one at that: the three cases resulted in twelve opinions authored by seven different Justices and brought into focus an unresolved tension surrounding the legitimacy of morality as a basis for lawmaking.

This Article examines the Justices' struggle to reconcile the intuitive sense that adult businesses can be detrimental to society at large with two countervailing forces: first, the common opinion that the state has no business legislating morality, and second, that the First Amendment now affords wide protection to activities once considered obscene and meriting little constitutional protection. To do this, in Section I we briefly summarize the First Amendment doctrinal framework; then, in Section II, we review in detail the cases and the opinions they generat-

* Professor of Law, Pontificia Universidad Católica Argentina (Buenos Aires); Visiting Professor, Notre Dame Law School (Indiana) and Strathmore Law School (Nairobi); Researcher, CONICET (Argentina).

** Law Clerk, Hon. Susan H. Black, U.S. Court of Appeals for the Eleventh Circuit. J.D. 2014, Notre Dame Law School.

The Authors would like to thank Michael Bradley, Dwight Duncan, Stella Marie Freddoso, Cheney Joseph Jr., Claire Leatherwood, Joel Nollette, and Adrian Vermeule for their valuable commentary.

1. 501 U.S. 560 (1991).
2. 529 U.S. 277 (2000).
3. 535 U.S. 425 (2002).

ed. In Section III, we characterize the “secondary effects” doctrine that emerges from these cases as the courts attempt to resolve this tension. We then critique that attempt in Section IV, placing it in a broader philosophical context. We find that while the Court by the time of *Alameda* may have set too high an evidentiary barrier within the secondary effects analysis, the Court is equally justified in focusing on secondary social harms as it would be in relying on public morality. But choosing which secondary effects are harmful involves moral reasoning of the same kind as that which underpins public morality, the very doctrine secondary effects appeared designed to avoid.

We insist that although *Alameda*, the most recent Supreme Court case involving secondary effects, was decided in 2002, the philosophical and jurisprudential problem at the root of these cases remains, perhaps now more than ever, exceedingly relevant. A legal community that often bristles when confronted with questions of morality is more likely to accept empirical evidence in lieu of philosophical argumentation. Secondary effects thus can provide an alternative basis on which to uphold legislation enacted in the exercise of the public morality component of the police power. As we will argue, secondary effects and public morality often come to the same thing.

I. BACKGROUND AND CONTEXT

To fully understand the secondary effects cases, some attention must be paid to the context in which they arose—in particular, to the law of obscenity as it has developed over the course of the twentieth century.⁴ Obscenity has never been protected by the First Amendment in American constitutional law.⁵ States were free to regulate obscene subject matter, and the federal government did so too via the Comstock Act of 1873,⁶ which prohibited the distribution of obscene materials by mail.⁷ The Comstock Act,

4. See generally John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 295–99 (2009). We rely extensively on Professor Fee’s synopsis of the developments leading up to the Secondary Effects Doctrine.

5. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

6. See Comstock Act of 1873, ch. 258, § 2, 17 Stat. 598.

7. *Id.* at 599.

however, did not define obscenity, and it was left to the courts to determine the contours of the obscenity exception. In 1896, the Supreme Court, in upholding a conviction for distributing a pamphlet containing obscene images, endorsed a jury instruction that defined obscenity as follows:

[T]he test of obscenity is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influence, and into whose hands a publication of this sort may fall . . . Would it . . . suggest or convey lewd thoughts and lascivious thoughts to the young and inexperienced?⁸

Prior to the introduction of tiers of scrutiny in First Amendment law, subject matter was either protected or unprotected under the First Amendment.⁹ Thus, if a jury found a work to be obscene by the *Rosen* test, the work was not constitutionally protected and that was the end of the matter. For example, “[t]here was no doubt that explicit material of the type one might find today in *Penthouse* or *Hustler* magazines was clearly obscene and did not have any constitutional protection.”¹⁰ But “[f]or a period, the law was so broad that disputed obscenity cases tended to involve mildly racy passages in novels, such as James Joyce’s *Ulysses*.”¹¹

This remained so until *Roth v. United States*,¹² which, in upholding a conviction based upon a successor statute to the Comstock Act, declared that “obscene material” is material that “deals with sex in a manner appealing to the prurient interest.”¹³ The Court framed the question as whether the average person, applying “contemporary community standards,” would judge this to be the “dominant theme of the material . . . taken as a whole.”¹⁴ *Roth* inaugurated a sea change in the regulation of obscenity, both doctrinally and practically. Then, in 1973, *Miller v.*

8. *Rosen v. United States*, 161 U.S. 29, 43 (1896).

9. See Fee, *supra* note 4, at 297 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)).

10. Fee, *supra* note 4, at 295–96 (citing *United States v. One Book Called “Ulysses”*, 5 F. Supp. 182 (S.D.N.Y. 1933)).

11. *Id.*

12. 354 U.S. 476 (1957).

13. *Id.* at 487.

14. *Id.* at 489.

*California*¹⁵ added to the *Roth* test the requirement that in order to be considered obscene, subject matter had to “depict or describe patently offensive ‘hard core’ sexual conduct”¹⁶ lacking “serious literary, artistic, political, or scientific value.”¹⁷ Although *Miller* listed some specific depictions of sexual acts that juries were permitted to find *per se* obscene, the subsequent introduction of tiers of scrutiny had the effect of placing even prohibitions against “hard-core” depictions in jeopardy.¹⁸

After *Miller*, the Court began to apply varying degrees of scrutiny to regulations burdening speech depending on whether the regulation specifically targeted the content of the speech or merely incidentally burdened it.¹⁹ In general, content-based restrictions on speech are subject to strict scrutiny, which usually proves fatal to the regulation.²⁰ Under strict scrutiny, “the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.”²¹ However, content-neutral regulations that nevertheless burden speech may be analyzed under a more lenient intermediate scrutiny standard if they are merely restrictions on the time, place, and manner of the speech.²² Under intermediate

15. 413 U.S. 15 (1973).

16. *Id.* at 27.

17. *Id.* at 24.

18. *See id.* at 25–26. *See generally* Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783 (2007) (chronicling the consolidation by the 1980s of distinct treatment of various speech regulations, including time, place, and manner regulations, regulations of commercial speech, symbolic conduct, and other areas of the law into a single intermediate scrutiny tier of review).

19. *See* Bhagwat, *supra* note 18, at 800–05. There remained, of course, types of speech meriting no First Amendment protection at all, such as incitement and fighting words. *See Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 791 (2011).

20. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991).

21. *Simon & Schuster*, 502 U.S. at 118 (citing *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987)).

22. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 312–14 (1984). There are of course other categories of speech regulations warranting merely intermediate scrutiny; for example, commercial speech, which until 1976 had been considered unprotected by the First Amendment. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 748 (1976); Bhagwat, *supra* note 18, at 793–94. For simplicity, and because the Court in the cases discussed herein used intermediate time, place, and manner scrutiny as an analogy for the treat-

scrutiny, content-neutral restrictions “are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”²³ Relevant to our discussion of *Barnes* and *City of Erie*, expressive conduct is also treated as speech if there is an intent to convey a particularized message and a great likelihood that the message will be understood,²⁴ and regulations of it are subject to either type of scrutiny depending on whether the law is facially content-based or content-neutral.

The upshot of these two developments is that sexually explicit speech became significantly more difficult to regulate.²⁵ Prior to *Roth*, the states and the federal government could directly regulate adult expression on the basis of its content and seek refuge in a wide obscenity exception.²⁶ After *Miller*, the obscenity exception was significantly narrowed. At the same time, a law that burdened one type of speech specifically was likely to be labeled a content-based restriction and stricken on that basis. Obscenity prosecutions dropped off precipitously and the pornography industry grew exponentially.²⁷

Secondary effects can be seen as a slight retrenchment intended to deal with the resulting constitutional arrangement.²⁸ Against the backdrop of severely curtailed regulatory power over obscenity, the Court, prior to *Barnes*, began to invoke the

ment of regulations of secondary effects, we refer only to time, place, and manner review in discussing intermediate scrutiny.

23. *Cnty. for Creative Non-Violence*, 468 U.S. at 293.

24. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989).

25. *See Fee*, *supra* note 4, at 296 (“[After *Miller*,] government could no longer take it for granted that all pornography, or even hard-core pornography, qualified as obscene. Nor could it assume that nude dancing was obscene.”).

26. *See id.* at 295–96.

27. *See id.*

28. *See id.* at 295 (describing secondary effects as a “response” to these developments); *see also* Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 PENN. ST. L. REV. 139, 149 (2012) (“The judicial allowance of morality-influenced zoning decisions, albeit under the guise of content-neutrality, represents a tacit endorsement of the enactment of local moral standards into law.”).

concept of negative “secondary effects”²⁹ of erotic speech—crime, disease, prostitution, decreases in neighborhood property values—to justify treating as time, place, and manner restrictions regulations that would not otherwise qualify for intermediate scrutiny. In *Young v. American Mini Theatres*,³⁰ the Supreme Court was confronted with Detroit’s “Anti-Skid Row” ordinance, which prohibited adult movie theaters from operating within a certain radius of another specified adult business.³¹ In upholding the ordinance as a time, place, and manner restriction, Justice Stevens, writing for a plurality of the Court, contrasted *Amerian Mini Theatres* with *Erznoznik v. City of Jacksonville*.³² Whereas in *Erznoznik* the Jacksonville city government had attempted to prohibit the screening of nudity in a drive-in theater because of the actual content of the speech itself, Detroit merely wanted to protect its citizens from the harmful effects caused by concentrations of adult businesses:

The Common Council’s determination was that a concentration of “adult” movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of “offensive” speech.³³

29. Secondary effects are general, indirect societal harms resulting from a pattern of activity. They are not to be confused with the apparently similar notion of “side effects.” These are certain, specific consequences of an individual action. See generally *Doctrine of Double Effect*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/double-effect/> [https://perma.cc/2ZY5-YMRN] (last accessed May 13, 2017). Though sometimes called “secondary effects,” “side effects” (unlike the secondary effects discussed in this Article) are unintended negative results of a good action. Side effects are essential to any discussion of ethics generally, and as such the Court has also addressed them, for example, in its discussion of assisted suicide. See, e.g., *Vacco v. Quill*, 521 U.S. 793, 800 n.6 (1997) (quoting with approval the New York State Task Force on Life and the Law, which had opined, “[Professional organizations] consistently distinguish assisted suicide and euthanasia from the withdrawing or withholding of treatment, and from the provision of palliative treatments or other medical care that risk fatal side effects”).

30. 427 U.S. 50 (1976).

31. See *id.* at 52 (plurality opinion).

32. See *id.* at 71 n.34 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)).

33. *Id.* The idea that certain conduct could have harmful secondary effects surfaced briefly as a vague supposition in *Stanley v. Georgia*, 394 U.S. 557 (1969).

This would be the first time the Supreme Court invoked the secondary, or follow-on, effects of speech to justify treating a law as content-neutral. A majority of the Court adopted this analysis in *Renton v. Playtime Theatres*.³⁴ In upholding an ordinance that paralleled Detroit's ordinance at issue in *American Mini Theatres* and required that adult movie theatres not be located in close proximity to one another, the Court opined that:

At first glance, the Renton ordinance, like the ordinance in *American Mini Theatres*, does not appear to fit neatly into either the "content-based" or the "content-neutral" category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the District Court concluded, the Renton ordinance is aimed not at the *content* of the films shown at "adult motion picture theatres," but rather at the *secondary effects* of such theaters on the surrounding community. The District Court found that the City Council's "*predominate concerns*" were with the secondary effects of adult theaters, and not with the content of adult films themselves.³⁵

The Court upheld the zoning regulations in *Renton*, instituting the doctrine of secondary effects in First Amendment cases dealing with zoning of adult businesses.

Secondary effects, according to Professor John Fee, were a direct result of the curtailment of the states' ability to regulate the very tangible consequences of the proliferation of adult businesses.³⁶ Whatever the consequences of deregulating sexually explicit television and film, they are not as concrete as the visible construction of brick-and-mortar establishments in American cities. Recognizing this result, the Justices permitted a narrow exception, in the form of secondary effects, to the general First Amendment rules they had created. This exception re-

There, Justice Marshall, though he rejected Georgia's argument that private possession of obscene material leads to "deviant sexual behavior or crimes of sexual violence," qualified his rebuke as "given the present state of knowledge." 394 U.S. at 566-67. Similarly, Chief Justice Burger entertained the possibility that there is an "arguable correlation" between obscene material and sex crimes in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58-59 (1973).

34. 475 U.S. 41 (1986).

35. *Id.* at 47.

36. See Fee, *supra* note 4, at 294-99.

sembled the old obscenity regime, despite its uncomfortable doctrinal fit. Secondary effects began to take on a life of their own in subsequent cases, however, and it is there that they began to embody the philosophical tension in the Court's jurisprudence that is the concern of this Article.

Barnes and *City of Erie* deal—the latter to a greater extent than the former, as we shall see—with the extension of the secondary effects doctrine to erotic dancing. In *Barnes*, secondary effects went unmentioned by the plurality opinion, which relied on a preexisting framework to deal with the regulation of expressive conduct. The plurality grounded the state's interest in the regulation of erotic dancing in the state's police powers³⁷—specifically, the right of the state to regulate for the health, safety, and morals of the public.³⁸ Secondary effects were introduced by Justice Souter's concurring opinion.³⁹ Once introduced here, however, secondary effects became the basis of the plurality opinion in *City of Erie*, which bore no mention of the public morality component of the police power, referring only to the power of the state to regulate in the interest of public health, safety, and welfare.⁴⁰ By this time, Justice Souter had come to reconsider his earlier position on the secondary effects doctrine, refusing to join the plurality opinion and attempting to limit its reach by an appeal to heightened evidentiary standards.⁴¹ By the time the Court considered *Alameda*, Justice Souter had recanted his earlier view and proposed a reformulation of the secondary effects doctrine.

These remarkable developments result, in our view, from the tension between the Court's attitude regarding the legitimacy of

37. *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 567–68 (1991) (plurality opinion). So did Justice Scalia in his opinion concurring in the judgment. *See id.* at 560 (Scalia, J., concurring in the judgment). Hence in *Barnes* four Justices explicitly upheld the police power for the protection of public morality. It is likely the last occurrence of this in the Supreme Court. *See infra* Section IV.

38. The state's police powers traditionally extended to public morals also called public morality. *See* Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 787–88 (2007) (reviewing the relevant case law of the Supreme Court).

39. *Barnes*, 501 U.S. at 586 (Souter, J., concurring in the judgment).

40. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000) (plurality opinion).

41. *See id.* at 310–17 (Souter, J., concurring in the judgment).

morals legislation and First Amendment jurisprudence.⁴² The secondary effects test has come under much criticism for its lack of doctrinal clarity,⁴³ and more than one member of the Court appeared to regard it as a legal fiction, if perhaps a necessary one.⁴⁴ However, the doctrinal morass of secondary effects ultimately results from the Court's reluctance to address the legitimacy of morals legislation head-on. It is true that the public morality rationale too has been subject to staunch criticism. But not in the same way or for the same reasons, as we discuss below.

Once it was accepted that though the obscenity exception had been curtailed, certain adult expression could still be regulated to a greater extent than other speech, the motivation for entertaining the secondary effects doctrine at all seems to be

42. It is not easy to circumscribe "morals laws" and distinguish them from other criminal laws. Hill goes as far as claiming that "there is no sui generis difference between the function of morals laws and other laws." John Lawrence Hill, *The Constitutional Status of Morals Legislation*, 98 KY. L.J. 1, 10 (2010). In his magisterial treatise on the police power Ernst Freund considered that most morals laws fell under three major headings: gambling, intoxication, and sexual immorality. ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 172 (1904) ("The practices with which [police power] legislation is chiefly concerned are: gambling, drink, and sexual immorality.").

43. Many scholars are quite hostile to the secondary effects doctrine as a legal concept. See, e.g., Bhagwat, *supra* note 18, at 797 ("The secondary effects doctrine is an extremely odd one, as it seems clearly inconsistent with the Court's approach to content neutrality elsewhere in its First Amendment jurisprudence . . ."); Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 59-61 (2000) (criticizing *Renton* for calling a content-based law "content-neutral," but limiting critique to "secondary effects" cases associated with restrictions on adult theatres and entertainment establishments); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 490 (1996) ("But if the doctrine of secondary effects has any sound foundation, it relates to refining the search for improperly motivated governmental actions. More specifically, the doctrine emerges from the view that it is relatively easy in cases involving secondary effects to isolate the role played by hostility, sympathy, or self-interest. No other account of the doctrine of secondary effects makes better (or indeed, any) sense."); Ofer Raban, *Content-Based, Secondary Effects, and Expressive Conduct: What in the World Do They Mean (and What Do They Mean to the United States Supreme Court)?*, 30 SETON HALL L. REV. 551, 553 (2000) ("[T]he doctrine of secondary effects obliterates the content-based doctrine . . ."); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 115-17 (1987) (arguing that secondary effects doctrine weakens the distinction between content-based and content-neutral regulations).

44. See *infra* notes 136-40 and accompanying text.

that the majority of the Justices appeared to find in the secondary effects test an alternative to public morality—a test the purpose of which would be to permit regulation of adult enterprises (and, potentially, other forms of conduct) without recourse to moral judgments.⁴⁵ But, we shall argue, the only way to make sense of the secondary effects rationale is in the light of states' police power to promote public morality. If this explanation holds true, the secondary effects test ought not to be understood as an exclusionary alternative to the public morality rationale but rather as a complement to it. The appeal to “objective” secondary effects, we shall conclude, cannot substitute for an appeal directly to morality. A review of the opinions in each of the three cases—*Barnes*, *City of Erie*, and *Alameda*—will provide the necessary context from which it will be possible to better understand the secondary effects test, the consternation it has caused on the Court, and the way we suggest it should interact with the public morality rationale.

II. THE APPARENT SUBSTITUTION OF SECONDARY EFFECTS FOR PUBLIC MORALITY

A. *The Barnes Case*

In *Barnes*, a South Bend, Indiana ordinance prohibited public nudity generally, which as applied to adult dancers required a minimal amount of clothing.⁴⁶ Two nude dancing establishments and certain other parties sued to enjoin enforcement of the ordinance, claiming that it was invalid under the First Amendment.⁴⁷ Sitting en banc, the Court of Appeals for the Seventh Circuit held, in a sharply divided decision, that non-obscene nude dancing performed for entertainment is expression protected by the First Amendment, and that the public indecency statute was improper because its purpose was to pre-

45. The secondary effects test also allowed the Justices to avoid addressing the lack of content neutrality in these laws regulating adult expression, and thereby avoid implicating additional First Amendment protection that had been given to adult-oriented materials. See *supra* notes 4–18 and accompanying text.

46. See *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 563 (1991) (plurality opinion).

47. See *id.* at 563–64.

vent the erotic message.⁴⁸ Upon review, Chief Justice Rehnquist, writing for a plurality of the Court and joined by Justice O'Connor and Justice Kennedy, held that while nude dancing is expressive conduct within the "outer perimeters" of the First Amendment, it is "only marginally so."⁴⁹ The plurality applied the test for regulations of expressive conduct formulated in *United States v. O'Brien*.⁵⁰

O'Brien had upheld under intermediate scrutiny a regulation banning the mutilation of draft cards as content-neutral, holding that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms."⁵¹ *O'Brien* set forth a four-part test for the analysis of facially neutral regulation of expressive conduct: the law will be upheld if (i) it is "within the constitutional power of the Government;" (ii) it furthers an "important or substantial governmental interest;" (iii) the governmental interest is "unrelated to the suppression of free expression;" and (iv) the "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."⁵² The *Barnes* plurality held, in satisfaction of the first element of the *O'Brien* test, that the "traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation."⁵³ The plurality cited *Bowers v. Hardwick*⁵⁴ for the proposition that in general the law "is constantly based on notions of morality" and implied that the courts would be forced to strike down most laws if morality were not a legitimate basis for legislation.⁵⁵ Similarly, such state authority furthers a substantial government

48. See *Miller v. City of South Bend*, 904 F.2d 1081 (7th Cir. 1990) (en banc).

49. *Barnes*, 501 U.S. at 566 (plurality opinion).

50. 391 U.S. 367 (1968).

51. *Barnes*, 501 U.S. at 567 (plurality opinion) (citing *O'Brien*, 391 U.S. at 376-77).

52. *Id.*

53. *Id.* at 569. Professor Louis Henkin correctly notes that the different cases refer to "morals," "morality," and "public morals," interchangeably. Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 403 (1963).

54. 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

55. *Barnes*, 501 U.S. at 569 (plurality opinion) (citing *Bowers*, 478 U.S. at 196).

interest in public morals,⁵⁶ which is unrelated to the suppression of free expression.⁵⁷ Proceeding through the remainder of the *O'Brien* test, the plurality found the statute constitutional.⁵⁸

Justice Scalia concurred in the judgment. In his view, however, the case could be resolved simply by noting that “[t]he intent to convey a ‘message of eroticism’ (or any other message) is not a necessary element of the statutory offense”⁵⁹ and thus on its face the law was not directed at expression.⁶⁰ Noting that public indecency had long been an offense at common law,⁶¹ Justice Scalia contended the First Amendment affords protection to expressive conduct only when the law prohibits it precisely because of its communicative attributes.⁶² Thus *O'Brien*-level intermediate scrutiny was inappropriate and the state did not need to show that its restriction was no broader than essential to achieve its aims.⁶³ Immoral conduct can be prohibited as long as the state does not intend to suppress a message; erotic dancing is, on this view, merely immoral conduct regulable by the states.⁶⁴

Justice Souter’s concurring opinion in *Barnes* is especially notable in that it drew secondary effects from the zoning context in *Renton v. Playtime Theatres*⁶⁵ into the field of expressive conduct regulation,⁶⁶ and did so while avoiding any reliance on public morality. Justice Souter, though accepting the plurality’s general framework (rather than Justice Scalia’s), explicitly substituted the morality justification invoked by the plurality with

56. *See id.*

57. *See id.* at 570.

58. *See id.* at 571–72.

59. *Id.* at 573 (Scalia, J., concurring in the judgment).

60. *See id.* at 572.

61. *See id.* at 573.

62. *See id.* at 577.

63. *See id.* at 576–77.

64. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 831 (2000) (Scalia, J., dissenting) (contending that commercial entities engaging in “the sordid business of pandering . . . engage in constitutionally unprotected behavior.” (citing *Ginzburg v. United States*, 383 U.S. 463, 467 (1966))).

65. 475 U.S. 41 (1986).

66. *See Barnes*, 501 U.S. at 582–85 (Souter, J., concurring in the judgment). Note that *Renton* involves a slightly differently formulated intermediate scrutiny test than *O'Brien*. *See infra* notes 77–82 and accompanying text.

a secondary effects rationale.⁶⁷ In Justice Souter's view, the "substantial government interest"⁶⁸ required by *O'Brien* was not the maintenance of public morals, but rather the suppression of the secondary effects of crime, prostitution and the like associated with adult establishments.⁶⁹ He also cited *Renton* as standing for the proposition that "legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects,"⁷⁰ a characterization he would later retract.⁷¹ The principal thrust of his opinion, however, was to refocus the governmental interest at issue from public morality to secondary effects.

Three of the four dissenting Justices in *Barnes* would no longer sit on the Court by the time *City of Erie* was decided.⁷² Nevertheless, Justice White's opinion is notable insofar as it contested the idea that the moral judgment embodied by the prohibition could be constitutional under the First Amendment.⁷³ In Justice White's view, "the perceived harm is the communicative aspect of the

67. *See id.* at 582.

68. *Id.* (citing *O'Brien*, 391 U.S. at 377).

69. *Id.* ("I nonetheless write separately to rest my concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by the respondents' establishments.")

70. *Id.* at 584.

71. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 316–17 (2000) (Souter, J., concurring in part and dissenting in part).

72. Justices White, Marshall, and Blackmun were no longer sitting on the Court in 2000 when *City of Erie* was decided. Justice Stevens, however, was, and would write the dissenting opinions in *City of Erie* and *Alameda*. Incidentally, Justice Stevens had written the opinion that introduced secondary effects into Supreme Court jurisprudence in the first place. *See Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 n.34 (1976); *see also supra* notes 32–35 and accompanying text.

73. *See Barnes*, 501 U.S. at 591 (White, J., dissenting). This is notable insofar as Justice White had been the author of *Bowers*, which the plurality in *Barnes* cited in defending its position that moral judgments can form a legitimate basis of state regulation. *See id.* at 569 (plurality opinion). The difference between *Bowers* and Justice White's dissent in *Barnes* is that Justice White is committed to the idea that erotic dancing is expressive conduct protected by the First Amendment; thus, moral judgments applied against it will be subject to strict scrutiny. Not so in *Bowers* where, in his view (the view of the Court), there was no expressive conduct at stake. *See Bowers v. Hardwick*, 478 U.S. 186, 195 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

erotic dance;⁷⁴ thus it could not be constitutionally prohibited. Justice White also directly disagreed with Justice Souter that the secondary effects could be reduced without preventing, rather than merely curtailing, the speech: "The attainment of these goals . . . depends on preventing an expressive activity."⁷⁵ This statement would come to embody the tension at the heart of the secondary effects cases to follow.

B. *The City of Erie Case*

In *City of Erie*, a plurality consisting of Justice O'Connor, Chief Justice Rehnquist, Justice Kennedy and Justice Breyer, in an opinion written by Justice O'Connor, endorsed a secondary effects justification in upholding a ban on public nudity nearly identical to the ban upheld in *Barnes* nine years earlier. The City of Erie's ordinance forbade the intentional appearance in public in a "state of nudity."⁷⁶ Erotic dancers would have to wear some, albeit extremely minimal, clothing to comply with the statute. Respondent Pap's A. M. operated a nude dancing establishment in Erie and challenged the regulation in state court, prevailing on appeal to the Pennsylvania Supreme Court.⁷⁷ The U.S. Supreme Court reversed, with the plurality upholding the ordinance as a content-neutral regulation satisfying *O'Brien's* four-part test.⁷⁸ The plurality first noted that "[a]s we explained in *Barnes* . . . nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection."⁷⁹ Erie's ordinance was not facially content-based, the plurality held, so it was not subject to strict scrutiny, but was ra-

74. *Barnes*, 501 U.S. at 591 (White, J., dissenting).

75. *Id.*

76. *City of Erie*, 529 U.S. at 283 (plurality opinion).

77. *See id.* at 283, 285. The Pennsylvania Supreme Court contended that "aside from agreement by a majority of the *Barnes* Court that nude dancing is entitled to some First Amendment protection, we can find no point on which a majority of the *Barnes* Court agreed." *Pap's A.M. v. City of Erie*, 719 A.2d 273, 278 (Penn. 1998). Of course, this neglects the single and most important point on which a majority of the *Barnes* Court did agree: the holding that the nearly identical South Bend ordinance was constitutional.

78. *City of Erie*, 529 U.S. at 283 (plurality opinion).

79. *Id.* at 289.

ther subject to evaluation under *O'Brien*.⁸⁰ Unlike *Barnes*, however, here the substantial government interest acknowledged by the plurality was the reduction of secondary effects, not the protection of public morality. Just as the draft card regulation in *O'Brien* was aimed at preserving the integrity of the selective service system, and not at the expressive conduct of burning draft cards, Erie's ordinance was directed not at the expressive content of nude dancing but rather at the secondary effects on the "public health, safety, and welfare" of the community,⁸¹ such as violence, sexual harassment, public intoxication, prostitution, and the spread of sexually transmitted diseases, as the preamble to the ordinance noted.⁸² Requiring that dancers wear only "pasties" and "G-strings," the ordinance's "effect on the overall expression is *de minimis*,"⁸³ and since the regulation was content-neutral, the plurality proceeded through the *O'Brien* test in summary fashion, finding the ordinance constitutional.⁸⁴

It is worth noting that the Court's invocation of the traditional elements of the police power here—"health, safety, and welfare"—substituted "welfare" for a different item normally rounding out the list: public morality. Public morality had been explicitly referenced by Chief Justice Rehnquist's *Barnes* plurality, though "welfare" and secondary effects were not.⁸⁵ It was just the opposite in *City of Erie*: public morality was nowhere to be found, and "welfare" and secondary effects appeared in its place.

Justice Scalia, joined by Justice Thomas, concurred only in the judgment. Justice Scalia would have held that the case was moot because the affected adult establishment had closed by the time the case reached the Court, but nevertheless went on to reiterate

80. *See id.* The plurality noted that the ordinance had been on the books in various forms since 1866, so it could not have been targeted at businesses such as Pap's, not in existence at that time. *See id.* at 290.

81. *Id.* at 291.

82. *Id.* at 290.

83. *Id.* at 294, 296.

84. *See id.* at 296–97, 300–02.

85. *See Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 569 (1991) (plurality opinion) ("The traditional police power of the states is defined as the authority to provide for the public health, safety, and morals, and we have upheld such as a basis for legislation . . . Thus, the public indecency statute furthers a substantial government interest in protecting order and morality.").

his view on the merits, expressed in *Barnes*, that there was no need to delve into any discussion of secondary effects. His opinion, similar to that expressed in another First Amendment context,⁸⁶ was that the ordinance at issue constituted “a general law regulating conduct and not specifically directed at expression,”⁸⁷ and as such was “not subject to First Amendment scrutiny at all.”⁸⁸ Justice Scalia’s view was that it is within a city’s power to regulate conduct in the interest of “*bonos mores*”⁸⁹ and that this power and “the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing *itself* is immoral, have not been repealed by the First Amendment.”⁹⁰

Despite the case involving facts nearly identical to *Barnes*, Justice Souter, whose separate concurrence in *Barnes* had been the only opinion to articulate the secondary effects concept in that case, dissented on the merits question in *City of Erie*.⁹¹ He once again endorsed the view that a city’s interest in reducing secondary effects associated with adult entertainment, provided it is unrelated to the suppression of free expression, is legitimate.⁹² His concern centered on the fact that Erie had relied on mere conjecture as to the actual effect of its restriction on the secondary effects, which “[w]e have never accepted . . . as adequate to carry a First Amendment burden.”⁹³ His partial dissent “rest[ed] on a demand for an evidentiary basis that [he] failed to make when [he] concurred in *Barnes*”⁹⁴ Recognizing that this was in direct conflict with his earlier statements in *Barnes*,⁹⁵

86. See *Emp’t Div. v. Smith*, 494 U.S. 872, 878–79 (1990) (holding that regulation of peyote use, being generally applicable, did not unconstitutionally burden Native American tribe’s free exercise of religion).

87. *City of Erie*, 529 U.S. at 307–08 (Scalia, J., concurring in the judgment).

88. *Id.* at 308.

89. *Id.* at 310.

90. *Id.*

91. Justice Souter concurred with the plurality on the mootness question, but dissented based on his view that the evidentiary record was insufficient to sustain the regulation. *Id.* at 310–11 (Souter, J., concurring in part and dissenting in part).

92. See *id.*

93. *Id.* at 312 (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 392 (2000)).

94. *Id.* at 316.

95. *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 584 (1991) (Souter, J. concurring in the judgment) (“[L]egislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects . . .”).

Justice Souter expressly stated that he made a mistake in that case; although he refused to retract his support for the secondary effects test, he noted that he “should have demanded the evidence then [in *Barnes*], too”⁹⁶ A stronger evidentiary showing would help to comfort the Court that no pernicious motivation to suppress governmentally disfavored speech stood behind the ostensibly neutral regulation.⁹⁷ This concern would take center stage later in *Alameda*.

Two Justices dissented outright. Justice Stevens, joined by Justice Ginsburg, expressed alarm that the secondary effects jurisprudence was making its way into hitherto untouched territory—they appeared to take as given that secondary effects were legitimate in zoning cases, such as *Renton*, but disagreed that the idea should be extended to expressive conduct regulations.⁹⁸ He noted that “[for] the first time, the Court has now held that such [secondary] effects may justify the total suppression of protected speech.”⁹⁹ In order to sustain this contention, Justice Stevens had to gloss over any difference between expressive conduct and pure speech, a maneuver that is present throughout the opinion though never addressed directly. Similarly, the opinion contains the implicit premise that the additional “message” conveyed when “the last stitch is dropped” is wholly distinct from the rest of the erotic expression.¹⁰⁰ Referring to *Barnes* as a “fractured decision,”¹⁰¹ Justice Stevens together with Justice Ginsburg would later join Justice Souter’s dissent in *Alameda* advocating a reformulation of the secondary effects concept, though not calling for its total abolition.

96. *City of Erie*, 529 U.S. at 316 (Souter, J., concurring).

97. *See id.* at 314.

98. *Id.* at 317 (Stevens, J., dissenting).

99. *Id.* at 317–18.

100. Note that this claim turns on the premise that the clothing requirement actually suppresses the message: “Indeed, if Erie’s concern with the effects of the message were unrelated to the message itself, it is strange that the only means used to combat those effects is the suppression of the message.” *Id.* at 325. The *City of Erie* plurality expressly disclaimed this idea. *Id.* at 292–93 (plurality opinion).

101. *Id.* at 318 (Stevens, J., dissenting).

C. The Alameda Case

In *City of Los Angeles v. Alameda Books, Inc.*,¹⁰² the Court was confronted with a municipal ordinance prohibiting adult establishments from operating within a thousand feet of one another or within five hundred feet of a school or church. A loophole in the original ordinance which had permitted multiple such businesses to operate under the same roof was corrected in 1983.¹⁰³ Two adult bookstores that also operated adult arcades, considered a separate adult business under the statute, sued the city seeking declaratory and injunctive relief, contending that the ordinance violated the First Amendment.¹⁰⁴ In defense, the city cited a study conducted in 1977 showing that concentrations of adult businesses were associated with higher crime.¹⁰⁵ On summary judgment, the district court applied strict scrutiny and struck down the ordinance.¹⁰⁶ The Ninth Circuit affirmed, holding that even if intermediate scrutiny were applied, the city would not have met its burden.¹⁰⁷ It held, in spite of the 1977 study, that “the city failed to present evidence upon which it could reasonably rely to demonstrate a link between multiple-use adult establishments and negative secondary effects.”¹⁰⁸

The Court granted certiorari “to clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton*.”¹⁰⁹ Again, a plurality of the Court upheld the statute, this time consisting of Justice O’Connor, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, in another opinion written by Justice O’Connor. While *City of Erie* dealt with expressive conduct, and thus utilized the *O’Brien* test, *Alameda* involved the slightly different *Renton* intermediate scrutiny framework established for cases dealing with zoning regulations.¹¹⁰ The *Renton* analysis proceeded in three steps:

102. 535 U.S. 425 (2002).

103. *Id.* at 431.

104. *Id.* at 432.

105. *See id.* at 430.

106. *See id.* at 429.

107. *Alameda Books, Inc. v. City of L.A.*, 222 F.3d 719 (9th Cir. 2000).

108. *Alameda*, 535 U.S. at 430.

109. *Id.* at 433.

110. *See id.* at 434.

first, if the regulation was not a total ban, then it could be analyzed as a time, place, and manner restriction;¹¹¹ next, if the regulation was aimed at secondary effects rather than at the content of the regulated material, it could properly be considered under intermediate scrutiny as a content-neutral restriction;¹¹² and finally, if the ordinance was “designed to serve a substantial government interest and . . . reasonable alternative avenues of communication remained available,” the regulation could be upheld.¹¹³ The key question in this case was whether the city could reasonably rely on the 1977 study to support its substantial interest in preventing secondary effects in defending a motion for summary judgment.¹¹⁴

The Court of Appeals held that the first prong of *Renton* had been satisfied and that the statute was a time, place, and manner restriction.¹¹⁵ However, the court then proceeded to skip the second question, declining to determine whether the ordinance was content-neutral or content-based, reasoning that in either case the city failed the third prong of *Renton*.¹¹⁶ The Court of Appeals held that the 1977 study did not show that the multiple-use ban served the city’s substantial interest in reducing crime because it did not “suppor[t] a reasonable belief that [the] combination [of] businesses . . . produced harmful secondary effects of the type asserted,”¹¹⁷ pointing out that the study had found that a high concentration of adult *establishments* was correlated with high crime rates, but that the study said nothing about the concentration of adult *businesses*.¹¹⁸ On a motion for summary judgment, this amounted to a very strict evidentiary requirement for the city.

111. *See id.* (citing *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 46 (1986)).

112. *See id.* (citing *Renton*, 475 U.S. at 47–49).

113. *See id.* (citing *Renton*, 475 U.S. at 50).

114. *See* FED. R. CIV. P. 56; *Anderson v. Liberty Lobby*, 477 U.S. 242, 248–252 (1986).

115. *Alameda Books, Inc. v. City of L.A.*, 222 F.3d 719, 723 (9th Cir. 2000).

116. *Id.* at 723–724.

117. *Id.* at 724.

118. *Id.*

The plurality found that the Court of Appeals “misunderstood the implications of the 1977 study.”¹¹⁹ The plurality was willing to permit the city to make the inference that high concentrations of adult businesses had the same effects as adult establishments on crime because “areas with high concentrations of adult establishments are also areas with high concentrations of adult operations, albeit each in separate establishments.”¹²⁰ The plurality expressed concern that any more stringent standard of proof, especially at the summary judgment stage, would result in an unreasonable burden on the city.¹²¹ This is not to say the city can “get away with shoddy data or reasoning;” on the contrary, “[t]he municipality’s evidence must fairly support the municipality’s rationale for its ordinance.”¹²² Nevertheless, the plurality opinion left the Court’s secondary effects jurisprudence untouched.

In dissent, Justice Souter expressed his concern that the evidentiary thresholds set out by the plurality would permit cities to engage in “covert content-based regulation.”¹²³ He echoed the Ninth Circuit’s view that the 1977 study was inapposite because it showed only the effects of concentrations of adult establishments, not the effects of concentrations of adult business operations.¹²⁴ Justice Souter emphasized that the 1983 amendment to the zoning scheme at issue moved “[f]rom a policy of dispersing adult establishments” to “a policy of dividing them in two,”¹²⁵ which would be substantially more burdensome and

119. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 436 (2002) (plurality opinion).

120. *Id.*

121. *Id.* at 437 (“While the city certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects, it does not bear the burden of providing evidence that rules out every theory for the link between concentrations of adult establishments that is inconsistent with its own.”).

122. *Id.* at 438.

123. *Id.* at 466 (Souter, J., dissenting).

124. *Id.* at 462 (“The Los Angeles study treats such combined stores as one . . . and draws no general conclusion that individual stores spread apart from other adult establishments (as under the basic Los Angeles ordinance) are associated with any degree of criminal activity above the general norm . . .”).

125. *Id.* at 454.

in all likelihood result in the closure, rather than the removal to another part of the city, of either the arcades or the bookstores.

In the first section of his opinion, joined only by Justices Stevens and Ginsburg, but not Justice Breyer,¹²⁶ Justice Souter questioned whether the analytical framework governing these cases ought to be revised. He noted that First Amendment cases garnering intermediate scrutiny were “spoken of as content neutral” but that cases such as this “rais[e] a risk of content-based restriction.”¹²⁷ He cautioned against equating cases involving this risk of content-based restriction with pure time, place, and manner restrictions, also analyzed under intermediate scrutiny, because in those comparatively harmless cases “[n]o one has to disagree with any message to find something wrong with a loudspeaker at three in the morning.”¹²⁸ Such a conflation would elide an important distinction: “A restriction on loudspeakers has no obvious relationship to the substance of what is broadcast, while a zoning regulation of businesses in adult expression just as obviously does.”¹²⁹ It may be true that the regulating jurisdiction is concerned only with the secondary effects and not the underlying message, but the restriction applies only if the expressive products have adult content.¹³⁰ These cases thus occupy a “limbo” between content-based restrictions and content-neutral restrictions.¹³¹ Justice Souter stated he would prefer to abandon the fiction that these restrictions are actually neutral with regard to content, and instead call them “content correlated.”¹³² They should be allowed to stand only if “it is possible to show by empirical evidence that the effects exist, that they are caused by the expressive activity subject to the zoning, and that the zoning can be expected either to ameliorate them or to enhance the capacity of government to combat them . . . *without suppressing the expressive activity it-*

126. Justice Breyer also dissented, but joined only in the second part of the dissenting opinion dealing with the question of evidentiary sufficiency. See *id.* at 460–66.

127. *Id.* at 455.

128. *Id.* (citing *Kovacs v. Cooper*, 336 U.S. 77 (1949)).

129. *Id.* at 456–57.

130. *Id.* at 457.

131. *Id.*

132. *Id.*

self.”¹³³ The capacity of zoning regulations to accomplish this diminishment of secondary effects without eliminating the speech is the only justification for treating them analogously to time, place and manner restrictions.¹³⁴ Empirical justification is essential, because “the weaker the demonstration of facts distinct from disapproval of the ‘adult’ viewpoint, the greater the likelihood that nothing more than condemnation of the viewpoint drives the regulation.”¹³⁵ Justice Souter acknowledged that his approach would raise the evidentiary threshold, but thought it warranted.¹³⁶

Justice Souter proceeded to attack the city’s reliance on the 1977 study with the support of Justice Breyer and the other two dissenters. He argued, along the same lines as the Ninth Circuit, that the assumption that separating adult video arcades from adult bookstores would reduce secondary effects was “clearly unsupported.”¹³⁷ The city assumed that more crime results from the combined adult enterprises than would be the case if the bookstore were located in one part of town and the video arcade in another.¹³⁸ Essentially, Justice Souter was unsatisfied that the 1977 study did not deal with the exact factual situation addressed by the regulation. He permitted no inferences to be drawn from the study. The plurality addressed this contention, replying that it would “raise the evidentiary bar that a municipality must pass,”¹³⁹ and noting that previous Supreme Court “cases require[d] only that municipalities rely upon evidence that is ‘reasonably believed to be relevant’ to the secondary effects that they seek to address.”¹⁴⁰ Justice Souter’s test would also effectively have prohibited municipalities from trying new regulatory approaches, since any new approach would by definition not have been tried, and thus not studied.¹⁴¹

133. *Id.* (emphasis added).

134. *Id.*

135. *Id.* at 458.

136. *See id.* at 459.

137. *Id.* at 461.

138. *See id.* at 462.

139. *Id.* at 441 (plurality opinion).

140. *Id.* at 442 (citing *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 296 (2000) (plurality opinion)).

141. *See id.* at 439–40.

The plurality argued that Justice Souter's approach would constitute a subtle diminishment of the Court's secondary effects case law: "[Souter's] logic is that verifying that the ordinance actually reduces the secondary effects asserted would ensure that zoning regulations are not merely content-based regulations in disguise [but] . . . [w]e think this proposal unwise."¹⁴² The plurality reasoned that municipalities are held to too high a standard if at summary judgment the city was required not only to show that it could reasonably rely on its findings that the regulation tends to reduce secondary effects, but also that its findings cannot conceivably be interpreted in any other way.¹⁴³ *Renton*, which Justice Souter had cited in *Barnes*, did not require such a burden.¹⁴⁴ Rather, the plurality thought the better approach would be to require the plaintiffs to cast doubt on the study, in which case the municipality may supplement its evidence to prove otherwise.¹⁴⁵ Justice Souter did not contradict these assertions; he insisted, as he did in *City of Erie*, that he had come to believe that a higher burden of proof was required in these cases to ensure that a municipality is truly targeting the secondary effects and not using them as a rationalization for targeting the content of the speech.¹⁴⁶

Justice Kennedy's concurrence is perhaps the most notable opinion in the case. It began with the proposition that secondary effects can be regulated if the city "uses its zoning power in a reasonable way to ameliorate them without suppressing speech."¹⁴⁷ Justice Kennedy concurred separately because he "agree[d] with the dissent that the [content-neutral] designation is imprecise" and secondly because he feared the plurality's view of *Renton*

142. *Id.* at 441.

143. *See id.* at 438.

144. *See Barnes v. Glen Theater, Inc.*, 501 U.S. 569, 571–72 (1991) (plurality opinion).

145. *See Alameda*, 535 U.S. at 439 (plurality opinion).

146. *See id.* at 459 (Souter, J., dissenting) ("The need for independent proof varies with the point that has to be established, and zoning can be supported by common experience when there is no reason to question it. We have appealed to common sense in analogous cases, even if we have disagreed about how far it took us." (citing *City of Erie v. Pap's A.M.*, 529 U.S. 277, 300–01 (2000) (plurality opinion); *id.* at 313 & n.2 (Souter, J., concurring in part and dissenting in part))).

147. *Id.* at 444 (Kennedy, J., concurring in the judgment).

“might constitute a subtle expansion.”¹⁴⁸ The challenge in regulating secondary effects is to “leave the quantity and accessibility of the speech substantially undiminished,”¹⁴⁹ at least no more than trivially.¹⁵⁰ Justice Kennedy was comfortable with the idea that intermediate scrutiny would apply to zoning ordinances targeted at the secondary effects of adult speech, even though it might appear content-based, as long as neither the purpose nor the effect is to suppress the speech.¹⁵¹

How might a city reduce secondary effects of speech without reducing the amount of speech at all? Following the logic of his premises, Justice Kennedy posited the existence of a factual situation in which simply separating the businesses geographically, without causing any to close, reduces the secondary effects associated with them. He hypothesized a circumstance in which there is an amplifying effect of adult businesses being near one another that causes the associated crime to increase more than proportionally. All of this required a theoretical “economics of vice,”¹⁵² in which there exists the verifiable possibility that each adult business produces more secondary effects when located near other such establishments than any would alone.¹⁵³ This resolved the evidentiary question: since the appeal arose from a motion for summary judgment, Justice Kennedy considered that it is possible for the city to show that the “economics of vice” are such that its measure will in fact reduce secondary effects in this way, without burdening speech, since “[a]t least in theory,” all the businesses would still exist and would not experience diminished patronage.¹⁵⁴ He went so far as to use a numerical example to prove the point.¹⁵⁵ If the city could factually demonstrate that such circumstances exist, it would prevail; thus, summary judgment against it was not warranted.

148. *Id.* at 444–45.

149. *Id.* at 445.

150. *Id.*

151. *See id.* at 447, 449.

152. *Id.* at 452.

153. *Id.* at 449 (“A city may not assert that it will reduce secondary effects by reducing speech in the same proportion.”).

154. *Id.* at 445–46.

155. *See id.* at 452.

Finally, Justice Scalia wrote a brief concurrence reiterating his view that regulations of this type are permissible, and noting that he joined the plurality opinion because he considered the plurality opinion “a correct application of [the Court’s] jurisprudence concerning regulation of the ‘secondary effects’ of pornographic speech.”¹⁵⁶

III. ON HOW PUBLIC MORALITY AND SECONDARY EFFECTS GO HAND IN HAND

A. Justice Souter’s Evolving Perspective

As discussed above, Justice Souter’s about-turn—from extending the secondary effects doctrine to expressive conduct cases, to retrenching by advocating for its alteration and effective sterilization via evidentiary bars—is a remarkable development in this area of the law. Though his intentions are of course unknown to us, on the basis of his opinions it appears that Justice Souter was uncomfortable with public morality as a basis for restriction of First Amendment freedoms. His replacement of public morality with secondary effects in *Barnes* can be seen as an effort to avoid delving into moral judgments, the assumption being that such judgments are personal and subjective, and thus not amenable to either legislative or judicial involvement.¹⁵⁷ However, Justice Souter appeared not to object to the idea that adult establishments can be regulated to a degree, perhaps because conventional wisdom holds that, at least on some level, they are not good for society. Yet he appeared to cringe at the thought of the Court allowing legisla-

156. *Id.* at 443 (Scalia, J., concurring).

157. Of course, Justice Souter does not explicitly reject moral justifications in his concurring opinion, though he does conspicuously avoid them. See *Barnes v. Glen Theaters, Inc.*, 501 U.S. 569, 582 (1991) (Souter, J., concurring in the judgment) (“I nonetheless write separately to rest my concurrence in the judgment, not on the possible sufficiency of society’s moral views to justify the limitations at issue, but on the State’s substantial interest in combating the secondary effects.” (emphasis added)). But see Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611 (1992). Blasi is unequivocal in his assessment of Justice Souter’s motives, contending that Justice Souter “could not accept Chief Justice Rehnquist’s proposition that the state’s interest in the enforcement of morality can serve as a justification for restricting activities that enjoy First Amendment protection.” *Id.* at 652.

tures to make such determinations arbitrarily—after all, especially in the First Amendment context, this might smack of censorship. Secondary effects, empirically measurable by such seemingly objective criteria as crime statistics and property values, would seem the perfect compromise in the search for the required substantial governmental interest. Such data would appear to modern sensibilities as more objective and independently verifiable than any conception of morality, which might differ from person to person. Justice Souter thus attempted to split the baby and let each side have its way by applying *Renton* to the regulation of expressive conduct.

When the *City of Erie* plurality tried take him up on this endeavor, however, Justice Souter reneged—even though *City of Erie*'s public nudity ordinance was nearly identical to the one Justice Souter himself had voted to uphold in *Barnes*. If the purpose of the secondary effects doctrine was to permit regulation of adult enterprises without recourse to moral judgments, then empirical data must be presented to verify the regulators' claims. Otherwise, a government could pass legislation aimed at censoring disfavored conduct or speech and simply invoke secondary effects as a cover.¹⁵⁸ Nothing would have been achieved; states would still be permitted to legislate morality. This possibility has been pointed out by both defenders¹⁵⁹ and critics¹⁶⁰ of the secondary effects test. Justice Souter recognized

158. See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 311 (2000) (Souter, J., concurring in part and dissenting in part) (“[A]pplication of an intermediate scrutiny test to a government’s asserted rationale for regulation of expressive activity demands some factual justification to connect that rationale with the regulation in issue.”); see also *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 465–66 (2002) (Souter, J., dissenting) (noting that the evidentiary support for the city’s regulation was “a very far cry from any assurance against covert content-based regulation” and that the law “sound[ed] . . . like a policy of content-based regulation”).

159. See Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1307–08 (2004) (claiming that “the empirical support requirement may not provide a meaningful constraint” since defenders of such laws can always make “highly speculative arguments about factual harms and thereby render the empirical grounding requirement useless”).

160. See Hill, *supra* note 42, at 62 (“[T]he quasi-Millian interpretation [of objective harm] does not go far enough because it opens the door to constitutional legitimacy whenever the state can adduce some putative empirical interest in limiting a behavior.”).

in retrospect, however, that *Renton* did not provide for a higher evidentiary burden that would ensure objectivity, and that the progress he had hoped to make in *Barnes* towards pure objectivity would thus be thwarted. He dismissed his suggestions to the contrary in his concurrence in *Barnes* as oversight, attributing his “lapse” to “[i]gnorance, sir, ignorance.”¹⁶¹ Now, he said, evidence of secondary effects “must be a matter of demonstrated fact, not speculative supposition;”¹⁶² else, he seemed to suppose, we will have made no progress out of the realm of subjectivity and morality. Justice Souter did not, however, make any attempt to revise the secondary effects doctrine in *City of Erie*. He still had not confronted the question of whether in fact secondary effects actually can be reduced without simultaneously reducing protected activity, but cracks in the edifice had begun to form.

Finally, in *Alameda*, Justice Souter at last acknowledged the elephant in the room: that “[w]hile spoken of as content neutral, these [adult business zoning] regulations are not uniformly distinct from the content-based regulations calling for scrutiny that is strict.”¹⁶³ Noting that time, place, and manner restrictions garner softer scrutiny precisely because they are unrelated to the affected content and do not diminish it, Justice Souter drew a distinction between an uncontroversial time, place, and manner restriction regulating noise¹⁶⁴ and a zoning ordinance applicable only to adult businesses.¹⁶⁵ His new category for this type of regulation, “content correlated,” would address this problem,¹⁶⁶ indeed, it would elide the “fiction”¹⁶⁷

161. *City of Erie*, 529 U.S. at 316 (quoting *McGrath v. Kristensen*, 340 U.S. 162, 178 (1950) (Jackson, J., concurring)).

162. *Id.* at 314.

163. *Alameda*, 535 U.S. at 455 (Souter, J., dissenting).

164. *See id.* (citing *Kovacs v. Cooper*, 336 U.S. 77 (1949)).

165. *See id.* at 456–57 (“A restriction on loudspeakers has no obvious relationship to the substance of what is broadcast, while a zoning regulation of businesses in adult expression just as obviously does.”).

166. *Id.* at 457.

167. *Id.* at 448 (Kennedy, J., concurring in the judgment) (“[T]he Court designated the restriction ‘content neutral’ The Court appeared to recognize, however, that the designation was something of a fiction, which, perhaps, is why it kept the phrase in quotes. After all, whether a statute is content neutral or content

that these types of restrictions do not seek to regulate secondary effects by actually targeting the primary conduct. However, the new test he created bears a striking similarity to strict scrutiny: requiring a regulating jurisdiction to factually prove that its restriction addresses the secondary problems without at all restricting speech looks a lot more like the “least restrictive means” requirement of strict scrutiny review than the “narrowly tailored” bar of intermediate scrutiny. In essence, this is an acknowledgement that the restrictions at issue in these cases burden the speech based on content.

B. *Can a Reduction in Secondary Effects Be Achieved Without Reducing Protected Activity?*

Justice Souter was not the only one to perceive that the reduction in the underlying speech was necessary to produce any diminishment of secondary effects. Justice White had originally voiced this concern in *Barnes*: “The attainment of these goals . . . depends on preventing an expressive activity.”¹⁶⁸ Similarly (but from a different perspective and while relying on the public morality rationale), Justice Scalia expressed a great deal of skepticism in *City of Erie* that any meaningful secondary effects would be ameliorated by requiring erotic dancers to wear clothing as minimal as the statute provided.¹⁶⁹ A *de minimis* regulation of the conduct (though permissible) would only be expected to have a *de minimis* effect on crime, intoxication, prostitution, and the like—with the logical implication being that a greater restriction (presumably also permissible in his view) would have a more significant effect. Even the plurality in *City of Erie* admitted that “[t]o be sure, requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects”¹⁷⁰—another tacit acknowledgement that greater reductions in secondary effects would presumably require greater intrusions on the primary conduct. The dissenters in

based is something that can be determined on the face of it; if the statute describes speech by content then it is content based.”).

168. *Barnes v. Glen Theaters, Inc.*, 501 U.S. 569, 591 (1991) (White, J., dissenting).

169. See *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 310 (2000) (Scalia, J., concurring in the judgment).

170. *Id.* at 301 (plurality opinion).

City of Erie, referring to the plurality's misgivings as "an enormous understatement," responded in no uncertain terms that "[t]o believe that the mandatory addition of pasties and a G-string will have *any* kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible."¹⁷¹ From their perspective, however, this was only of tertiary importance; the problem at the outset was that erotic messages were suppressed to any degree.

In *Alameda*, Justice Kennedy recognized these contradictions and tried to resolve them by positing that if secondary effects could be reduced at no cost to the underlying speech, then regulations targeting them could be countenanced. He too acknowledged that the content-neutral designation as applied to zoning regulations focused on adult establishments is "something of a fiction."¹⁷² After all, in the case of a specialized zoning regime applicable only to adult businesses, content neutrality is quite a stretch. He illustrated the only possible reconciliation of Justice Souter's concerns by resort to his "economics of vice" thought experiment. If there exists some sort of (empirically verifiable) feedback effect whereby the secondary effects caused by two adult businesses in close proximity exceed the aggregate effects produced by each when geographically separated, then a regulation could simultaneously reduce the effects without reducing the activities of the establishments. In this circumstance, the "fiction" could be tolerated because overall level of speech would not be affected.

Though Justice Kennedy's opinion in *Alameda* deals only with the zoning regulations, the underlying tension he describes exists in *City of Erie* as well. In *City of Erie*, each opinion acknowledged that any reduction of secondary effects achieved by requiring dancers to wear pasties and G-strings would be minimal. The plurality considered this immaterial; the suppression of secondary effects was a valid purpose, and the extent to which the city chose to (or was able to) reduce them is none of the Court's business.¹⁷³ In any event, the infringement

171. *Id.* at 323 (Stevens, J., dissenting).

172. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in the judgment).

173. *See City of Erie*, 529 U.S. at 301 (plurality opinion).

on speech was also *de minimis*.¹⁷⁴ The dissent was unconvinced that any substantial reduction of secondary effects could be achieved without a much greater intrusion into protected speech, and used this fact as evidence that secondary effects can only be ameliorated at the expense of speech.¹⁷⁵ Thus, in both *City of Erie* and *Alameda*, all of the Justices implicitly acknowledged that secondary effects can only be reduced in proportion to the suppression of speech producing the effects. Justice Kennedy's hypothesis about the "economics of vice" is the only circumstance in which this would not be the case.¹⁷⁶ In *Alameda*, Justice Souter stated he would require direct and unambiguous proof of such a factual circumstance at the outset of the case;¹⁷⁷ in contrast, Justice Kennedy was willing to send the case back to the district court to allow the parties to produce additional evidence at trial.¹⁷⁸ But the fact remains that, under this proposed framework, the regulation will only be sustained in the improbable event that Justice Kennedy's "economics of vice" is proven to be a factual reality.

The Justices recognized, then, that it is implausible that secondary effects can be reduced without concomitant restrictions on the activity ultimately responsible for the secondary effects. The First Amendment context illuminates this point, insofar as the doctrinal muddle resulting from attempting to treat content-based regulations as content-neutral forced the Justices to consider the relationship between purportedly immoral conduct and its secondary effects. We begin to see an equivalence between secondary effects and public morality. If allegedly immoral conduct is actually wrong, that is, not conducive to human flourishing, then it is no surprise that secondary evils surround it. It follows that the attendant ills would be reduced in proportion to the reduction in the immoral activity causing them. A slight restriction on public nudity as in *Barnes* and *City of Erie* might result in a slight reduction in secondary effects;

174. *Id.*

175. *See id.* at 323–24 (Stevens, J., dissenting).

176. *Alameda*, 535 U.S. at 452 (Kennedy, J., concurring in the judgment).

177. *Id.* at 457 (Souter, J., dissenting).

178. *Id.* at 453 (Kennedy, J., concurring in the judgment).

presumably, banning the conduct would eliminate associated secondary effects entirely.¹⁷⁹ If the conduct in question is to be left completely intact, as Justices Kennedy, Souter, Stevens, Breyer and Ginsburg insisted, then there must be some more-than-proportional relationship between the vice and the effects sought to be thwarted. It requires an “economics of vice”—a super-proportional relationship between the activity when conducted in a certain fashion, as Justice Kennedy theorized, that dictates that secondary effects can almost miraculously disappear without any reduction in the underlying conduct. If this is plausible to a limited extent, it is the exception that proves the rule that secondary effects and public morality are intimately intertwined.

IV. IS THERE A DIFFERENCE BETWEEN PUBLIC MORALITY AND SECONDARY EFFECTS?

It appears that *Barnes v. Glen Theatre, Inc.*, decided in 1991, was the last case in which the Supreme Court—or rather a plurality of three Justices plus Justice Scalia—explicitly relied on the public morality element of the police power to uphold a law.¹⁸⁰ But it does not really matter if the legislative interest is described by the Court in terms of public morality, as the plurality and Justice Scalia described it in *Barnes*, or without terminological reference to public morality but rather using instead the term public welfare, as a virtually identical plurality described the interest in *City of Erie* when it accepted to apply

179. There of course may be policy reasons against banning a given conduct altogether. Thomas Aquinas’s dictum may happen to be on point regarding some conducts: it is not the purpose of the law to suppress all immoralities but only the most grievous ones. See THOMAS AQUINAS, *SUMMA THEOLOGIAE* part II-I, quest. 96, art. 2, at 2321–23 (Benzinger Bros. 1947) (1265–74). But this is a different question from the one we address in the text, namely the relationship between the extent of the suppression of the conduct and the extent of the amelioration of its negative secondary effects.

180. In 1996 Justice Stevens, writing for a plurality, made a passing reference to the public morality rationale while stating that “[a]lmost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to ‘vice activity.’” 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514 (1996). Five years later Justice Thomas reiterated this idea in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 589–90 (2001) (Thomas, J., concurring in part and concurring in the judgment).

the secondary effects framework that had been advanced by Justice Souter concurring in *Barnes*. It is not the names that matter but the actual reality of the regulations and the reasoning at issue.¹⁸¹ The *Barnes* and *City of Erie* pluralities' reasoning clearly refer to the same thing even though only the former uses the term public morality. Professor Cicchino, on the contrary, notes the different wording in the two cases and attempts to make much of it, concluding that secondary effects, while relevant for public welfare, are unrelated to public morality.¹⁸² By so doing he "completely reads 'public morals' out of the states' police power."¹⁸³ But whenever secondary effects are at stake, the public morality argument is unavoidable regardless of the terminology chosen by the several Justices.

Even when Justice Souter introduced secondary effects in *Barnes*—perhaps, as we said, in order to avoid the concept of public morality¹⁸⁴—he referred to the "State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by respondents' establishments."¹⁸⁵ He was not referring to just any effects out there but some that deserved to be legitimately "combated" by the State.¹⁸⁶ Likewise,

181. What matters is whether public morality has been upheld under whatever name. Cf. Santiago Legarre, *Towards a New Justificatory Theory of Comparative Constitutional Law*, 1 STRATHMORE L.J. 90, 109 (2015) (making a similar argument concerning the defense of natural law under whatever name).

182. Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify As Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 170 (1998) (holding that Justice Souter's secondary effects are the kinds of empirical effects on the public welfare to which public morality arguments are unrelated). Wolfe too notes the difference between Justice Souter's terminology and that of the plurality in *Barnes* but he correctly does not draw Cicchino's inferences. Christopher Wolfe, *Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 74 (2000).

183. Christopher J. Gawley, *A Requiem for Morality: A Response to Peter M. Cicchino*, 30 CAP. U. L. REV. 711, 718 (2002).

184. We reiterate that we are tentative ("perhaps") because it is not clear that this was Justice Souter's intention. See *supra* note 146.

185. *Barnes v. Glen Theaters, Inc.*, 501 U.S. 569, 582 (1991) (Souter, J., concurring in the judgment).

186. Justice Souter's argument in *Alameda* that empirical justification is essential, because "[t]he weaker the demonstration of facts distinct from disapproval of the 'adult' viewpoint, the greater the likelihood that nothing more than condemnation of the viewpoint drives the regulation" does not detract from the argument in the text. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 458 (2002) (Souter, J., dis-

when in *City of Erie* the plurality embraced Justice Souter's test, it clearly referred to "deleterious effects caused by the presence of such an establishment in the neighborhood"¹⁸⁷ and to "harmful secondary effects."¹⁸⁸ "Deleterious" and "harmful" are synonymous, and they mean "damaging." Of course, "damaging," applied in the secondary effects contexts associated with adult establishments, does not mean, for the most part, *physically* damaging. As recalled by the plurality in *City of Erie*, the city council had stated in the preamble to Erie's ordinance that it had adopted the regulation to try to limit an atmosphere conducive to public intoxication and prostitution, among other deleterious effects.¹⁸⁹ These secondary effects were selected, among others, by the city (and accepted by the Justices) as relevant for the purposes of justifying a restriction of the conduct at stake. They were not just any effects; they were, clearly, morally relevant: intoxication and prostitution—*ex hypothesi* conduct by consenting adults—are morally problematic regardless of what the law might say about them at a given time and place. None of which, we insist, is by chance: if what is at stake (nude dancing) is purportedly immoral conduct, then it comes as no surprise that evils will surround it.

There is, therefore, a complementarity between the secondary effects test and the public morality rationale.¹⁹⁰ Indeed, they

senting). For purposes of defining deleterious effects deserving to be combated, empirical analysis is necessary but insufficient.

187. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 293 (2000) (plurality opinion).

188. *Id.*

189. *Id.* at 290.

190. Professor Goldberg accepts that when "a morals rationale for government action is relied on together with a government interest in reducing harms or increasing benefits that are material or otherwise observable," there is a "composite" morals-based justification for lawmaking. Goldberg, *supra* note 159, at 1245. In such cases "the concern with morality does not stand alone but instead appears coupled with other grounds for the exercise of government power." *Id.* If, however, the inseparability thesis defended in this article is true there shall always be a "composite" justification for such lawmaking, *pace* Goldberg who separates excessively public morality and secondary effects while positing that there are pure morals-based justifications for lawmaking. *Id.* at 1244–45. She indeed detaches herself from the (correct, in our opinion) view of others that "may find [her] proposal impractical because they see moral judgments as so fundamentally intertwined with the most concrete—and practical—seeming harms so as to render empirical and morals rationales analytically indistinguishable." *Id.* at 1310–11.

are inseparable.¹⁹¹ If the test was initially extended beyond the zoning context by Justice Souter in order to replace public morality, that effort was destined to fail. Public morality serves to identify which secondary effects are relevant for purposes of restricting rights. The attempts by scholars such as Professor Cicchino¹⁹² to draw a stark contrast between “bare assertions of morality” and “public welfare” arguments—or, in the case of Professor Goldberg, between “pure” and “composite” morals-based justifications¹⁹³—are similarly destined to fail. Cicchino says that public morality arguments are “unrelated” to any empirical effects on the public welfare¹⁹⁴ and that they “defend a law by asserting a legitimate government interest in prohibiting or encouraging certain human behavior without any empirical connection to goods *other than* the alleged good of eliminating or increasing, as the case may be, the behavior at issue.”¹⁹⁵ But neither proposition is true except by Cicchino’s arbitrary stipulation. Laws based on morality do in fact seek to protect against societal harm, but such harms may not always be particularized or perceptible to the degree required by Cicchino and others whose views ultimately emulate in one way or another John Stuart Mill’s harm principle.¹⁹⁶ Public morality arguments are, in sum, not only compatible with secondary ef-

191. Gawley, *supra* note 183, at 714 n.13.

192. Cicchino, *supra* note 182, at 140–41.

193. Goldberg, *supra* note 159, at 1244–45.

194. Cicchino, *supra* note 182, at 170.

195. *Id.* at 140.

196. See generally JOHN STUART MILL, ON LIBERTY (1860). While implicitly resisting the notion that Mill’s philosophy is ingrained in the United States constitution, Justice Scalia notably argued in *Barnes* that “there is no basis for thinking that our society has ever shared that Thoreauvian ‘you may do what you like so long as it does not injure someone else’ beau ideal—much less for thinking that it was written into the Constitution.” *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 574–75 (1991) (Scalia, J., concurring in the judgment). The historic presence of public morality as one of the goods to be promoted by the police power testifies to this reality. As Professor William J. Novak writes regarding public morality, “[o]f all the contests over public power in that period, [the nineteenth century] morals regulation was the easy case.” WILLIAM J. NOVAK, THE PEOPLE’S WELFARE 149 (1996). The police power endures today in legislation that resorts to secondary effects considerations for similar purposes, like for instance the ordinance upheld in the *City of Erie* case. Likewise, other branches of the law typically go well beyond the harm principle, such as the regulation of the environment, the law of nuisance, and the police power for the promotion of public health.

fects arguments; the latter complement the former insofar as they intend to provide the alluded “empirical connection.”

Why, then, the apparent demise of public morality as a rationale in this context? Why the attempt by Cicchino, and others,¹⁹⁷ to read public morals out of the states’ police power?¹⁹⁸ In our view the rejection of public morality is in part due to a poor conceptualization of it in Supreme Court case law, especially in *Bowers v. Hardwick*.¹⁹⁹ In *Bowers* public morals were reduced to

197. See, e.g., Goldberg, *supra* note 159, at 1236 (claiming that “mere reference[s] to morality should not suffice as . . . justification[s] for lawmaking” and that instead, the proponent of a law must point to “demonstrable facts” showing some harm); Steven G. Gey, *Is Moral Relativism A Constitutional Command?*, 70 IND. L.J. 331, 331 (1995) (stating that “[i]n order to pass muster under the Constitution, government policy must be premised primarily on some rationale other than morality, such as preventing a specifically identified harm to one individual by another”).

198. It must be said that public morality is an elusive concept, difficult to define. What Freund said of the police power (a much related concept, as we know) is also true of the idea of public morality: “The term police power, while in constant use and indispensable in the vocabulary of American constitutional law, has remained without authoritative or generally accepted definition.” FREUND, *supra* note 42, at iii.

We haste to make clear that in spite of the inherent elusiveness of the concept at stake the American legal system is, we think, better off with the category “public morality.” We find persuasive Professor John Finnis’s answer to the question “why not say that the exercise of rights is to be limited only by respect for the rights of others?” Even if he is commenting on a different legal system (the one governed by the European Convention on Human Rights and Fundamental Freedoms, where “public morality” also features) his response is on point. See Santiago Legarre, *The use of the term “(Public) Morality” in the European Convention on Human Rights: a Brief History*, in INTERNATIONAL LAW IN THE POST-COLD WAR WORLD 268 (Sienho Yee & Wang Tieya eds., 2001). Rather than accepting the Millian challenge implied in the question Finnis suggests that “although it would be possible, given the logical reach of rights-talk, to express *any* desired restriction on rights in terms of other rights” the public morality rationale is “neither conceptually redundant nor substantively unreasonable.” He goes on to explain that there is reason for referring to it specifically because public morality is a “diffuse common benefit[] in which all participate in indistinguishable and unassignable shares.” JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 216 (2d ed. 2011). It is true of public morality what is true more generally of the common good: rights terminology is bound to impoverish its richness. See generally MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

199. 478 U.S. 186, 196 (1986). Justice Scalia embraced a concept of public morality similar to the one in *Bowers* in his dissent in *Lawrence*. See *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (affirming the “impossibility of distinguishing homosexuality from other traditional “morals’ offenses”).

their subjective, majoritarian dimension: whatever a majority of the people or of a legislature considers immoral is immoral for purposes of public morality. So the presumed belief of a majority of the electorate in Georgia that sodomy is immoral and unacceptable was held in that case enough of a rational basis for the relevant law.²⁰⁰ This equation of public morals to merely traditional or conventional morality is dangerous (and the object of valid criticism)²⁰¹ insofar as it potentially enables disastrous moral choices to deserve the label of “public morality.”²⁰² Professor Robert P. George is correct when he affirms that the “genuine immorality of the act it prohibits is . . . a necessary (though not a sufficient) condition for the legitimacy of a morals law. Sometimes prejudice really does masquerade as moral judgment; and majorities have no right to enact their mere prejudices into law.”²⁰³ History confirms of course that traditions and majorities can and have at times been capricious, and this is a danger that ought not be overlooked. Traditional or majoritarian judgments ought to be properly under the scrutiny of reason.

When *Bowers* was overruled in *Lawrence v. Texas*,²⁰⁴ Justice Scalia, dissenting, famously prophesied the demise of public morality:

200. See *Bowers*, 478 U.S. at 196.

201. For example, Goldberg rightly claims that “if the Court accepts a morals-based justification out of respect for majoritarian views, it cannot ensure against the majority’s misuse of morality as a benign cover for arbitrary or invidious aims.” Goldberg, *supra* note 159, at 1237.

202. This is not to say tradition does not have a valid and useful place in constitutional law and American jurisprudence generally. Appeals to tradition can help to identify rules and customs that are the product of the collected, time-tested wisdom of the ages, often the incompletely articulated and imperfectly understood result of centuries of experience and trial and error, and often a useful practical counterpoint to rationalistic deductive moral reasoning that is prone to error. See generally FREDRICK A. HAYEK, *LAW, LEGISLATION, AND LIBERTY: RULES AND ORDER* (1973). In addition, tradition can have legal significance when it is relevant in determining the semantic content of ancient legal texts such as constitutions. In that case, tradition can serve to delineate the permissible constructions of a constitutional provision by helping to clarify contemporaneous understandings of the text. An example particularly relevant to the present discussion is the longstanding obscenity exception to the First Amendment. See *supra* notes 4–18 and accompanying text.

203. ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY*, at x (1993).

204. 593 U.S. 558 (2003).

We ourselves relied extensively on *Bowers* when we concluded, in *Barnes v. Glen Theatre, Inc.* that Indiana's public indecency statute furthered "a substantial government interest in protecting order and morality." State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers'* validation of laws based on moral choices. Every single one of these laws is called into question by today's decision.²⁰⁵

But one can abandon *Bowers'* holding that a certain sodomy law is constitutional (as *Lawrence* did) without simultaneously abandoning *Bowers'* dictum that "the law is constantly based on notions of morality," which is unobjectionable and is indeed the crux of the public morality rationale.²⁰⁶ We agree with Professor Hill that *Lawrence* does not preclude future morals legislation based on assertions of societal harm.²⁰⁷ At the same time one can reconfigure *Bowers'* description of morality so that it is not reduced to its subjective, majoritarian, traditional dimension. For the notion of public morality to be enriched it ought to be complemented by an objective dimension, an appeal to reason and truth. For something to be within the domain of public morality—and, conversely, for something to be considered publicly immoral—it ought to be susceptible of reasoning in public. We must be able to argue: "For reasons X and Y, such conduct immorally impacts the public domain, the life of the community." Of course, such reasoning may at times be faulty or indeed fail. But failure presupposes a standard according to

205. *Id.* at 590 (Scalia, J., dissenting) (quoting *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 569 (1991) (plurality opinion); *id.* at 575 (Scalia, J., concurring in the judgment)) (citations omitted).

206. That "the law is constantly based on notions of morality" is, more generally, the crux of natural law theory. As such that proposition states a general idea and is totally independent from the context in which it was proclaimed in *Bowers*. For an explication of the theory, see FINNIS, *supra* note 188, at 281–90; Santiago Legarre, *Derivation of Positive from Natural Law Revisited*, 57 AM. J. JURIS. 103 (2012). Within a position apparently at odds with "natural law," Goldberg accepts the "unavoidable presence of moral judgments in lawmaking." Goldberg, *supra* note 159, at 1304.

207. See Hill, *supra* note 42, at 6 (finding that *Lawrence v. Texas* is a "sober, coherent, but limited, restriction on the power of the state to foster, express, and reinforce public morality").

which certain reasoning has failed; it presupposes truth and falsehood in practical, moral discourse.

That certain conduct was traditionally considered immoral or that it was disapproved by a majority are relevant considerations only when those judgments (traditional or majoritarian) come afterwards, so to speak: because such conduct *is* immoral we have considered it immoral.²⁰⁸ Which, by the way, does not entail the conclusion that we ought to consider it illegal too: it is not the purpose of the law to suppress all immoralities but only the most grievous ones.²⁰⁹ We are not advocating here for (or against) the prohibition of nude dancing (or of any other particular conduct for that matter).

Insofar as the rise of the secondary effects test is perceived to evidence a general trend away from reliance on appeals to public morality, we ought to bring back to the conversation our previous conclusion: that substitution was bound to fail. The test cannot work without a concept of public morality. Thus, Justice Scalia's claim in his dissent in *Lawrence* that the decision would be the end of morals legislation is not literally true so long as the secondary effects test remains viable.

V. CONCLUSION

We have attempted in this Article to analyze and explain a remarkable development in a small subset of the Court's First Amendment jurisprudence: the substitution of public morality as a legitimate basis for legislation with appeals to purportedly empirically observable harms. However, as we have seen, this experiment is doomed to failure. The criteria by which we judge secondary effects to be deleterious are in the end the

208. Our view is therefore compatible with the idea that tradition can serve as a valid basis for upholding laws under the police power; the status of a tradition as a longstanding practice in our community can legitimately give weight, even if not conclusive weight, to the argument that it is and should be protected by our law. It operates like a sort of presumption. For example, in the case of interracial marriage (which was traditionally prohibited in our society) the moral arguments against it were clearly strong enough to overcome the presumption of legitimacy bestowed by tradition in that case.

209. See *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 455 (2002) (Souter, J., dissenting).

same moral arguments once used to uphold legislation on their own. The appeal to secondary effects has done little more than impose a statistical data requirement on authorities seeking to regulate in the interest of public morality. Yet this appeal to empiricism wrongly assumes that reliance on public morality alone has been devoid of recourse to experience, which is not a fair characterization. This realization, too, is apparent in the Supreme Court's secondary effects cases, and has led members of the Court to insist on more and more stringent evidentiary burdens on regulators. We hope we have shown these worries to be unfounded, because the very same moral criteria underlie public morality and secondary effects. We hope too that this Article may help open a path by which to explore other potential applications of the secondary effects test. If our argument is correct, one could indeed try to analyze other situations in which public morality is at stake, such as the regulation of gambling and of marijuana, for example, in terms of secondary effects—knowing now that secondary effects will only make sense if one resorts to public morality, under whatever name.

MARRIAGE, THE COURT, AND THE FUTURE

RYAN T. ANDERSON*

INTRODUCTION	362
I. WHAT THE COURT SAID (AND HOW IT GOT IT WRONG)	364
II. THE DISSENTS	371
III. WHAT THE DISSENTING JUSTICES HAD TO SAY ABOUT THE HARMS THIS RULING WOULD CAUSE.....	376
A. Harm to Constitutional Democratic Self- Government	376
B. Harm to Civil Harmony	379
C. Two Views of Marriage	381
IV. THE COMPREHENSIVE VIEW OF MARRIAGE	383
A. An Academic Community	384
B. The Marital Community.....	385
C. The Comprehensive View of Marriage Is Based on Human Nature, Not Anti-Gay Animosity	388
V. WHY MARRIAGE MATTERS FOR PUBLIC POLICY	389
VI. CONSEQUENCES OF REDEFINING MARRIAGE	397
A. Serving the Desires of Adults, Not the Needs or Rights of Children	398
B. Weakening Marital Norms	400
C. The Norm of Monogamy.....	402
D. The Norm of Exclusivity	406
E. The Norm of Permanence	408
F. What's in a Name?	409
G. Threatening Religious Liberty	411

* William E. Simon Senior Research Fellow at The Heritage Foundation. This paper is drawn from my book *Truth Overruled: The Future of Marriage and Religious Freedom*.

INTRODUCTION

The Supreme Court's ruling in *Obergefell v. Hodges*¹ is a serious setback for Americans who believe in the Constitution, the rule of law, self-government, and marriage as the union of husband and wife. The Supreme Court has not simply decided a case incorrectly, it has damaged the common good and harmed our republic. The ruling is as clear of an example of judicial usurpation as we have had in a generation. Nothing in the Constitution justifies the redefinition of marriage by judges. In imposing on the American people its judgment about a policy matter that the Constitution leaves to citizens and their elected representatives, the Court has inflicted serious damage on the institution of marriage and the Constitution.

In the majority opinion, written by Justice Anthony Kennedy, the Court declares: "The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest."² Manifest to five unelected and unaccountable judges, that is. Not to the American citizens who, in state after state, voted to uphold the true definition of marriage,³ and certainly not to the Americans who ratified the Fourteenth Amendment, on which the Court relies. The majority of the Court has simply replaced the people's opinion about what marriage is with its own, without any constitutional basis whatsoever.

Almost everyone was and is in favor of marriage equality because almost everyone wants the law to treat all marriages equally—that is, in the same way. The debate in the United States in the decade and a half before *Obergefell* was not about equality. It was about marriage. We disagreed about *what marriage is*.

Of course, "marriage equality" was a great slogan for the Left. It fits on a bumper sticker. You can make a red equal sign your Facebook profile picture. It is a wonderful piece of advertising. And yet it's completely vacuous. It doesn't say a thing

1. 135 S. Ct. 2584 (2015).

2. *Id.* at 2602.

3. *See, e.g.*, Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES (Nov. 5, 2008), <http://www.nytimes.com/2008/11/06/us/politics/06marriage.html> [<https://perma.cc/2YHL-MPUD>] (discussing passage of three such measures in 2008).

about *what marriage is*. Only if you know what marriage is can you then decide whether any given marriage *policy* violates marriage *equality*. Before you can get to considerations of equal protection of the law, you have to know what it is that the law is trying to protect equally.

Sloganeering aside, appeals to “marriage equality” betray sloppy reasoning. Every law makes distinctions. Equality before the law protects citizens from *arbitrary* distinctions, from laws that treat them differently *for no good reason*. To know whether a law makes the right distinctions, whether the lines it draws are justified, one has to know the public purpose of the law and the nature of the good it advances or protects.

After all, even those who want to redefine marriage to include same-sex couples will draw lines defining what sorts of relationships are a marriage and what sorts are not. If we are going to draw lines that are based on principle, if we are going to draw lines that reflect the truth, we have to know what sort of a relationship marriage is.⁴ You have to answer *that* question before you talk about recognizing marriage equally.

And yet implicit throughout the Court’s argument in *Obergefell* is the assumption that marriage is a genderless institution. But as Justice Samuel Alito pointed out two years earlier in his dissenting opinion in the Defense of Marriage Act case, the United States Constitution is silent about what marriage is. Justice Alito framed the debate as a contest between two visions of marriage⁵: what he calls the “conjugal” and “consent-based” views.⁵

Justice Alito cited a book I coauthored as an example of the conjugal view of marriage (also called the “comprehensive” view): a “comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life.”⁶ On the other side, he cited Jonathan Rauch as a proponent of the consent-based idea that marriage is a commitment marked by emotional un-

4. See generally SHERIF GIRGIS, RYAN T. ANDERSON, & ROBERT P. GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE (2012); Sherif Girgis, Robert P. George, & Ryan T. Anderson, *What is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245 (2011).

5. See *United States v. Windsor*, 133 S. Ct. 2675, 2711 (2013) (Alito, J., dissenting).

6. *Id.* at 2718 (citing GIRGIS, ANDERSON & GEORGE, *supra* note 4, at 23–28).

ion.⁷ The Constitution, he explained, is silent on which of these substantive visions of marriage is correct.⁸ Justice Alito, of course, was right about the Constitution. And yet Justice Kennedy's majority opinion contained no serious consideration, let alone refutation, of arguments that marriage is a conjugal union of husband and wife thus that states thus had constitutional authority to so define it.

In this Article, I first dissect the argument of the majority opinion striking down conjugal marriage laws. Then I turn to the dissenting opinions, which expose the utter failure of the majority opinion as a work of constitutional law. I then consider two harms that follow from the judicial usurpation of politics on this question before turning to the substantive issues. While the Constitution is silent on which view of marriage is correct, some people simply assert that there is no rational basis, no public reason, for viewing marriage as the union of husband and wife. So after discussing the *Obergefell* decision itself, I turn to the question at the heart of the debate: the nature of marriage. I sketch a philosophical defense of marriage as the union of husband and wife, I explain why this matters for public policy, and I close the Article by showing three likely harms of the redefinition of marriage, whether it be accomplished democratically or, as in the United States, judicially.

I. WHAT THE COURT SAID (AND HOW IT GOT IT WRONG)

The question before the Supreme Court in *Obergefell* was not whether government recognition of same-sex marriages is a good policy but whether anything in the Constitution removes from the people their authority to decide their marriage policy. Yet the Court's majority speaks almost exclusively about its "new insights" into marriage⁹ and says almost nothing about the Constitution. It could not have done otherwise, because our Constitution is silent on what marriage is. It protects specific fundamental rights and provides the structure of deliberative democracy by which we the people, retaining our authority as

7. *Id.* at 2716 (citing JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 94 (2004)).

8. *Id.*

9. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

full citizens and not subjects of oligarchic rule, decide important questions of public policy, such as the proper understanding of marriage and the structure of laws defining and supporting it. The Court purports to explain why the marriage policy that the United States has followed for all its history is now prohibited by the Constitution. But what it actually does is to *assume* that marriage is an essentially genderless institution and then announce that the Constitution requires states to adopt that same vision of marriage in their laws.

This assumption is all the more remarkable given Justice Kennedy's observation in oral arguments that the definition of marriage as the union of man and woman "has been with us for millennia. And it—it's very difficult for the Court to say, oh, well, we—we know better."¹⁰ Suggesting that he was reluctant to redefine marriage from the bench, he noted that same-sex marriage had been around for only ten years. And he added, "Ten years is—I don't even know how to count the decimals when we talk about millennia."¹¹

Even the liberal Justice Stephen Breyer acknowledged that marriage understood as the union of man and woman "has been the law everywhere for thousands of years among people who were not discriminating even against gay people, and suddenly you want nine people outside the ballot box to require states that don't want to do it to change . . . what marriage is."¹² He asked the Solicitor General, "Why cannot those states at least wait and see whether in fact doing so in the other states is or is not harmful to marriage?"¹³ And yet he joined Justice Kennedy's majority opinion redefining marriage everywhere.

The incoherence of the majority opinion is evident in its first paragraph:

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their iden-

10. Transcript of Oral Argument at 7, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), https://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_7148.pdf [<https://perma.cc/AGT8-LJ7L>] [hereinafter *Obergefell* Argument Transcript].

11. *Id.*

12. *Id.* at 16.

13. *Id.*

tity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.¹⁴

As Justice Clarence Thomas makes clear in his dissenting opinion, though, constitutional protections of liberty can hardly require government *recognition*.¹⁵ The liberty that the Constitution protects is a freedom *from* government interference. Gays and lesbians enjoyed full liberty “to define and express their identity” and to exercise their “liberty by marrying someone of the same sex” in the house of worship or wedding hall of their choice.¹⁶ Yet Justice Kennedy writes as if governmental recognition of any consensual relationship is a guaranteed form of *liberty*.

What support does he offer for such a conclusion? He starts with a paean to “the transcendent importance of marriage”: the “lifelong union of a man and a woman always has promised nobility and dignity to all persons,” and the “centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations.”¹⁷ Citing theological, philosophical, literary, and artistic treatments of marriage, he admits that it “is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.”¹⁸ Indeed, he points out that for the states defending their marriage laws, marriage “is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.”¹⁹

So why, exactly, does the U.S. Constitution require a redefinition of marriage? Justice Kennedy turns to the Due Process Clause of the Fourteenth Amendment, which says that no state shall “deprive any person of life, liberty, or property, without due process of law.”²⁰ And why does that clause require states to recog-

14. *Obergefell*, 135 S. Ct. at 2593.

15. *See id.* at 2634 (Thomas, J., dissenting).

16. *Id.* at 2593 (majority opinion).

17. *Id.* at 2594.

18. *Id.*

19. *Id.*

20. *Id.* at 2597 (citing U.S. CONST. amend. XIV).

nize same-sex relationships as marriages? Because the fundamental liberties that the Due Process Clause protects extend to “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”²¹ And these choices, Justice Kennedy asserts, now require not merely the absence of government coercion but affirmative recognition by the government. Who decides which “intimate choices” require such recognition, and when, and how much? The Supreme Court, of course.

Here is the central thesis of Justice Kennedy’s argument:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.²²

Yes, such claims must be addressed, and yes, one generation may detect an injustice to which an earlier generation was blind. But when a policy considered unjust by some nonetheless has *some* reasonable basis, and when the Constitution is silent about this particular policy, judges should not strike down the policy merely because of their own “new insights.”²³ For they, too, could be wrong. Far from rectifying an injustice, they may be committing one. And in purporting to vindicate a newly discovered constitutional right, they may be violating the Constitution by usurping the authority of the people and their elected representatives in Congress and the state legislatures. In the case of marriage, the Constitution empowers the people of future generations to make the necessary judgment calls through the political process. In *Obergefell*, the Court usurped that role by imposing a decision in a contest between two reasonable policy views on which the Constitution is silent.

21. *Id.*

22. *Id.* at 2598.

23. *Id.* at 2596.

Justice Kennedy acknowledges that all the Supreme Court's previous decisions about the right to marry "presumed a relationship involving opposite-sex partners."²⁴ But now, he writes, the Court sees that this presumption was wrong, and the majority opinion identifies four principles that "demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."²⁵ Let us examine those four principles.

First, "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."²⁶ This is because "two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation."²⁷ We might ask why this is not also true for all persons, whatever their *number*. Justice Kennedy does not explain why two but not three or four "persons together can find other freedoms." We might also wonder how "autonomy" gives rise to a right to government recognition.

Second, "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."²⁸ (Again, why just two?) Here Justice Kennedy is describing, nearly verbatim, the view of marriage as an intense emotional union that I will discuss later in this Article. "Marriage," he writes, "responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other."²⁹ It is all about consenting adult romance and care. Marriage is merely, on Justice Kennedy's account, legally recognized companionship. The principle that marriage is the only relationship that ultimately matters is particularly harmful because it implies that other relationships are necessarily less important. It would condemn the unmarried, whatever their sexual orientation, "to live in loneliness."³⁰ The idea

24. *Id.* at 2598.

25. *Id.* at 2599.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 2600.

30. *Id.* at 2608.

that people are condemned to live in loneliness unless marriage is redefined is outrageous.

Third, marriage “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”³¹ Same-sex couples, then, have “rights of childrearing, procreation, and education.”³² These rights entail a right to marriage since, as a prior decision held, “the right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.”³³ Here Justice Kennedy discusses children reared by same-sex couples without once acknowledging that some might want a mother and a father.³⁴ He asserts an adult’s right to have children but says nothing about a child’s right to a mother and a father.

“Fourth and finally, this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order.”³⁵ Well, yes, marriage, a union of man and woman, husband and wife, father and mother, is a keystone of our social order *precisely because* of its procreative character, which same-sex couples lack. So this is actually a point *against* Justice Kennedy’s view. He asserts without argument that “[t]here is no difference between same- and opposite-sex couples with respect to this principle.”³⁶ As he writes, “[s]ame-sex couples, too,

31. *Id.* at 2600.

32. *Id.*

33. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

34. *See, e.g.*, Brief of Robert Oscar Lopez and B. N. Klein as Amici Curiae in Support of Respondents at 7, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556); Robert Oscar Lopez, *Growing Up with Two Moms: The Untold Children’s View*, PUB. DISCOURSE (Aug. 2012), <http://www.thepublicdiscourse.com/2012/08/6065> [https://perma.cc/WFY3-L8Q5]; Katy Faust, *Dear Justice Kennedy: An Open Letter from the Child of a Loving Gay Parent*, PUB. DISCOURSE (Feb. 2, 2015), <http://www.thepublicdiscourse.com/2015/02/14370> [https://perma.cc/J8TZ-SBXL]; Heather Barwick, *Dear Gay Community: Your Kids Are Hurting*, FEDERALIST (Mar. 17, 2015), <http://www.thefederalist.com/2015/03/17/dear-gay-community-your-kids-are-hurting> [https://perma.cc/JAA3-UBEL]; Doug Mainwaring, *I’m Gay and I Oppose Same-Sex Marriage*, PUB. DISCOURSE (Mar. 8, 2013), <http://www.thepublicdiscourse.com/2013/03/9432> [https://perma.cc/F6EF-528U]; Doug Mainwaring, *Nature vs. Synthetics: What’s at Stake in the Dolce and Gabbana Controversy*, PUB. DISCOURSE (Mar. 19, 2015), <http://www.thepublicdiscourse.com/2015/03/14663> [https://perma.cc/5R9X-TTHQ].

35. *Obergefell*, 135 S. Ct. at 2601.

36. *Id.*

may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning."³⁷ Unless, of course, those purposes and that meaning have something to do with uniting as one flesh, comprehensively, in the sort of bond apt for generating new human beings and binding them to their mothers and fathers. Remarkably, Justice Kennedy not once seriously engages with *that* argument. I develop it later in this Article.

The opinion concludes, almost as an afterthought, that the right to government recognition of same-sex marriages is derived not only from the Fourteenth Amendment's Due Process Clause but from its Equal Protection Clause as well. The reasoning here is even cloudier. "The Due Process Clause and the Equal Protection Clause are connected in a profound way," writes Justice Kennedy, and in "any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right."³⁸ He concludes that "[t]his interrelation of the two principles furthers our understanding of what freedom is and must become. The Court's cases touching upon the right to marry reflect this dynamic."³⁹ This passage, devoid of any legal argument, is as clear an instance of the Court's legislating from the bench as you will find.

Apparently to buttress his opinion, Justice Kennedy cites ways in which the social practice and legal regulation of marriage have changed over time. He mentions the doctrine of coverture, which treated "a married man and woman . . . as a single, male-dominated legal entity,"⁴⁰ bans on interracial marriage, and legal barriers to marriage for persons who owed child support or were in prison.⁴¹ What he fails to acknowledge is that none of these practices or regulations redefined *what marriage is*: a comprehensive union of sexually complementary spouses. The Court's majority never addresses arguments of the sort presented in *What Is Marriage?*,⁴² even though many

37. *Id.* at 2602.

38. *Id.* at 2603.

39. *Id.*

40. *Id.* at 2596.

41. *Id.* at 2598–99.

42. See GIRGIS, ANDERSON, & GEORGE, *supra* note 4.

amici curiae presented such arguments and some dissenting Justices deployed them.⁴³

The only argument of the states that Justice Kennedy addresses—quite briefly—is that redefining marriage will change the institution for everyone in ways that could lead to a decrease in the marriage rate. He first misstates this argument (“an opposite-sex couple [might] choose not to marry simply because same-sex couples may do so”) and then dismisses it as resting on a “counterintuitive view of opposite-sex couple’s decisionmaking processes regarding marriage and parenthood.”⁴⁴

The *actual* argument (as opposed to the straw man that Justice Kennedy sets up) is that legally redefining marriage changes its social meaning for everyone in a way that will shape people’s behavior over time. The recognition of same-sex marriage, the Court says, involves “only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.”⁴⁵ But that is *precisely* what the debate is all about: whether redefining marriage causes harm. Justice Kennedy merely assumes his answer to the question and declares victory, offering no evidence or argument.

II. THE DISSENTS

The Court’s most basic error is its failure to interpret and apply the Constitution to the case at hand. It simply offers philosophizing about what marriage should be and what freedom “must become.”⁴⁶ Chief Justice John Roberts opens his dissenting opinion by noting that the Supreme Court “is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be.”⁴⁷ As Chief Justice Roberts notes later in his opinion, “There is, after all, no ‘Companionship and Understanding’ or ‘Nobility and Dignity’

43. Justice Thomas, for example, cited my amicus brief in his dissent. See *Obergefell*, 135 S.Ct. at 2636 n.5 (Thomas, J., dissenting).

44. *Id.* at 2607 (majority opinion).

45. *Id.*

46. *Id.* at 2603.

47. *Id.* at 2611 (Roberts, C.J., dissenting).

Clause in the Constitution."⁴⁸ How did the Court get it so wrong? The Chief Justice explains:

Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.⁴⁹

He continues, "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."⁵⁰ Assuming the powers of a legislature, the majority has acted "on its desire to remake society according to its own 'new insight' into the 'nature of injustice.'"⁵¹ Chief Justice Roberts criticizes the majority for its lack of judicial humility:

[T]he 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?⁵²

Justice Antonin Scalia makes a similar point:

Hubris is sometimes defined as o'erweening pride; and pride, we know, goeth before a fall. The Judiciary is the "least dangerous" of the federal branches because it has "neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm" and the States, "even for the efficacy of its judgments." With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the "reasoned judgment" of a

48. *Id.* at 2616.

49. *Id.* at 2611.

50. *Id.* at 2612.

51. *Id.*

52. *Id.*

bare majority of this Court—we move one step closer to being reminded of our impotence.⁵³

Chief Justice Roberts also faults the majority for its sloppy use of history. Justice Kennedy's opinion, as we have seen, recites a list of marriage laws that have changed with the times. These changes did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. If you had asked a person on the street how marriage was defined, no one would ever have said, "Marriage is the union of a man and a woman, where the woman is subject to coverture." The majority may be right that the "history of marriage is one of both continuity and change," but the core meaning of marriage has endured.⁵⁴ The Chief Justice continues:

In *Loving* [*v. Virginia*, 388 U.S. 1 (1967)], the Court held that racial restrictions on the right to marry lacked a compelling justification. In *Zablocki* [*v. Redhail*, 434 U.S. 374 (1978)], restrictions based on child support debts did not suffice. In *Turner* [*v. Safley*, 482 U.S. 78 (1987)], restrictions based on status as a prisoner were deemed impermissible.

None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman. The laws challenged in *Zablocki* and *Turner* did not define marriage as "the union of a man and a woman, where neither party owes child support or is in prison." Nor did the interracial marriage ban at issue in *Loving* define marriage as "the union of a man and a woman of the same race." . . . Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was. As the majority admits, the institution of "marriage" discussed in every one of these cases "presumed a relationship involving opposite-sex partners."⁵⁵

The problem with the analogy to interracial marriage is that it assumes what is in dispute: that sex is as irrelevant to marriage as race is. It is clear by any reasonable standard, and so, the Court was right to hold, that race has nothing to do with marriage. Racist laws kept the races apart to keep whites at the top. As I argue

53. *Id.* at 2631 (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 78, at 522, 523 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961)) (citation omitted).

54. *Id.* at 2614–15 (Roberts, C.J., dissenting).

55. *Id.* at 2619.

later in this Article, marriage has everything to do with men and women, husbands and wives, mothers, fathers, and their children, and that is why principle-based policy has defined marriage as the union of one man and one woman.

Marriage can and should be color-blind, but it cannot be blind with regard to the two sexes. The color of two people's skin has nothing to do with whether they can unite in the sort of comprehensive union naturally oriented to family life, in which the lovemaking act is also a life-giving act—the kind of union that demands permanence and exclusivity. Race has nothing to do with whether they can give any children born of their union the love and knowledge of their own mother and father. Race has nothing to do with society's orderly reproduction, which the Court's preceding cases recognize as central to the fundamental right to marry. The sexual difference between a man and a woman, however, is central to each of these concerns. Men and women, regardless of their race, can unite in marriage, and children, regardless of their race, need their mom and dad.⁵⁶ Chief Justice Roberts was therefore right to conclude:

In short, the “right to marry” cases stand for the important but limited proposition that particular restrictions on access to marriage *as traditionally defined* violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here.⁵⁷

Justice Kennedy's “four principles of due process” jurisprudence, then, is nonsense:

Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law.⁵⁸

Indeed, this freewheeling due process jurisprudence, the chief justice points out, was first deployed by the Supreme

56. *Cf. supra* note 34.

57. *Id.*

58. *Id.* at 2616.

Court in *Dred Scott v. Sandford*,⁵⁹ in which “the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court relied on its own conception of liberty and property in doing so.”⁶⁰ Fifty years later the Court again gave free rein to its own conception of liberty and property in *Lochner v. New York*,⁶¹ in which it “struck down a New York law setting maximum hours for bakery employees, because there was ‘in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law.’”⁶² Chief Justice Roberts quotes Justice Oliver Wendell Holmes Jr.’s dissent: “‘The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics,’ a leading work on the philosophy of Social Darwinism.”⁶³ Nor does the Fourteenth Amendment enact Andrew Sullivan’s vision of marriage.⁶⁴

After a few decades of legislating from the bench, Chief Justice Roberts explains, the Court eventually recognized its error and vowed not to repeat it. “‘The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely,’ we later explained, ‘has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.’”⁶⁵ Until *Obergefell*, that is.

As for the supposed “synergy” between the Due Process Clause and the Equal Protection Clause to which the majority appeals, Chief Justice Roberts simply observes that “the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position.”⁶⁶ Think of a student who cannot find good support

59. 60 U.S. 393 (1857).

60. *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting).

61. 198 U.S. 45 (1905).

62. *Obergefell*, 135 S. Ct. at 2617 (Roberts, C.J., dissenting) (quoting *Lochner*, 198 U.S. at 72).

63. *Id.* (quoting *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting)).

64. See, e.g., ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* (1996).

65. *Obergefell*, 135 S. Ct. at 2617 (Roberts, C.J., dissenting) (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963)).

66. *Id.* at 2623.

for a claim in a term paper and so adds dozens of tangential references, as if many weak arguments somehow combine to yield a strong one. "In any event," the Chief Justice writes, "the marriage laws at issue here do not violate the Equal Protection Clause, because," and here he quotes Justice Sandra Day O'Connor, "distinguishing between opposite-sex and same-sex couples is rationally related to the States' 'legitimate state interest' in 'preserving the traditional institution of marriage.'"⁶⁷

So nothing in the Fourteenth Amendment, nothing in the Due Process Clause or the Equal Protection Clause, authorized five unelected judges to redefine marriage for the nation. As Justice Scalia puts it: "We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification."⁶⁸ Yet the majority somehow "discovered in the Fourteenth Amendment a 'fundamental right' overlooked by every person alive at the time of ratification, and almost everyone else in the time since."⁶⁹

III. WHAT THE DISSENTING JUSTICES HAD TO SAY ABOUT THE HARMS THIS RULING WOULD CAUSE

The dissenting Justices in *Obergefell* point out four ways in which *Obergefell* will likely harm the body politic: it will harm constitutional democratic self-government, it will harm civil harmony, it will harm marriage itself, and it will harm religious liberty. I discuss the harm to marriage and religious liberty later in this Article, so here I focus on the first two.

A. Harm to Constitutional Democratic Self-Government

The ruling has already harmed constitutional democratic self-government and will continue to do so. In his dissent Justice Scalia says that it is not important to him what marriage policy a state adopts. "It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Rul-

67. *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring in judgment)).

68. *Id.* at 2628 (Scalia, J., dissenting).

69. *Id.* at 2629.

er, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court."⁷⁰ Constitutional democratic self-government is vitally important; indeed it is our first political right. Scalia continues: "This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves."⁷¹

Of course, democratic self-government is not unlimited. That is why I have referred to *constitutional* democratic self-government. For we the people placed limits on the authority we delegated to the political branches of government. That is what a constitution is all about. Justice Scalia therefore notes that the "Constitution places some constraints on self-rule—constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments."⁷² But apart from the limits we the people placed on ourselves, "those powers 'reserved to the States respectively, or to the people' can be exercised as the States or the People desire."⁷³ So the question before the Court was "whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove *that* issue from the political process?"⁷⁴ Justice Scalia's response: "Of course not."⁷⁵ And that is why this decision involved judicial activism, a harm to self-government.

He concludes, "This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy."⁷⁶ Chief Justice Roberts is likewise dismayed by the Court's arrogance:

70. *Id.* at 2627.

71. *Id.*

72. *Id.* (emphasis in original).

73. *Id.* (quoting U.S. CONST. amend. X).

74. *Id.*

75. *Id.*

76. *Id.* at 2629.

The role of the Court envisioned by the majority today, however, is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. In the majority's telling, it is the courts, not the people, who are responsible for making "new dimensions of freedom . . . apparent to new generations," for providing "formal discourse" on social issues, and for ensuring "neutral discussions, without scornful or disparaging commentary."⁷⁷

The Court's super-legislative power should trouble anyone concerned with *representative* government, because it is not representative of the American people. Justice Scalia notes that the Supreme Court "consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School."⁷⁸ Besides their elite professional training, he observes:

Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans), or even a Protestant of any denomination. The strikingly unrepresentative character of the body voting on today's social upheaval would be irrelevant if they were functioning as *judges*, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; *they say they are not*. And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.⁷⁹

No social transformation without representation: our constitutional democracy in a nutshell.

77. *Id.* at 2624 (Roberts, C.J., dissenting) (quoting *id.* at 2596–97 (majority opinion)).

78. *Id.* at 2629 (Scalia, J., dissenting) (citation omitted).

79. *Id.* (citation omitted).

B. *Harm to Civil Harmony*

The ruling will also undermine civil harmony. Fundamental policy changes imposed by judicial rulings with no basis in the Constitution are harder for people to accept. Justice Scalia notes that American self-government was working:

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to. Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work.⁸⁰

But the Court, observes Chief Justice Roberts, has now put an end to all of that:

Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.⁸¹

The Court, writes the Chief Justice:

[S]eizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own “understanding of what freedom is and must become.”⁸²

This will make the redefinition of marriage more contested in the United States. He elaborates:

80. *Id.* at 2627 (citation omitted).

81. *Id.* at 2611–2 (Roberts, C.J., dissenting).

82. *Id.* at 2612 (quoting *id.* at 2603 (majority opinion)).

The Court's accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it. Here and abroad, people are in the midst of a serious and thoughtful public debate on the issue of same-sex marriage This deliberative process is making people take seriously questions that they may not have even regarded as questions before.

When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate. . . .

But today the Court puts a stop to all that.⁸³

The Court had no reason or basis in the Constitution to short-circuit the democratic process, no reason to end the national discussion we were having about the future of marriage. Chief Justice Roberts continues:

There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide.⁸⁴

The Chief Justice quotes from a law review article by Justice Ruth Bader Ginsburg, who joined the majority opinion, in which she assesses the damage *Roe v. Wade*⁸⁵ did to civil harmony: "The political process was moving . . . , not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict."⁸⁶ *Obergefell* has now provoked conflict rather than resolved it.

83. *Id.* at 2625 (Roberts, C.J., dissenting).

84. *Id.*

85. 410 U.S. 113 (1973).

86. *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting) (quoting Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385–86 (1985)).

C. *Two Views of Marriage*

But were there ever any reasonable grounds for this debate in the first place? Harms to constitutional democratic self-government and civil harmony may be worth the cost if the opposing side was simply entrenched in bigotry. Indeed, if there simply was no rational basis to conjugal marriage laws at all, the way there was no rational basis to bans in interracial marriage, then a good argument could be made that courts striking them down would not even inflict any harms, for it does not harm constitutional self-government to strike down unconstitutional laws. All of this turns on the nature of the marriage debate, which, as we saw earlier, turns not on “equality” but on the nature of marriage.

Justice Kennedy’s working theory of the nature of marriage has been called the “consent-based” view of marriage.⁸⁷ The consent-based view of marriage is primarily about an intense emotional union: a romantic, caregiving union of consenting adults. It is what the John Corvino and Maggie Gallagher describes as the relationship that establishes your “number one person.”⁸⁸ What sets marriage apart from other relationships is the priority of the relationship. It is your most important relationship; the most intense emotional, romantic union; the caregiving relationship that takes priority over all others. Andrew Sullivan says that marriage has become “primarily a way in which two adults affirm their emotional commitment to one another.”⁸⁹ This vision of what marriage is does all of the work in Justice Kennedy’s majority opinion in *Obergefell*.

In *What Is Marriage?*, my coauthors and I argue that this view collapses marriage into companionship in general.⁹⁰ Rather than understanding marriage correctly as *different in kind* from other relationships, the consent-based view sees in it only a *difference of degree*: marriage has what all other relationships have, but more of it. This, we argue, gets marriage wrong. It cannot explain or justify any of the distinctive commitments that mar-

87. See, e.g., GIRGIS, ANDERSON, & GEORGE, *supra* note 4, at 15.

88. JOHN CORVINO & MAGGIE GALLAGHER, *DEBATING SAME-SEX MARRIAGE* 15 (2012).

89. Andrew Sullivan, *Introduction*, in *SAME-SEX MARRIAGE: PRO AND CON: A READER*, at xvii, xix (Andrew Sullivan ed., 1997).

90. GIRGIS, ANDERSON & GEORGE, *supra* note 4, at 15.

riage requires—monogamy, exclusivity, and permanence—nor can it explain what interest the government has in it.

If marriage is simply about consenting adult romance and caregiving, why should it be permanent? Emotions come and go; love waxes and wanes. Why would such a bond require a pledge of permanency? Might not someone find that the romance and caregiving of marriage are enhanced by a temporary commitment, in which no one is under a life sentence?

In fact, if marriage is simply about consenting adult romance and caregiving, why should it be a sexually exclusive union? Sure, some people might prefer to sleep only with their spouse, but others might think that agreeing to have extramarital sexual outlets would actually *enhance* their marriage. Why impose the expectation of sexual fidelity?

Lastly, if marriage is simply about consenting adult romance and caregiving, why can't three, four, or more people form a marriage? There is nothing about intense emotional unions that limits them to two and only two people. Threesomes and four-somes can form an intense emotional, romantic, caregiving relationship as easily as a couple. Nothing in principle requires monogamy. Polyamory seems perfectly compatible with the consent-based view of marriage.

The consent-based view of *what marriage is* fails as a theory of marriage because it cannot explain any of the historical marital norms. A couple informed by the consent-based view might live out these norms if temperament or taste so moved them, but there would be no reason of principle for them to do so and no basis for the law to encourage them to do so. Marriage can come in as many different sizes and shapes as consenting adults can dream up. Love equals love, after all. And why, in any case, should the government have any involvement in this kind of marriage? If marriage is just about the love lives of consenting adults, let us get the state out of their bedrooms. And yet those who would redefine marriage want to put the government into more bedrooms.

There is nothing "homosexual," "gay," or "lesbian," of course, about the consent-based view of marriage. Many heterosexuals have bought into it over the past fifty years. This is the vision of marriage that came out of the sexual revolution. Long before there was a debate about same-sex anything, heterosexuals bought into a liberal ideology about sexuality that makes a mess of marriage.

Cohabitation, no-fault divorce, extramarital sex, non-marital childbearing, pornography, and the hook-up culture all contributed to the breakdown of the marriage culture. The push for the legal redefinition of marriage did not cause these problems. It is, rather, their logical conclusion. The problem is that it is the logical conclusion of a bad train of logic.

If the sexual habits of the past fifty years have been good for society, good for women, good for children, then by all means it's reasonable to enshrine the consent-based view of marriage in law. But if the past fifty years have not been so good for society, for women, for children, indeed, if they have been, for many people, a disaster, then why would we lock in a view of marriage that will make it more difficult to recover a more humane vision of human sexuality and family life?

The law cannot be neutral between the consent-based and conjugal views of marriage. It will enshrine one view or the other. It will either teach that marriage is about consenting adult love of whatever size or shape the adults choose, or it will teach that marriage is a comprehensive union of sexually complementary spouses who live by the norms of monogamy, exclusivity, and permanency, so that children can be raised by their mom and dad. There is no third option. There is no neutral position. The law will embrace one or the other.

IV. THE COMPREHENSIVE VIEW OF MARRIAGE

So, is there a rational basis to the conjugal view of marriage? My analysis of marriage utilizes a generally Aristotelian methodology that can be used to analyze any type of community.⁹¹ We can understand any community by analyzing three factors: the actions that the community engages in, the goods that the community seeks, and the norms of commitment that shape that community's common life. To illustrate how this method of analysis works, consider an uncontroversial example: the academic community of a university.

91. Cf. Aristotle, *The Politics* §§ 1254a1–1254a7, at 54 (T.A. Sinclair, trans., Penguin Books 1992) (350 B.C.E.).

A. *An Academic Community*

What makes a university an *academic* community rather than a big business or a sports franchise, even though most universities engage in both business and athletics on a large scale? Following the Aristotelian methodology, I argue that a university is an academic community because of the academic actions in which it engages, the academic goods it seeks, and the academic norms by which it lives.

Members of an academic community engage in academic action. What sorts of things are academic actions? Professors research and write academic articles and books and assign students to read them. They deliver lectures, which students attend and on which they take notes. Students take exams and write papers, and professors grade and discuss them with students. These are the sorts of activities that constitute an academic community *as* an academic community. Annual giving campaigns and football games are nice additions, but they don't go to the heart of what makes a university a university. These academic activities are the heart of a university (or at least they should be).

Now what are these academic activities ultimately seeking? What are the goods toward which they are oriented? They are oriented toward the goods of truth and knowledge. All of the exercises that professors make students perform, the homework, the term papers, the research projects, and all of the work that they themselves do, writing those books and papers and delivering those lectures, are all about eliminating ignorance from our lives and coming to a better appropriation of the truth. Academic actions are not supposed to be exercises in propaganda or defenses of prejudices. They are about discovering the truth so we do not live in ignorance or as slaves to prejudice. Academic actions are oriented toward academic goods, the goods of knowledge and of the truth.

So what norms do such actions in pursuit of such goods require of an academic community? This is where all the commitment to academic integrity, academic freedom, and academic honor codes comes into play. Students should not plagiarize, researchers should cite all of their sources, scientists should assess all of the data, not just those that support their hypothesis. If one researcher finds weaknesses in another's study, the latter should not view it as an attack but as assistance in the common pursuit of truth. When a professor cri-

tiques a student's paper, the student should not view it as an insult but as help in his understanding the truth.

There are three easy steps. Academic actions (research, reading, writing, discussion) are ordered toward academic goods (knowledge of the truth and elimination of ignorance) and thus demand academic norms (academic honesty, academic freedom, academic honor codes) so the community can fulfill its purpose: the discovery of truth.

B. *The Marital Community*

We can understand the marital relationship in the same way. What makes marriage different from other forms of community, like a football team, say, or a university? In every aspect, marriage is a *comprehensive* relationship. It is comprehensive in the act that uniquely unites the spouses, in the goods that the spouses are ordered toward, and in the norms of commitment that it requires from them.

Marriage unites spouses in a comprehensive act: marital sexual intercourse is a union of hearts, minds, and bodies. Marriage, like the marital act that seals it, is inherently ordered toward a comprehensive good, the creation and rearing of entirely new human organisms, who are to be raised to participate in every kind of human good. And finally, marriage demands comprehensive norms: spouses make the comprehensive commitments of permanency and exclusivity, comprehensive throughout time (permanent) and at every moment in time (exclusive).

If that sounds abstract, let us move in for a closer look. First, the comprehensive act. How can two persons unite comprehensively? To unite comprehensively, they must unite at all levels of their personhood. But what is a person? Human beings are mind-body unities. We are not ghosts in machines or souls that are somehow inhabiting flesh and bones. Rather, we are en fleshed souls or ensouled bodies: a mind-body unity.⁹² Thus, to unite with someone in a comprehensive way, one must unite with him at all levels of his personhood: a union of hearts, minds, and bodies.

92. See generally PATRICK LEE & ROBERT P. GEORGE, BODY-SELF DUALISM IN CONTEMPORARY ETHICS AND POLITICS (2009).

Ordinary friendships are unions of hearts and minds. Uniting bodily is not a part of the typical understanding of friendship. But bodily union is part of what it means to be in a spousal relationship. This, of course, raises the question: How can two human beings unite bodily? To answer this, we need to understand what makes any *individual* one body.

What is it that makes each one of us a unified organism? Why are we not just clumps of cells? The answer is that all of our various bodily systems and parts work together for the common good of our biological lives. Your heart, lungs, kidneys, and muscles and all the other organs and tissues coordinate to keep you alive. Coordination toward a common end explains unity, in this case bodily unity of an individual.

And in most respects you are complete as an individual. With respect to locomotion, you can set this Article down, get up, and walk into the kitchen for a bite to eat. With respect to digestion, you can digest that bite all by yourself. With respect to circulation and respiration, you can breathe and pump oxygenated blood throughout your body as an individual. In all of these functions, you are complete.

Yet with respect to one biological function, you are radically incomplete. In the marital act, a man's body and a woman's body do not just make contact as in a kiss or interlock as when holding hands. The Hebrew Bible reveals something true about our humanity when it says that a man and a woman in the marital act become "one flesh."⁹³ This is not merely a figure of speech. The Bible does not say the husband and wife are so much in love it is *as if* the two become one. The Scriptures rightly suggest that at the physical and metaphysical level, a man and a woman truly become two in one *flesh*. The sexual complementarity of a man and a woman allows them to unite in this comprehensive way.

In the marital act, the husband and wife engage in a single act with a single function: coordination toward a common end unites them. They form a single organism as a mated pair with a single biological purpose, which the couple performs together as a unity. Note the parallel. The muscles, heart, lungs, stomach, and intestines of an individual human body cooper-

93. *Genesis*, 2:24 (NIV).

ate with each other toward a single biological end: the continued life of that body. In the same way, a man and a woman, when they unite in the marital act, cooperate toward a single biological end: procreation. This is true regardless of whether any particular marital act results in the fusion of a sperm with an egg. What matters is the voluntary behavior in which the spouses engage. That is what unites them.

And the union that this act brings about is so complete that frequently, nine months later, it requires a name. The lovemaking act is also the life-giving act. The act that unites a man and a woman as husband and wife is the same act that can make them mother and father. This begins to tell us something about toward what the marital relationship is ordered.

In the same way that academic communities engage in academic actions that are ordered toward the academic goods of the pursuit of truth and knowledge, the marital relationship is (like the act that embodies it) ordered toward the marital good of procreation and rearing and education of children. The good toward which the marital act is ordered is not a one-time good like winning the next football game or passing the next test. The marital act is comprehensive. It unites the spouses in heart, mind, and body, and is thus oriented toward a comprehensive good, the procreation and education of new persons who can appreciate human goodness in all its dimensions. Marriage is unlike any other community in being comprehensive.

Now it should be clear why marriage requires the comprehensive commitments of both exclusivity and permanency. Let us start with exclusivity. What sort of exclusivity does marriage call for? *Sexual* exclusivity. You do not cheat on your spouse by attending a lecture with someone else. You do not cheat on your spouse by playing football with someone else. But you do cheat on your spouse if you sleep with someone else. It is the sexual act that transforms an ordinary friendship, a union of hearts and minds, into the comprehensive community of marriage, and so the marital norm of exclusivity focuses on sexual fidelity. The act that is distinctive to marriage, which we therefore call the "marital act," must be reserved exclusively for the spouses. To unite comprehensively with your spouse requires that you pledge not to unite sexually with others. It requires you, in the words of the traditional marriage vow, to forsake all others.

Something similar is true for the other comprehensive commitment of marriage. Because marriage is a comprehensive union, it requires the comprehensive commitment of permanency. To unite comprehensively, spouses cannot hold anything back. If they have a sunset clause, if they have an escape date, if they have a way out, then they are not really uniting comprehensively. Comprehensive union requires an open-ended commitment. So marriage requires “forsaking all others” not only for the time being but also into the future: “till death do us part.” Ordered toward the comprehensive good of procreation, marriage must be permanent. The families that marriage produces—not only parents and children but also grandparents, nieces and nephews, aunts, uncles, and cousins—will be stable only if the marital union itself is stable. Again, the comprehensive nature of marriage explains its comprehensive act, good, and norms.

C. *The Comprehensive View of Marriage Is Based on Human Nature, Not Anti-Gay Animosity*

Many diverse political, philosophical, and theological traditions, each with its own vocabulary and with differences around the margins, have articulated something like the comprehensive view of marriage. They have arrived at this truth by grappling with basic human realities, not out of animosity toward same-sex relationships. Indeed, cultures that had no concept of “sexual orientation” and cultures that took homoeroticism for granted have understood that the union of husband and wife is a distinct and uniquely important relationship. Citing the historical consensus, Justice Alito asked during oral arguments:

[H]ow do you account for the fact that, as far as I’m aware, until the end of the twentieth century, there never was a nation or a culture that recognized marriage between two people of the same sex? Now, can we infer from that that those nations and those cultures all thought that there was some rational, practical purpose for defining marriage in that way, or is it your argument that they were all operating independently based solely on irrational stereotypes and prejudice?⁹⁴

Support for marriage as the union of a man and a woman cannot simply be the result of anti-gay animus, Justice Alito

94. Obergefell Argument Transcript, *supra* note 10, at 9.

pointed out, because “there have been cultures that did not frown on homosexuality. . . . Ancient Greece is an example. It was well accepted within certain bounds.”⁹⁵ The Justice added that “people like Plato wrote in favor of that.”⁹⁶ And yet, the ancient Greeks, including Plato, never thought a same-sex relationship was a marriage.

As Chief Justice John Roberts explained in his dissenting opinion in *Obergefell*, marriage as the union of husband and wife is about serving the common good, not excluding anyone:

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbians. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship.⁹⁷

Defying the universal consensus about marriage requires breathtaking presumption. Whatever arguments there may be in favor of doing so, that consensus cannot be dismissed as a relic of irrational animus against men and women attracted to members of their own sex.

V. WHY MARRIAGE MATTERS FOR PUBLIC POLICY

I have argued so far that marriage, properly understood, is a comprehensive union, that it unites a man and a woman in a comprehensive act, ordered toward the comprehensive good of procreating and raising new life in a family, and requiring of them a comprehensive—that is, exclusive and permanent—bond. But even if this is the philosophical truth about marriage, why does it matter? Why should anyone care? More specifically, why should the *state* care?

Virtually every political community has regulated male-female sexual relationships. This is not because government is a sucker for romance. If marriage were just about consenting

95. *Id.* at 14.

96. *Id.*

97. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2613 (2015) (Roberts, C.J., dissenting).

adult love, the state would not be in the marriage business. Government recognizes male-female sexual relationships because these alone produce new human beings. For highly dependent infants, there is no path to physical, moral, and cultural maturity, no path to personal responsibility, without a long and delicate process of ongoing care and supervision to which mothers and fathers bring unique gifts. Unless children mature, they never will become healthy, upright, productive members of society. Marriage exists to make men and women responsible to each other and to any children that they might have.

Marriage is society's least restrictive means of ensuring the well-being of children. Government recognition of marriage protects children by encouraging men and women to commit themselves to each other and to take responsibility for their children. From a public policy perspective, marriage is about uniting a man and a woman with each other as husband and wife to be father and mother to any children their sexual union produces. Marriage is based on the anthropological truth that men and women are complementary, the biological fact that reproduction depends on a man and a woman, and the social reality that children deserve a mother and a father.

Whenever a baby is born, there is always a mother nearby. That is a fact of biology. The question is whether a father will be close by and, if so, for how long. Marriage increases the odds that the father of a child will be committed to the child's mother and that the two of them, committed to each other, will be committed to their child. It connects persons and goods that otherwise tend to fragment. As the late sociologist James Q. Wilson put it: "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve."⁹⁸

Connecting sex, babies, and moms and dads is the irreplaceable social function of marriage. Laws and social expectations can strengthen or weaken marriage in this role, and that is why the government is rightly involved in this aspect of our lives. Maggie Gallagher develops this idea:

98. JAMES Q. WILSON, *THE MARRIAGE PROBLEM* 41 (2002).

The critical public or “civil” task of marriage is to regulate sexual relationships between men and women in order to reduce the likelihood that children (and their mothers, and society) will face the burdens of fatherlessness, and increase the likelihood that there will be a next generation that will be raised by their mothers and fathers in one family, where both parents are committed to each other and to their children.⁹⁹

As strong as the government’s interest is in the marriages of its citizens, however, it is important to remember that the government does not *create* marriage, it *recognizes* marriage. Marriage is a natural institution that predates government.¹⁰⁰ Society as a whole, not merely any given set of spouses, benefits from marriage. This is because marriage helps to channel procreative love into a stable institution that provides for the orderly bearing and rearing of the next generation.

The complementarity that defines marriage as the union of a man and a woman is crucial as well for the raising of children. There is no such thing as “parenting.” There is mothering, and there is fathering,¹⁰¹ and children do best with both.¹⁰² It does not detract from the many mothers and fathers who have of necessity raised children alone, and done so successfully, to insist that mothers and fathers bring distinct strengths to the task.

In a summary of the “best psychological, sociological, and biological research to date,” W. Bradford Wilcox, a sociologist at the University of Virginia, finds that “men and women bring different gifts to the parenting enterprise, that children benefit from having parents with distinct parenting styles, and that family breakdown poses a serious threat to children and to the societies in which they live.”¹⁰³ Wilcox finds that “most fathers and mothers possess sex-specific talents related to parenting, and societies should organize parenting and work roles to take

99. CORVINO & GALLAGHER, *supra* note 88, at 96.

100. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2613 (2015) (Roberts, C.J., dissenting); *cf. id.* at 2594 (majority opinion) (“[T]he institution has existed for millennia . . .”).

101. W. Bradford Wilcox, *Reconcilable Differences: What Social Sciences Show about the Complementarity of the Sexes and Parenting*, TOUCHSTONE, Nov. 2005, at 32, 36.

102. DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY 146 (1996).

103. Wilcox, *supra* note 101, at 36.

advantage of the way in which these talents tend to be distributed in sex-specific ways.”¹⁰⁴

Dads play important roles in the formation of both their sons and their daughters. As the sociologist David Popenoe of Rutgers University explains, “The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable.”¹⁰⁵ Popenoe concludes:

We should disavow the notion that “mommies can make good daddies,” just as we should disavow the popular notion . . . that “daddies can make good mommies.” . . . The two sexes are different to the core, and each is necessary—culturally and biologically—for the optimal development of a human being.¹⁰⁶

I discuss at great length the sociology of parenting in general, the unique contributions of mothers and fathers, and the recent literature on same-sex parenting in particular in my recent book *Truth Overruled*.¹⁰⁷ The social scientific evidence of the importance of fathers is so compelling that even President Barack Obama refers to it as a truism:

We know the statistics—that children who grow up without a father are five times more likely to live in poverty and commit crime; nine times more likely to drop out of schools and twenty times more likely to end up in prison. They are more likely to have behavioral problems, or run away from home, or become teenage parents themselves. And the foundations of our community are weaker because of it.¹⁰⁸

Fathers matter, and marriage helps to connect fathers to mothers and children. Citing President Obama is an opportunity to point out that a child who grows up without a married mom and dad can defy the odds. President Obama is a tre-

104. *Id.*

105. POPENOE, *supra* note 102, at 146.

106. *Id.* at 197; *see also* Wilcox, *supra* note 101, at 36.

107. RYAN T. ANDERSON, *TRUTH OVERRULED: THE FUTURE OF MARRIAGE AND RELIGIOUS FREEDOM* 26–31, 147–62 (2015).

108. Barack Obama, Speech on Fatherhood at the Apostolic Church of God, Chicago (June 15, 2008), http://www.realclearpolitics.com/articles/2008/06/obamas_speech_on_fatherhood.html [<https://perma.cc/Y5XJ-QEX2>].

mendous example of that.¹⁰⁹ But he would be the first to acknowledge that, on average and for the most part, children who grow up without their married mother and father have a more difficult road to travel. To the all-male graduating class of the historically black Morehouse College, the president said:

I was raised by a heroic single mom But I sure wish I had had a father who was not only present, but involved. Didn't know my dad. And so my whole life, I've tried to be for Michelle and my girls what my father was not for my mother and me. I want to break that cycle.¹¹⁰

Marriage benefits everyone because separating childbearing and childrearing from marriage burdens innocent bystanders—not just children, but the whole community. When parents are unable to care for their children, someone has to step in, and that “someone” is often the state. By encouraging the marriage norms of monogamy, sexual exclusivity, and permanence, the state strengthens civil society and reduces its own role.

Marriage protects children from poverty. It increases the likelihood that they will enjoy social mobility. It steers them away from crime and relieves the state of having to pick up the pieces of their families. If you care about social justice or limited government, if you care about the poor or about freedom, you should care about a strong marriage culture. Civil recognition and support of the marriage union of a man and a woman is the most effective and least intrusive way to pursue freedom and prosperity. In *Truth Overruled*, I discuss countless studies that show how the breakdown of marriage causes harms.¹¹¹ Scholars from the Right and Left—Charles Murray's *Coming Apart*¹¹² and Robert Putnam's *Our Kids*¹¹³—agree at least on this much. The question is whether the *definition* of marriage has any role in these policy outcomes and whether the *redefinition* of marriage will exacerbate our problems.

109. See generally BARACK OBAMA, *DREAMS FROM MY FATHER* (1995).

110. President Barack Obama, Commencement Speech at Morehouse College (May 19, 2013), <http://blogs.wsj.com/washwire/2013/05/20/transcript-obamas-commencement-speech-at-morehouse-college> [<https://perma.cc/JGU7-B4GX>].

111. ANDERSON, *supra* note 107, at 24–32.

112. CHARLES MURRAY, *COMING APART* (2012).

113. ROBERT PUTNAM, *OUR KIDS* (2015).

But one thing to note before turning to the consequences of marriage's redefinition: Defining marriage as the union of a husband and a wife does not violate anyone's liberty. If the government rightly recognizes, protects, and promotes marriage as the ideal institution for childbearing and childrearing, adults remain perfectly free to make choices about their relationships. A redefinition by the state of the unique institution of marriage is not necessary for citizens to live in another relationship of their choosing. Justice Thomas devotes his entire dissenting opinion in *Obergefell* to making this point.

Justice Thomas argues that "the majority invokes our Constitution in the name of a 'liberty' that the Framers would not have recognized, to the detriment of the liberty they sought to protect."¹¹⁴ In "the American legal tradition," he writes, "liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement."¹¹⁵ And the liberty of people in same-sex relationships was not being infringed:

[T]hey have been able to cohabit and raise their children in peace. They have been able to hold civil marriage ceremonies in States that recognize same-sex marriages and private religious ceremonies in all States. They have been able to travel freely around the country, making their homes where they please. Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.¹¹⁶

Even in states that had not redefined marriage, persons were free "to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children."¹¹⁷ The government was restricting no one's liberty. But some people had a desire *for* government recognition:

Petitioners claim that as a matter of "liberty," they are entitled to access privileges and benefits that exist solely *because*

114. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2631 (2015) (Thomas, J., dissenting).

115. *Id.* at 2634.

116. *Id.* at 2635.

117. *Id.*

of the government. They want, for example, to receive the State's *imprimatur* on their marriages—on state issued marriage licenses, death certificates, or other official forms.¹¹⁸

This cannot be a “liberty” claim. As Justice Thomas argues, “[R]eceiving governmental recognition and benefits has nothing to do with any understanding of ‘liberty’ that the Framers would have recognized.”¹¹⁹

Despite the increasingly heated rhetoric from the advocates of “marriage equality,” there was no ban on same-sex marriage in the decade before *Obergefell* anywhere in the United States. In all fifty states, two persons of the same sex could live together, join a religious community that would bless their relationship, and choose from a multitude of employers that offered them the same benefits available to married couples. Chief Justice Roberts highlighted this in his dissent: “[T]he marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit.”¹²⁰ No government license or sanction was necessary for any of this.

But is not the government’s refusal to bestow the name of “marriage” on same-sex relationships demeaning to the persons in those relationships? In the *Obergefell* oral arguments, Justice Kennedy, dismissing the comprehensive view of marriage, declared that “the whole purpose of marriage” is to bestow “dignity” on a couple.¹²¹ If he were right, then withholding that “dignity” from same-sex couples would indeed be demeaning. But John Bursch, the lawyer defending the State of Michigan’s marriage laws, explained that the institution of marriage “did not develop to deny dignity or to give second class status to anyone. It developed to serve purposes that, by their nature, arise from biology.”¹²²

Perhaps the most common objection to this basic argument involves infertility. If infertile couples can marry—and no one has

118. *Id.* at 2635–36.

119. *Id.* at 2636.

120. *Id.* at 2620 (Roberts, C.J., dissenting).

121. *Obergefell* Argument Transcript, *supra* note 10, at 72.

122. *Id.* at 43.

ever denied that they can—how can the definition of marriage be linked to procreation? There are four responses to this argument.

First, as a policy matter, the state is in the business of recognizing marriage not because every marriage will produce a child but because every child has a mother and a father. Through its marriage policy, the state respects the natural bonds that unite the parents who brought a child into the world and encourages them to commit to each other permanently and exclusively. Public policy must consider the big picture, not individual cases. It is the procreative *nature* of marriage rather than the actual procreative results of individual marriages that explains government policy in this area. (And would anyone really want the government to require fertility tests or to ask couples if they intend to have children?)

Second, as a practical matter, many couples who think they are infertile end up conceiving or adopting children. Many who say they never want children change their minds. It is important to keep these men and women united with each other. Marital fidelity ensures that the fertile spouse does not procreate children with someone else, children who will be deprived of a fully committed mother and father. The fifty-year-old husband whose wife has gone through menopause will never beget children with another woman if he is faithful to his marriage vows. The state has a general interest in channeling spouses' sexual desire into marriage.

Third, as a philosophical matter, an infertile marriage is fully a marriage. A marriage is a comprehensive union marked by one-flesh union, the coordination of the spouses' two bodies toward the single biological end of reproduction. That coordination, and thus the one-flesh union, takes place *whether or not* it achieves its biological end in the fertilization of an egg by a sperm some hours later. The union, like the act that seals it, is still oriented toward family life. This explains why in common, civil, and canon law, infertility has never nullified a marriage. Impotence, by contrast, which prevents a couple from consummating their union in the one-flesh marital act, *has* been grounds for declaring that a marriage was never completed.¹²³

123. See *Latta v. Otter*, 771 F.3d 456, 494 (9th Cir. 2014) ("Nor was infertility generally recognized as a ground for divorce or annulment under the old fault-

Fourth, as a pedagogical matter, recognizing marriages in spite of infertility teaches that marriage is a comprehensive union, not merely an instrument for baby making. That teaching benefits society by encouraging genuine devotion, and hence stability, in all opposite-sex marriages. By contrast, redefining marriage to include same-sex relationships will teach that marriage (gay or straight) is an instrument for gratifying the emotions of adults. The stability that guarantees children a mom and a dad is not a component of such a union.

In sum, then, public policy is about the rule, not the exception; marital norms benefit society even when lived out by infertile couples; infertile marriages are still marriages, and state recognition of infertile marriages has the benefit of reinforcing the truth about marriage without any disadvantages.

VI. CONSEQUENCES OF REDEFINING MARRIAGE

How does same-sex marriage affect the public purpose of marriage? The first step in answering that question is to understand that the Supreme Court's ruling did not *expand* marriage; it *redefined* marriage. As Chief Justice Roberts remarked during oral arguments, "Every definition that I looked up, prior to about a dozen years ago, defined marriage as unity between a man and a woman as husband and wife."¹²⁴ So, he continued, "you're not seeking to join the institution, you're seeking to change what the institution is. The fundamental core of the institution is the opposite-sex relationship and you want to introduce into it a same-sex relationship."¹²⁵

This is not simply an opinion held by opponents of same-sex marriage. Consider these candid remarks of the writer and gay rights activist Masha Gessen from 2012:

It's a no-brainer that [same-sex couples] should have the right to marry, but I also think equally that it's a no-brainer that the institution of marriage should not exist Fighting for gay marriage generally involves lying about what we are going to do with marriage when we get there—because we

based regime, even though sexual impotence was."); Kaufman v. Kaufman, 164 F.2d 519, 519–20 (D.C. Cir. 1947).

124. Obergefell Argument Transcript, *supra* note 10, at 5.

125. *Id.* at 5–6.

lie that the institution of marriage is not going to change, and that is a lie.

The institution of marriage is going to change, and it should change. And again, I don't think it should exist. And I don't like taking part in creating fictions about my life. That's sort of not what I had in mind when I came out thirty years ago.

I have three kids who have five parents, more or less, and I don't see why they shouldn't have five parents legally . . . I met my new partner, and she had just had a baby, and that baby's biological father is my brother, and my daughter's biological father is a man who lives in Russia, and my adopted son also considers him his father. So the five parents break down into two groups of three . . . And really, I would like to live in a legal system that is capable of reflecting that reality, and I don't think that's compatible with the institution of marriage.¹²⁶

Whatever you call this series of relationships, it is not "marriage" as we have understood it until recently.

Law teaches. It shapes ideas, which shape what people do. A radical change in the law of marriage will have at least three harmful consequences that we can foresee. The needs and rights of children will be subordinated to the desires of adults. The marital norms of monogamy, exclusivity, and permanence will be weakened. And religious liberty will be threatened.

A. *Serving the Desires of Adults, Not the Needs or Rights of Children*

Now that the Court has redefined marriage to eliminate the norm of sexual complementarity, no institution in our legal and political system upholds the principle that every child deserves both a mother and a father. Redefining marriage as a genderless institution sends the signal that men and women, mothers and fathers, are interchangeable. That is a lie, but as people absorb these lies from the law, more children will be denied the benefit of their own parents' committed love for life.

126. Masha Gessen, Address at the Sydney Writers' Festival (May 18, 2012), quoted in Robert P. George, *What Few Deny Gay Marriage Will Do*, FIRST THINGS (Apr. 16, 2013), <http://www.firstthings.com/blogs/firstthoughts/2013/04/what-few-deny-gay-marriage-will-do> [<https://perma.cc/G7EZ-CLZ7>].

The consent-based view of marriage now enshrined in law teaches that marriage is more about the desires of adults than about the needs—or rights—of children. It re-centers the marital relationship on the intense emotional union of adults—their romance—rather than on the procreation of new lives and the durability of the union on which those lives depend. When fathers who have absorbed the law’s new lessons about marriage face the ordinary temptations to leave, they will be likelier to leave. That means more kids growing up without their own mother and father in a committed bond for life.

Justice Alito was the most sensitive of the dissenters to *how* the Court was presenting marriage. The Court’s argument, he observes, “is that the fundamental purpose of marriage is to promote the well-being of those who choose to marry. Marriage provides emotional fulfillment and the promise of support in times of need.”¹²⁷ As Justice Alito explains, “This understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.”¹²⁸

But obscuring the truth about marriage has consequences. Summarizing the argument of the states in defense of their historical marriage laws, Justice Alito writes that “States formalize and promote marriage, unlike other fulfilling human relationships, in order to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children.”¹²⁹ But as the expectations associated with marriage were weakened, so were the benefits that marriage provides.

Think back fifty years, to when Daniel Patrick Moynihan wrote his famous report for President Lyndon Johnson on the state of the black family.¹³⁰ Back then, Moynihan was concerned that the rate of births to single mothers was approaching 25 percent among blacks, which he warned would spell disaster

127. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2641 (2015) (Alito, J., dissenting).

128. *Id.*

129. *Id.*

130. See DANIEL PATRICK MOYNIHAN, U.S. DEP’T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965).

for that population.¹³¹ Today, 40 percent of all births in America are out of wedlock; the rate is 50 percent among Hispanics and 70 percent among blacks.¹³² These children have done nothing wrong, but their prospects in life are much bleaker than those of children born to married parents. They will bear the social costs of the breakdown of the family.

Many scholars and policymakers have concluded, unsurprisingly, that America's most pressing social problem is absentee fathers. Before he "evolved" to his present position on marriage,¹³³ President Obama was among them. But how will we insist that fathers are essential when the law has redefined marriage to make fathers optional? If the law tells a man that his presence in his child's life is entirely optional, when the going gets tough his motive for sticking around will be weaker. Laws that reflected the truth about marriage reinforced the idea that the home of a married mother and father is the most appropriate environment for rearing children. That ideal has not only been abolished but condemned as bigotry.

B. *Weakening Marital Norms*

The problem with redefining marriage is not that a few thousand additional households will get additional economic and other benefits. It is that giving them those benefits will require changing the public meaning of marriage, which will weaken its stabilizing norms. Now that the law has changed to teach that marriage is whatever consensual relationship you find most emotionally fulfilling, people will start to believe it, and then they will start to live accordingly. They will be more receptive to sexually open relationships, or temporary ones, or multiple-partner ones, as their appetites and fancies dictate. You do not have to take my word for it. Many *proponents* of

131. *See id.* at 8. By way of comparison, the percentage of births to unwed mothers in the general population was in the single digits. *Id.*

132. *See* Roger Clegg, *Latest Statistics on Out-of-Wedlock Births*, NAT'L REV.: THE CORNER (Oct. 11, 2013), <http://www.nationalreview.com/corner/360990/latest-statistics-out-wedlock-births-roger-clegg> [<https://perma.cc/N4EJ-RD5A>].

133. Zeke J. Miller, *Obama Says He Didn't Mislead on Gay Marriage*, TIME (Feb. 11, 2015), <http://time.com/3704760/barack-obama-gay-marriage-david-axelrod> [<https://perma.cc/8JP9-JJBW>].

same-sex marriage are gleefully predicting just that.¹³⁴ The result will be less family stability, which hurts children and women and especially the poor.

Leading LGBT advocates admit that redefining marriage changes its meaning. E. J. Graff acknowledges that redefining marriage changes the “institution’s message,” which will “ever after stand for sexual choice, for cutting the link between sex and diapers.”¹³⁵ Same-sex marriage, she argues, “does more than just fit; it announces that marriage has changed shape.”¹³⁶ Andrew Sullivan says that marriage has become “primarily a way in which two adults affirm their emotional commitment to one another.”¹³⁷

Some advocates of redefining marriage embrace the goal of weakening the institution of marriage *in these very terms*. “[Former President George W.] Bush is correct,” says Victoria Brownworth, “when he states that allowing same-sex couples to marry will weaken the institution of marriage It most certainly will do so, and that will make marriage a far better concept than it previously has been.”¹³⁸ Professor Ellen Willis is delighted that “conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart.”¹³⁹

Michelangelo Signorile urges same-sex couples to “demand the right to marry not as a way of adhering to society’s moral codes but rather to debunk a myth and radically alter an archaic institution.”¹⁴⁰ Same-sex couples should “fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely,” because “[t]he most sub-

134. See, e.g., Gessen, Address, *supra* note 126.

135. E. J. Graff, *Retying the Knot*, in SAME-SEX MARRIAGE: PRO AND CON: A READER, note 89, at 134, 136.

136. *Id.* at 137.

137. Andrew Sullivan, *Introduction*, in SAME-SEX MARRIAGE: PRO AND CON: A READER, *supra* note 89, at 17, 19.

138. Victoria A. Brownworth, *Something Borrowed, Something Blue: Is Marriage Right for Queers?*, in I DO/I DON’T: QUEERS ON MARRIAGE 53, 58–59 (Greg Wharton & Ian Philips eds., 2004).

139. Ellen Willis, *Can Marriage Be Saved?*, NATION (June 17, 2004), <https://www.thenation.com/article/can-marriage-be-saved-0> [<https://perma.cc/DR38-KREN>].

140. Michelangelo Signorile, *Bridal Wave*, OUT, Dec. 1991/Jan. 1994, at 68, 161.

versive action lesbians and gay men can undertake . . . is to transform the notion of 'family' entirely."¹⁴¹

Government needs to get marriage policy right because it shapes the norms associated with this most fundamental relationship. The Supreme Court's redefinition of marriage abandoned the norm of male-female sexual complementarity as an essential characteristic of marriage. As a logical matter, making that essential characteristic optional makes others, such as monogamy, exclusivity, and permanence, optional as well.¹⁴²

As the law now teaches a falsehood about marriage, it will be harder for people to live out the norms of marriage, because they make no sense, in principle, if marriage is merely a matter of intense emotional feeling. No reason of principle requires an emotional union to be permanent or even limited to two persons, much less sexually exclusive. There is no reason it must be oriented to family life and shaped by its demands. A couple might choose to live out these norms for their own reasons, but there is no reason of principle to demand that they do so. Legally enshrining a radical consent-based view of marriage undermines the norms whose link to the common good is the basis for state recognition of marriage in the first place. As society weakens the rational foundation for the norms of marriage, fewer people will observe them, and fewer people, therefore, will reap the benefits of the marital institution. That weakening will affect not only same-sex households raising children but all marriages and all children.

The state, then, cannot achieve the purpose that is the only reason for its recognition of marriage, the responsible procreation and care of children, if it obscures *what marriage is*. And yet weakening marital norms and severing the connection of marriage to responsible procreation are the admitted goals of many prominent advocates of redefining marriage.

C. *The Norm of Monogamy*

Professor Judith Stacey of New York University has expressed hope that redefining marriage will give marriage "varied, creative, and adaptive contours," leading some to "ques-

141. *Id.*

142. See GIRGIS, ANDERSON & GEORGE, *supra* note 4, at 18–21, 32–34.

tion the dyadic limitations of Western marriage and seek . . . small group marriages.”¹⁴³ In their statement “Beyond Same-Sex Marriage,” more than three hundred LGBT and “al-
lied” scholars and advocates call for legally recognizing sexual relationships involving more than two partners.¹⁴⁴

Professor Elizabeth Brake of Arizona State University thinks that justice requires using legal recognition to “denormalize[] heterosexual monogamy as a way of life”¹⁴⁵ and “rectify[] past discrimination against homosexuals, bisexuals, polygamists, and care networks.”¹⁴⁶ She supports “minimal marriage,” in which “individuals can have legal marital relationships with more than one person, reciprocally or asymmetrically, themselves determining the sex and number of parties, the type of relationship involved, and which rights and responsibilities to exchange with each.”¹⁴⁷

In 2009, *Newsweek* reported that the United States already had over five hundred thousand polyamorous households, concluding that:

[P]erhaps the practice is more natural than we think: a response to the challenges of monogamous relationships, whose shortcomings . . . are clear. Everyone in a relationship wrestles at some point with an eternal question: can one person really satisfy every need? Polyamorists think the answer is obvious—and that it’s only a matter of time before the monogamous world sees there’s more than one way to live and love.¹⁴⁸

Justice Samuel Alito voiced concerns about the norm of monogamy during oral arguments in *Obergefell*. If “equality” re-

143. Judith Stacey, *Gay and Lesbian Families: Queer Like Us*, in ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY 117, 129 (Mary Ann Mason et al. eds., 1998).

144. See *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships*, BEYONDMARRIAGE.ORG (July 26, 2006), https://web.archive.org/web/20060920234800/http://www.beyondmarriage.org/full_statement.html [<https://perma.cc/S5LU-MGG7>]; *Signatories*, BEYONDMARRIAGE.ORG, <https://web.archive.org/web/20060922075259/http://www.beyondmarriage.org/signatories.html> [<https://perma.cc/S27N-ZH46>].

145. Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 ETHICS 302, 336 (2010).

146. *Id.* at 323.

147. *Id.* at 303.

148. Jessica Bennett, *Polyamory: The Next Sexual Revolution?*, NEWSWEEK (July 28, 2009, 8:00 PM), <http://www.newsweek.com/polyamory-next-sexual-revolution-82053> [<https://perma.cc/M3EV-SU8U>].

quires redefining marriage to include same-sex couples, what else does “equality” require? If the fundamental right to marry is simply about consenting adult romance and caregiving, what limits could the state ever place on it? Justice Alito posed the hypothetical of “a group consisting of two men and two women apply[ing] for a marriage license” and asked, “Would there be any ground for denying them a license?”¹⁴⁹ Pursuing this line of thought further, he asked about other types of couples. How about siblings?:

They’ve lived together for twenty-five years. Their financial relationship is the same as the same-sex couple. They share household expenses and household chores in the same way. They care for each other in the same way. Is there any reason why the law should treat the two groups differently?¹⁵⁰

It was a good question, and one that the lawyers to whom it was directed could not answer.¹⁵¹ Nor could the Court. Chief Justice Roberts points out that every argument the Court made to redefine marriage to include same-sex couples could be used to redefine it to include multi-person relationships: “Although the majority randomly inserts the adjective ‘two’ in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not.”¹⁵² Roberts continues: “It is striking how much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage.”¹⁵³ Not once did the Court explain why marriage was limited to twosomes once they got rid of male-female complementarity.

The same week as oral arguments, the London *Telegraph* reported that the British “Green Party is ‘open’ to the idea of three-person marriages.”¹⁵⁴ Indeed, a party leader said “she was ‘open to further conversation and consultation’ about the

149. Obergefell Argument Transcript, *supra* note 10, at 17.

150. *Id.* at 33.

151. *See id.* at 33–34.

152. Obergefell v. Hodges, 135 S. Ct. 2584, 2621 (2015) (Roberts, C.J., dissenting).

153. *Id.*

154. Matthew Holehouse, *Greens “open” to three-person marriage, says Natalie Bennett*, TELEGRAPH (May 1, 2015, 12:28 PM), <http://www.telegraph.co.uk/news/general-election-2015/11576818/Greens-open-to-three-personmarriage-says-Natalie-Bennett.html> [<https://perma.cc/TKC4-BGMV>].

prospect of the state recognising polyamorous relationships.”¹⁵⁵ The issue came up precisely because a constituent had asked about “marriage equality” for threesomes:

At present those in a “trio” (a three-way relationship) are denied marriage equality, and as a result face a considerable amount of legal discrimination.

As someone living with his two boyfriends in a stable long-term relationship, I would like to know what your stance is on polyamory rights. Is there room for Green support on group civil partnerships or marriages?¹⁵⁶

Will there be room for such support in America’s political parties? In the month leading up to the *Obergefell* ruling, the *Emory Law Journal* published a symposium exploring the constitutional right to polygamy.¹⁵⁷ And in the spring of 2015, Ronald C. Den Otter, a political scientist in California, published *In Defense of Plural Marriage*, in which he purports to show “why the constitutional arguments that support the option of plural marriage are stronger than the constitutional arguments against it.”¹⁵⁸ The day that the Supreme Court redefined marriage everywhere, *Politico* ran an essay titled: “It’s Time to Legalize Polygamy: Why group marriage is the next horizon of social liberalism.”¹⁵⁹

But if you suspect that all this talk about polygamy and polyamory is just conservative scaremongering, consider that the advocates of same-sex marriage have been enthusiastically exploring new family forms. The liberal online magazine *Salon* in August 2013 posted a woman’s account of her shared life with a husband, boyfriend, and daughter under the headline “My

155. *Id.*

156. *Id.*

157. Symposium, *Polygamous Unions? Charting the Contours of Marriage Law’s Frontier*, 64 EMORY L.J. 1669, 1669–70 (2015); see also Eugene Volokh, *Emory Law Journal on a Constitutional Right to Polygamy*, VOLOKH CONSPIRACY (June 9, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/09/emory-law-journal-symposium-on-a-constitutional-right-to-polygamy> [<https://perma.cc/L9FG-U2Y9>].

158. Ronald C. Den Otter, *IN DEFENSE OF PLURAL MARRIAGE 1* (2015).

159. Fredrik DeBoer, *It’s Time to Legalize Polygamy: Why group marriage is the next horizon of social liberalism*, POLITICO (June 16, 2015), <http://www.politico.com/magazine/story/2015/06/gay-marriage-decision-polygamy-119469> [<https://perma.cc/P8FJ-3LRJ>].

Two Husbands.” The subhead: “Everyone wants to know how my polyamorous family works. You’d be surprised how normal we really are.”¹⁶⁰

These adventurers have even coined a new word to denote one of the new domestic arrangements: “throuple.” *New York* magazine profiled one such group: “Their throuplehood is more or less a permanent domestic arrangement. The three men work together, raise dogs together, sleep together, miss one another, collect art together, travel together, bring each other glasses of water, and, in general, exemplify a modern, adult relationship. Except that there are three of them.”¹⁶¹ Are those inclined to such relationships being treated unjustly when their consensual romantic bonds go unrecognized? Are their children unconscionably “stigmatized?” We have just witnessed a successful lawsuit demanding “marriage equality” for same-sex couples. But on what basis could the Court deny marriage equality to same-sex throuples? Or mixed-sex quartets?¹⁶² Monogamy’s privileged place in Western law and culture, after all, was based on the belief that the one man and the one woman who unite in the comprehensive act that produces a child should form a stable family. But if the male-female nature of marriage is utterly arbitrary, what is so special about the number two? What is the principled reason for denying “marriage equality” to threes and fours and more?

D. *The Norm of Exclusivity*

The journalist Andrew Sullivan, who has extolled the “spirituality” of “anonymous sex,”¹⁶³ also thinks that the “openness” of same-sex unions could enhance the bonds of husbands and wives:

160. Angi Becker Stevens, *My Two Husbands*, SALON (Aug. 3, 2013, 8:00 PM), http://www.salon.com/2013/08/05/my_two_husbands [https://perma.cc/FR8E-FTAP]; see also Brooke Lea Foster, *Married, but Not Exclusive*, WASHINGTONIAN (July 30, 2013), <http://www.washingtonian.com/articles/people/married-but-not-exclusive> [https://perma.cc/744Z-U2L6].

161. Molly Young, *He & He & He*, NEW YORK (June 29, 2012), <http://nymag.com/news/features/benny-morecock-throuple> [https://perma.cc/7CM5-58ZK].

162. See Obergefell Argument Transcript, *supra* note 10, at 33.

163. Andrew Sullivan, Letter to the Editor, SALON (Dec. 8, 1999), <http://www.salon.com/1999/12/15/sullivan> [https://perma.cc/K33X-KEMQ].

Same-sex unions often incorporate the virtues of friendship more effectively than traditional marriages; and at times, among gay male relationships, the openness of the contract makes it more likely to survive than many heterosexual bonds . . . [T]here is more likely to be greater understanding of the need for extramarital outlets between two men than between a man and a woman . . . [S]omething of the gay relationship's necessary honesty, its flexibility, and its equality could undoubtedly help strengthen and inform many heterosexual bonds.¹⁶⁴

"Openness" and "flexibility" are Sullivan's euphemisms for sexual infidelity. *The New York Times* recently reported on a study finding that exclusivity was not the norm among gay partners: "'With straight people, it's called affairs or cheating' . . . 'but with gay people it does not have such negative connotations.'"¹⁶⁵

A writer in the *Advocate* candidly admits where the logic of redefining marriage to include same-sex relationships leads: "We often protest when homophobes insist that same sex marriage will change marriage for straight people too. But in some ways, they're right."¹⁶⁶ The article continues:

Anti-equality right-wingers have long insisted that allowing gays to marry will destroy the sanctity of "traditional marriage," and, of course, the logical, liberal party-line response has long been "No, it won't." But what if—for once—the sanctimonious crazies are right? Could the gay male tradition of open relationships actually alter marriage as we know it? And would that be such a bad thing?¹⁶⁷

A 2011 *New York Times Magazine* profile of Dan Savage, headlined "Married, with Infidelities," introduced Americans to the term "monogamish," referring to relationships in which the partners allow sexual infidelity provided they are honest about

164. ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 202–03 (1996).

165. Scott James, *Many Successful Gay Marriages Share an Open Secret*, N.Y. TIMES (Jan. 28, 2010), <http://www.nytimes.com/2010/01/29/us/29sfmetro.html> [<https://perma.cc/DVG4-8XPQ>].

166. Ari Karpel, *Monogamish*, ADVOCATE (July 7, 2011, 4:00 A.M.) <http://www.advocate.com/arts-entertainment/features/2011/07/07/monogamish> [<https://perma.cc/P5CJ-D8WB>].

167. *Id.*

it.¹⁶⁸ The article explained, “Savage says a more flexible attitude within marriage may be just what the straight community needs.”¹⁶⁹ After all, sexual exclusivity “gives people unrealistic expectations of themselves and their partners.”¹⁷⁰ Savage seems inclined to keep monogamy, but he wants to get rid of the requirement of sexual exclusivity, which he finds outdated and inhumane. No one can have all his sexual needs fulfilled by one person for the rest of his life. This is what is wrong with marriage. Spouses who discuss their sexual relationships openly and honestly, says Savage, with no coercion and no deceit, should be free to have a sexually open relationship.¹⁷¹

For Savage, a monogamish relationship may actually enhance the emotional bond of spouses. One of the reasons that spouses get divorced, Savage argues, is that their sexual needs are not being fulfilled inside of marriage. Because Americans have this outdated and unrealistic expectation of sexual exclusivity, when the other spouse finds out about an affair his or her heart is broken. Marriage would work much better, Savage says, if spouses could focus their marriage on their romantic caregiving relationship while being free to fulfill sexual needs outside of it.¹⁷² If marriage is really just about deep romantic feeling and personal fulfillment, it is hard to fault his logic.

E. *The Norm of Permanence*

The activists who are questioning the norms of monogamy and exclusivity do not have much use for permanence either. Going far beyond no-fault divorce, which simply weakened this norm, some would eliminate it all together. And they have come up with a name for the new arrangement: “wedlease,” which Paul Rampell introduced in an August 2013 op-ed in the *Washington Post*.¹⁷³ Why, he wondered, should marriage be permanent when

168. Mark Oppenheimer, *Married, with Infidelities*, N.Y. TIMES MAG. (June 30, 2011), <http://www.nytimes.com/2011/07/03/magazine/infidelity-will-keep-us-together.html> [<https://perma.cc/4WUS-ZC8G>].

169. *Id.*

170. *Id.*

171. *See id.*

172. *See id.*

173. Paul Rampell, *A High Divorce Rate Means It's Time to Try "Wedleases"*, WASH. POST (Aug. 4, 2013), <http://www.washingtonpost.com/opinions/a-high->

so little else in life is? Why not have temporary marriage licenses, as with other contracts? “Why don’t we borrow from real estate and create a marital lease?” Rampell proposed. Just as you can lease a house, you should be able to lease a spouse. “Instead of wedlock, a ‘wedlease.’”¹⁷⁴ He continues:

Here’s how a marital lease could work: Two people commit themselves to marriage for a period of years—one year, five years, 10 years, whatever term suits them. The marital lease could be renewed at the end of the term however many times a couple likes The messiness of divorce is avoided and the end can be as simple as vacating a rental unit.¹⁷⁵

Apparently, the expectation of a permanent commitment in marriage is unrealistic and inhumane. The reason that divorce causes so much heartbreak and disruption is that spouses have unrealistically expected to live with and love one other person for the rest of their lives. The trouble starts when this proves impossible. But if they only signed up for a “wedlease” in the first place, they would avoid the trauma of shattered expectations. Their five- or ten-year “wedlease” could be renewed if they wished, but if it were not going well, the sunset clause would bring the relationship to a peaceful end.

F. *What’s in a Name?*

The state is interested in marriage and marital norms because they protect children, strengthen civil society, and make limited government possible. Good marriage laws embody and promote a true vision of marriage, which makes sense of those norms as a coherent whole. There is nothing magical about the word “marriage.” Applying the title to a relationship that is not in fact a marriage will not produce adherence to marital norms.

Whatever you think about the morality of “throuples,” “monogamish” relationships, and “wedleases,” the social costs of sexually open marriages, multi-partner marriages, and intentionally temporary marriages will be high. And yet the radical change represented by each of these new words follows logi-

divorce-rate-means-its-time-to-try-wedleases/2013/08/04/f2221c1c-f89e-11e2-b018-5b8251f0c56e_story.html [https://perma.cc/Q6DV-BSQ2].

174. *Id.*

175. *Id.*

cally once we abandon the notion that marriage requires a man and a woman. If marriage is just about consenting adult romance, then consenting adults will have it on whatever terms they like. Love equals love, after all.

The evidence is simply overwhelming that the marital norms of monogamy, sexual exclusivity, and permanence make a difference for society—and those norms are based on sexual complementarity. If a man does not commit to a woman in a permanent and exclusive relationship, the likelihood of his begetting fatherless children and leaving fragmented families in his wake increases. The more sexual partners a man has and the shorter those relationships are, the more likely he is to have children with multiple women to whom he is not committed. His attention and resources thus divided, the predictable consequences unfold for the mothers, the children, and society.

Government promotes marriage to make men and women responsible to each other and to any children they might have. The marital norms of monogamy and sexual exclusivity serve the same purpose, because they encourage childbearing within a context that makes it most likely that children will be raised by their mother and father. These norms also encourage shared responsibility and commitment between spouses, ensure that children receive sufficient attention from both their mothers and their fathers, and exclude sexual and kinship jealousy from the family. The norm of permanence ensures that children will be cared for by their mother and father until they reach maturity. It also promotes interaction across the generations as elderly parents are cared for by their adult children and as grandparents help to care for their grandchildren without the complications of fragmented stepfamilies.

Someone might object that it hardly matters if a small percentage of marriages are open, group, or temporary. The same argument was made during the no-fault divorce debate. No-fault divorce was for the relatively small number of people suffering in unhappy marriages and would be irrelevant for everyone else. But the change in the law changed everyone's expectations of

marital permanence.¹⁷⁶ The breakdown of the marriage culture that followed made it possible in our generation to consider removing sexual complementarity from the legal definition of marriage. And that redefinition may lead to further redefinition.

Pretending as a matter of law that men and women are interchangeable, that “monogamish” relationships work just as well as monogamous relationships, that “throuples” are the same as couples, and that “wedlease” is preferable to wedlock will only lead to more broken homes, more broken hearts, and more intrusive government. Americans should reject such revisionism and work to restore the essentials that make marriage so important for societal welfare: sexual complementarity, monogamy, exclusivity, and permanence.

G. *Threatening Religious Liberty*

With marriage now redefined, we can expect to see the marginalization of those with traditional views and the erosion of religious liberty. The law and culture will seek to eradicate such views through economic, social, and legal pressure. With marriage redefined, believing what virtually every human society once believed about marriage will increasingly be deemed a malicious prejudice to be driven to the margins of culture. The consequences for religious believers are becoming apparent.

Some of the Justices pointed to this threat during the oral arguments before the Supreme Court in *Obergefell*. When pressed by Justice Alito, the solicitor general, Donald Verrilli, admitted that religious schools that affirm marriage as the union of a man and a woman might lose their nonprofit tax status if marriage were redefined: “[I]t’s certainly going to be an issue. I—I don’t deny that. I don’t deny that, Justice Alito. It is—it is going to be an issue.”¹⁷⁷

And all four dissenting justices noted the religious liberty concerns in their dissents. The ruling, Chief Justice Roberts

176. See Maggie Gallagher & Barbara Dafoe Whitehead, Symposium, *End No-Fault Divorce?*, FIRST THINGS (Aug. 1997), <https://www.firstthings.com/article/1997/08/end-no-fault-divorce> [<https://perma.cc/5HJA-2AMP>].

177. *Obergefell* Argument Transcript, *supra* note 10, at 38; see also Johnny Rex Buckles, *The Sexual Integrity of Religions Schools and Tax Exemption*, 40 HARV. J.L. & PUB. POL’Y 254 (2017).

warns, “creates serious questions about religious liberty.”¹⁷⁸ He observes that “many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution.”¹⁷⁹

Justice Alito points out that activists will use the decision’s rhetoric to attack religious liberty:

It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.¹⁸⁰

Justice Alito sees dark days ahead: “I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.”¹⁸¹ And we have the Court to blame: “By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas.”¹⁸²

Most alarmingly, the majority opinion never discusses the free exercise of religion. Chief Justice Roberts wryly notes, “The majority graciously suggests that religious believers may continue to ‘advocate’ and ‘teach’ their views of marriage.”¹⁸³ But the First Amendment, he says, “guarantees . . . the freedom to ‘exercise’ religion. Ominously, that is not a word the majority uses.”¹⁸⁴

Justice Thomas picks up on this as well, noting that the majority opinion indicates a misunderstanding of religious liberty in our Nation’s tradition:

Religious liberty is about more than just the protection for “religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to

178. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting).

179. *Id.*

180. *Id.* at 2642 (Alito, J., dissenting) (citation omitted).

181. *Id.* at 2642–43.

182. *Id.* at 2643.

183. *Id.* at 2625 (Roberts, C.J., dissenting).

184. *Id.*

their lives and faiths.” Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice.

Although our Constitution provides some protection against such governmental restrictions on religious practices, the People have long elected to afford broader protections than this Court’s constitutional precedents mandate. Had the majority allowed the definition of marriage to be left to the political process—as the Constitution requires—the People could have considered the religious liberty implications of deviating from the traditional definition as part of their deliberative process. Instead, the majority’s decision short-circuits that process, with potentially ruinous consequences for religious liberty.¹⁸⁵

And protect religious liberty we must, for as Chief Justice Roberts notes, “Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.”¹⁸⁶ Why not? Because “the most discouraging aspect of today’s decision is the extent to which the majority feels compelled to sully those on the other side of the debate.”¹⁸⁷ As the Chief Justice writes, “These apparent assaults on the character of fair minded people will have an effect, in society and in court. Moreover, they are entirely gratuitous.”¹⁸⁸ Indeed, “It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority’s ‘better informed understanding’ as bigoted.”¹⁸⁹

Here is what we can expect. The administrative state may require those who contract with the government, receive governmental money, or work directly for the state to embrace and promote same-sex marriage even if doing so violates their religious beliefs. Nondiscrimination laws may make even private actors with no legal or financial ties to the government—including businesses and religious organizations—liable to civil suits for refusing to treat same-sex relationships as marriages.

185. *Id.* at 2638–39 (Thomas, J., dissenting) (quoting *id.* at 2607 (majority opinion)) (citations omitted).

186. *Id.* at 2626 (Roberts, C.J., dissenting).

187. *Id.*

188. *Id.* (citation omitted).

189. *Id.* at 2626.

Finally, private actors in a culture that is now hostile to traditional views of marriage may discipline, fire, or deny professional certification to those who express support for traditional marriage.¹⁹⁰ The Becket Fund for Religious Liberty reports that “over 350 separate state anti-discrimination provisions would likely be triggered by recognition of same-sex marriage.”¹⁹¹

The attack on religious liberty has in fact already begun, as I describe in more detail in *Truth Overruled*.¹⁹² It is important to understand the conceptual framework for this attack. In 2013 a bill was proposed in the Illinois legislature to redefine marriage while supposedly protecting religious liberty. The Catholic bishop of Springfield explained why the protections of the statute were meaningless:

[The bill] would not stop the state from obligating the Knights of Columbus to make their halls available for same-sex “weddings.” It would not stop the state from requiring Catholic grade schools to hire teachers who are legally “married” to someone of the same sex. This bill would not protect Catholic hospitals, charities, or colleges, which exclude those so “married” from senior leadership positions This “religious freedom” law does nothing at all to protect the consciences of people in business, or who work for the government. We saw the harmful consequences of deceptive titles all too painfully last year when the so-called “Religious Freedom Protection and Civil Union Act” forced Catholic Charities out of foster care and adoption services in Illinois.¹⁹³

In fact, the lack of religious liberty protection seems to be a feature, not a bug, of such bills:

190. For more on this, see Thomas M. Messner, *Same-Sex Marriage and the Threat to Religious Liberty*, (Heritage Found., Backgrounder No. 2201, Oct. 30, 2008), <http://www.heritage.org/research/reports/2008/10/same-sex-marriage-and-the-threat-to-religious-liberty> [<https://perma.cc/Q34N-4WYW>].

191. BECKET FUND FOR RELIGIOUS LIBERTY, *SAME-SEX MARRIAGE AND STATE ANTI-DISCRIMINATION LAWS 2* (Jan. 2009), <http://www.becketfund.org/wp-content/uploads/2011/04/Same-Sex-Marriage-and-State-Anti-Discrimination-Laws-with-Appendices.pdf> [<https://perma.cc/6D99-BJ4T>]; see also Messner, *supra* note 190, at 4.

192. ANDERSON, *supra* note 107, at 85–104.

193. Letter from Thomas John Paprocki, Bishop of Springfield, to Priests, Deacons, and Pastoral Facilitators of the Diocese of Springfield (Jan. 3, 2013), <http://www.dio.org/blog/item/326-bishop-paprockis-letter-on-same-sex-marriage.html> [<https://perma.cc/5TK2-YF7P>].

There is no possible way—none whatsoever—for those who believe that marriage is exclusively the union of husband and wife to avoid legal penalties and harsh discriminatory treatment if the bill becomes law. Why should we expect it [to] be otherwise? After all, we would be people who, according to the thinking behind the bill, hold onto an “unfair” view of marriage. The state would have equated our view with bigotry—which it uses the law to marginalize in every way short of criminal punishment.¹⁹⁴

Georgetown University law professor Chai Feldblum, a member of the U.S. Equal Employment Opportunity Commission, argues that “equality” in sexual matters must trump religious liberty:

[F]or all my sympathy for the evangelical Christian couple who may wish to run a bed and breakfast from which they can exclude unmarried, straight couples and all gay couples, this is a point where I believe the “zero-sum” nature of the game inevitably comes into play. And, in making that decision in this zero-sum game, I am convinced society should come down on the side of protecting the liberty of LGBT people.¹⁹⁵

Indeed, for many supporters of redefining marriage, such infringements on religious liberty are not flaws but virtues of the movement.

In 2013 the Supreme Court struck down the federal Defense of Marriage Act¹⁹⁶ in an opinion, written by Justice Kennedy, notable for its intemperate rhetoric.¹⁹⁷ Justice Scalia, in dissent, warned of the dangers lurking in the majority opinion:

[T]o defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements To hurl such accusations so casually demeans *this institution*. In the majority’s judgment, any resistance to its holding is beyond the pale of reasoned disagreement All that, simply for supporting an Act that did no more than codify an aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually

194. *Id.*

195. Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOKLYN L. REV. 61, 119 (2006).

196. Pub. L. No. 104-199, 110 Stat. 2419 (1996).

197. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

all of human history. It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race.¹⁹⁸

Those dangers have been amplified by the Court in *Obergefell*.

198. *Id.* at 2708–09 (Scalia, J., dissenting).

THE POWER TO DEFINE OFFENSES AGAINST THE LAW OF NATIONS

ALEX H. LOOMIS*

INTRODUCTION	418
I. TEXT.....	420
A. Surplusage and structure	420
B. Alternative interpretations.....	422
II. EARLY CONSTITUTIONAL HISTORY	424
A. The definition of “define”	425
B. The power to punish vaguely defined offenses	427
C. The clause’s purpose.....	431
D. The power to define “felonies on the high seas” and “piracy”	433
1. Felonies.....	434
2. Piracies.....	437
III. NEUTRALITY	445
A. Historical background	445
B. The constitutional basis for American neutrality legislation	449
1. Pre-Neutrality Act understanding of neutrality	450
2. The Neutrality Act’s legislative and post- enactment history	453
C. The Neutrality Act and the law of nations	461
1. Respect for neutral territory	461
2. Prohibition on foreign enlistment	462
3. Prohibition on fitting out and arming foreign vessels	466

* J.D. Candidate, Harvard Law School, Class of 2017. I would like to thank Noah Feldman, Jack Goldsmith, Stephen Hammer, Judge Brett Kavanaugh, Michael Klarman, John Loomis, Scott Proctor, Kailan Sierra-Davidson, Vivek Suri, Trenton Van Oss, and Paul Vanderslice for helpful comments and suggestions. All errors are my own.

4. How much did the United States care about the law of nations?	469
D. Lessons from the Neutrality Act	473
IV. SUPREME COURT PRECEDENT ANALYZING THE DEFINE AND PUNISH CLAUSE.....	474
A. <i>Arjona</i>	475
B. <i>Quirin</i> and <i>Hamdan</i>	477
C. Lessons.....	482
V. WHAT CAN CONGRESS PUNISH?	483
A. <i>Type two</i> offenses	484
B. <i>Type three</i> offenses	486
C. <i>Type four</i> offenses.....	487
1. Foreign relations deference	487
2. What can't Congress punish?.....	490
VI. CONCLUSION	492

INTRODUCTION

In 1865, the United States tried and convicted several people for conspiracy to assassinate under a statute giving jurisdiction for offenses against the law of war to military commissions.¹ One hundred and forty years later, the Supreme Court set aside a military commission's conspiracy conviction under a similar law on the grounds that conspiracy to violate the law of war is *not* an offense against the law of war.² The relevant statutory language remained the same, but international law had changed. Congress pegged the statute to international law, so the statute no longer authorized prosecutions for conspiracy in military commissions.

But suppose that Congress had instead proscribed particular law-of-war offenses, including conspiracy. This hypothetical statute would have mirrored international law in 1865 but not in 2005. Does Congress still have the power to define and punish conspiracy as an offense against the law of nations, or did Congress lose this power when international law changed?

1. See General Court-Martial Order No. 356 (1865), *reprinted in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 342, 342 (James Richardson ed., 1901) [hereinafter PRESIDENTS' PAPERS].

2. *Hamdan v. United States*, 548 U.S. 557, 611–12 (2006).

The answer to this question turns on whether Congress enjoys a separate *power to define* offenses against the law of nations, and if so, how broad that power is.³ This issue matters. The government's power to try Guantanamo detainees in military commissions depends in part on the scope of the Define and Punish Clause.⁴ A lurking yet expansive criminal punishment power would also allow Congress to undo some of the Supreme Court's recent federalism decisions. To take just one example, if the clause allows Congress to enact civil sanctions as well as criminal ones, a new Violence Against Women Act might be sustained as punishing international human rights violations.⁵

This Article argues that Congress possesses a separate and broad *power to define* the offenses against the law of nations that it chooses to punish. Congress may criminalize private conduct that does not itself violate the law of nations. In fact, the Define and Punish Clause empowers Congress to criminalize any conduct if the United States has any obligation to suppress that conduct under either an extant or developing rule of customary international law.

This view swims against the tide of scholarly⁶ and judicial⁷ opinion and implies that Congress has not made use of a signif-

3. This Article uses the modern spelling of the word "offenses" for consistency. "The law of nations," for the purposes of this Article, is interchangeable with "public international law." See WILLIAM R. CASTO, *FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL* 3 (2006). This Article generally uses the phrase "the law of nations" when referring to international law in the late-eighteenth and early-nineteenth centuries, and "international law" for references to the late-nineteenth century through the present.

4. See *Al Bahlul v. United States*, 792 F.3d 1, 15 (D.C. Cir. 2015), *rev'd on other grounds* 840 F.3d 757 (en banc). The en banc D.C. Circuit disagreed on the grounds for reversing the panel's decision. Only one judge on the D.C. Circuit argued that Congress has an extensive *power to define* offenses against the law of nations. See *id.* at 759 (Henderson, J., concurring).

5. See generally Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to 'Define and Punish . . . Offenses Against the Law of Nations'*, 42 WM. & MARY L. REV. 447, 547-48 (2000); Michael T. Morley, *The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism*, 112 YALE L.J. 109 (2002).

6. See Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 NW. U.L. REV. 1675, 1682 (2012); Charles D. Siegal, *Deference and Its Dangers: Congress' Power to "Define . . . Offenses Against the Law of Nations"*, 21 VAND. J. TRANSNAT'L L. 865, 873-79 (1988). But see Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1809-10 (2009).

icant source of constitutional authority. But the Constitution's text and structure, early constitutional history, Supreme Court precedent, and foreign relations law all point in favor of interpreting the Define and Punish Clause broadly. This Article addresses each source of evidence in turn. Section I argues from the Constitution's text that Congress enjoys a separate power to define the offenses against the law of nations that it punishes. Sections II–V then flesh out the scope of that power. Section II demonstrates that the Framers and early political leaders believed that the power to define offenses against the law of nations included the power to create new offenses that other countries did not recognize. Section III shows that early American neutrality law punished offenses against the law of nations that were not recognized as such under international law. Section IV examines the Supreme Court's analysis of the Define and Punish Clause. The few cases on the subject suggest that Congress's power to define is not pegged to international law. Part V adds a foreign-relations-law perspective and explains the specific conditions that must exist before Congress may enact criminal legislation under the Define and Punish Clause.

I. TEXT

The Constitution's text and structure suggest that Congress enjoys a *power to define* offenses against the law of nations separate from its *power to punish* those offenses. This Section, however, does not flesh out how broad this power is—Sections II–V cover that. This Section argues only that Congress has a separate *power to define*.

A. Surplusage and structure

The text and structure of the Constitution provide two independent reasons to believe that Congress has a *power to define* separate from its *power to punish*. First, consider the clause itself: "The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."⁸ If the Define and Punish Clause gave Congress

7. See *Al Bahlul*, 792 F.3d at 15; *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1249 (11th Cir. 2012). *But see* *United States v. bin Laden*, 92 F. Supp. 2d 189, 220 (S.D.N.Y. 2000).

8. U.S. CONST., art. I, § 8.

no powers apart from a *power to punish*, then the words “define and” would be superfluous.⁹ The Supreme Court made this point in an 1820 case concerning the Define and Punish Clause.¹⁰ Reading the Define and Punish Clause as giving Congress a separate *power to define* avoids this surplusage problem.

That problem would not exist if the Framers attached little importance to the phrase “define and punish” and used it as a single, legally redundant phrase, like “aid and abet” today.¹¹ But the Philadelphia Convention chose the words with care and settled on the phrase “define and punish” only after debating the precise wording. The Committee of Style had originally drafted the clause as, “To define & punish piracies and felonies on the high seas, and punish offenses against the law of nations.”¹² Gouverneur Morris, who spoke the most at the Convention and was likely most responsible for the text’s final style,¹³ changed the clause to its current form by proposing to strike the second “punish,” giving Congress the power to define offenses against the law of nations too. But his motion only passed by a six-to-five vote (the Convention voted by state delegations, not individual delegates).¹⁴ This one-vote margin would be hard to explain if the Framers considered the *power to define and punish* to be no different than the *power to punish*.

Second, two other constitutional provisions give Congress authority to penalize private acts, but neither give Congress the power to define those offenses. Congress has the “Power . . . To provide for the Punishment of counterfeiting the Securities and

9. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect . . .”).

10. See *United States v. Smith*, 18 U.S. 153, 158 (1820) (“The power given to Congress is not merely ‘to define and punish piracies;’ if it were, the words ‘to define,’ would seem almost superfluous, since the power to punish piracies would be held to include the power of ascertaining and fixing the definition of the crime.”).

11. Draft criminal legislation at the time of the Framing, for example, sometimes used variants of the phrase “define and punish” as a matter of course. See, e.g., S. JOURNAL 108 (Jan. 27, 1790) (“Proceeded to the second reading of the ‘bill defining the crimes and offences that shall be cognizable under the authority of the United States, and their punishment;’ . . .”).

12. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 614–15 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].

13. See MICHAEL J. KLARMAN, THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 15 n.* (2016).

14. See 2 FARRAND’S RECORDS, *supra* note 12, at 614–15. For a more thorough discussion of this episode, see *infra* notes 51–63.

current Coin of the United States”¹⁵ and the “Power to declare the Punishment of Treason,”¹⁶ but not the power to define those offenses. That difference in language suggests that Congress has more discretion in defining offenses against the law of nations than it has in defining counterfeiting and treason.¹⁷

Of course, selective enumeration sometimes implies nothing. For instance, the Constitution only enumerates three criminal punishment powers, yet Congress, pursuant to the Necessary and Proper Clause, may punish unenumerated offenses with “some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States.”¹⁸ The Framers likely enumerated criminal punishment powers out of fear that the authority to punish those acts might not be incidental to Congress’s other powers.

But selective enumeration of the power to define is different. The power to punish any offense presupposes the power to define what conduct is criminal. Enumerating the power to define would be unnecessary unless the Framers thought the power to define vested Congress with greater creative powers than the power to punish. The Define and Punish Clause, therefore, likely provides Congress with a separate power to define piracy, felonies on the high seas, and offenses against the law of nations.

B. *Alternative interpretations*

Three alternative interpretations of the Define and Punish Clause could undercut the preceding arguments. First, the power to define might really be a *duty to define*. That is, the word “define” might just prevent Congress from passing criminal laws that do not define offenses against the law of nations clearly enough to give the people fair notice. Second, the Define and Punish Clause might be an anti-common-law provision written to ensure that Congress takes responsibility for

15. U.S. CONST. art. I, § 8, cl. 6.

16. *Id.* art. III, § 3, cl. 2.

17. *Cf.* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824) (“[E]numeration presupposes something not enumerated.”); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (“In deploying [intratextualism], the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase.”).

18. *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014) (quoting *United States v. Fox*, 95 U.S. 670, 672 (1878)).

punishing these offenses through legislation rather than forcing the judiciary to do so with common law crimes. Third, perhaps the power to define is really a power to provide a national definition for offenses against the law of nations that is binding on the states if they decide to punish the same conduct.

But these possible interpretations are probably wrong. First, the Constitution describes the power to define as a “power,” not a duty, implying that it gives Congress “Command; authority; dominion.”¹⁹ Like the Necessary and Proper Clause, the Define and Punish “[C]lause is placed among the powers of congress, not among the limitations on those powers[,]” and “[i]ts terms purport to enlarge, not to diminish the powers vested in the government.”²⁰ This interpretation would also make the power to define superfluous because Congress already has this duty under the Due Process Clause.²¹ Finally, in *United States v. Smith*, Justice Livingston argued in a dissent in favor of the *duty-to-define* interpretation, but no Justice joined his opinion.²² A majority of the Supreme Court held that the power to define does not imply an obligation to define these offenses with greater specificity than ordinary crimes.²³

Nothing in the historical record suggests that the clause was meant to preclude federal common law crimes either. In 1793, the Washington administration prosecuted Americans for offenses against the law of nations, even though no statute prohibited the conduct in question.²⁴ Further, when the Supreme Court held in 1812 that there was no federal common law of crimes, it relied on entirely different grounds.²⁵ The Define and Punish Clause would therefore be superfluous if it merely barred federal common law crimes. Finally, there is no historical evidence in support of this interpretation.

Nor does the Define and Punish Clause take away any power from the states. There is no evidence from the Framing to suggest that the clause was intended to harmonize state criminal legisla-

19. *Power*, 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785).

20. *McCulloch v. Maryland*, 17 U.S. 316, 419, 420 (1819).

21. *See, e.g., Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015).

22. *See* 18 U.S. 153, 164–83 (1820) (Livingston, J., dissenting).

23. *See id.* at 156–63 (majority opinion).

24. *See infra* note 154 and accompanying text.

25. *See United States v. Hudson & Goodwin*, 11 U.S. 32, 32 (1812).

tion. The Framers, in fact, added the clause because many states did not criminalize these offenses at all.²⁶ Additionally, the clause is listed alongside provisions giving Congress power in Article I, Section 8 and not Section 10, which limits state power. Finally, in 1887, the Supreme Court in *United States v. Arjona* rejected this interpretation and made clear that states can define and punish law-of-nations offenses differently than Congress.²⁷

Because these other interpretations are unpersuasive, the Constitution's text suggests that Congress enjoys a separate power to define offenses against the law of nations.

II. EARLY CONSTITUTIONAL HISTORY

Turning to early constitutional history, there are four independent reasons why the power to define offenses against the law of nations affords Congress significant discretion. First, the Framers understood the power to define to include the power to create new offenses. Second, the power to define must have included the power to create new offenses because most "offenses against the law of nations" were indeterminate in the late-eighteenth century, and the Framers did not want legal ambiguities to constrain Congress. Third, the Framers included the Define and Punish Clause to give Congress the ability to avoid international controversy. They probably would not have wanted judges to second-guess Congress's understanding of the law of nations because doing so could provoke foreign policy crises. Fourth, the Framers believed that Congress had an expansive power to define the other crimes mentioned in the Define and Punish Clause.

26. See *infra* notes 65–71 and accompanying text.

27. 120 U.S. 479, 487 (1887). But see *Smith v. Turner*, 48 U.S. 283, 394 (1849). The *Turner* Court thought that Congress had an exclusive power over these offenses because "the [sovereign] nature of" the define and punish power, along with the various other powers listed in Article I, Section 8, indicates that it was beyond state jurisdiction. *Id.* The Court did not think the phrase "power to define" led to this conclusion. Further, this language was dictum, *id.* at 393 (noting that the case concerned Congress's power to regulate commerce), and was later rejected by the Court in *Arjona. Arjona*, which sustained a federal law criminalizing the counterfeiting of foreign currency, 120 U.S. at 487, was admittedly decided one hundred years after the Constitution was drafted and *Turner* was decided sixty years after, so neither is particularly helpful in clarifying original meaning.

A. *The definition of “define”*

The Framers probably believed that the power to define included the power to create new offenses. Framing-era dictionaries give roughly the same definition to the verb “to define”: “To determine, to decide, to decree.”²⁸ Congress, not judges or international law scholars, therefore has the power to determine, decide, and decree what are “Piracies and Felonies Committed on the high Seas, and Offences against the Law of Nations.”²⁹

Notes from the Philadelphia Convention support this interpretation. The Committee of Detail originally drafted the clause as, “To declare the law and punishment of piracies and felonies committed on the high seas . . . and of offenses against the law of nations”³⁰ After a separate motion replaced “declare the law and punishment” with “punish,” James Madison and Edmund Randolph moved to change “punish” to “define and punish.”³¹ Gouverneur Morris objected. He “prefer[red] *designate* to *define*, the latter [‘define’] being as he conceived, limited to the preexisting meaning.”³² Madison and Randolph’s motion passed after others reassured Morris that “define” was “applicable to the creating of offenses also, and therefore suited the case both of felonies & of piracies.”³³

28. *Define*, 1 JOHNSON, *supra* note 19. Another used Johnson’s definition but added “to explain a thing by its qualities; to circumscribe; to mark the limit.” *Define*, THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789). Thus, Congress, not the courts, should have the power to “explain [offenses against the law of nations] by [their qualities],” “circumscribe” them, and “mark [their] limits.”

29. *Cf.* *Nixon v. United States*, 506 U.S. 224, 231 (1993) (“‘Sole’ is defined as ‘having no companion,’ ‘solitary,’ ‘being the only one,’ and ‘functioning . . . independently and without assistance or interference.’ If the courts may review the actions of the Senate to determine whether that body ‘tried’ an impeached official, it is difficult to see how the Senate would be ‘functioning . . . independently and without assistance or interference.’” (citations omitted)).

30. 2 FARRAND’S RECORDS, *supra* note 12, at 177, 182.

31. *Id.* at 315–16.

32. *Id.* at 316.

33. *Id.* In a recent case, the United States Court of Appeals for the Eleventh Circuit interpreted this exchange differently. In the court’s telling, nobody else at the Convention wanted Congress to have the power to create new offenses. *See United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1250 (11th Cir. 2012) (“Morris suggested that they should use the word ‘designate’ as opposed to ‘define’ because he felt that ‘define’ was limited to the preexisting meaning of felonies. But the delegates rejected this motion and adopted Madison and Randolph’s proposal to insert the more limited word ‘define.’” (citations omitted)). But the court seems to

Finally, the Framers believed that giving Congress the power to define treason could lead to Congress inventing new varieties of treason.³⁴ Madison explained in *Federalist No. 43* that the Constitution “insert[ed] a constitutional definition of the crime” to prevent Congress from creating “new-fangled and artificial treasons.”³⁵ If the Framers believed the power to define treason would allow the creation of “new and artificial treasons,” they probably thought the power to define offenses against the law of nations would allow Congress to do the same thing. They also understood, as Eugene Kontorovich argues, that the power to define treason “could be a means to oppress the citizen.”³⁶ Alexander Hamilton accordingly described the Constitution’s treason definition as an important rights protection in *Federalist No. 84*.³⁷ So the Framers probably knew that giving Congress a power to define offenses against the law of nations could also threaten liberty.³⁸ An Antifederal-

have mischaracterized the debate. It left out the Convention’s reassurances that “define” was “applicable to the creating of offenses also.” Omitting that part of the story completely changes its meaning. Eugene Kontorovich likewise writes that “[t]he response to Morris was that *creating* new crimes would only be appropriate for felonies, but not piracies.” Kontorovich, *supra* note 6, at 1700 (footnotes omitted). But the delegates actually said that the power to designate “suited the case *both* of felonies & of piracies.” 2 FARRAND’S RECORDS, *supra* note 12, at 316 (emphasis added).

A more serious objection is that the debate over this motion consists solely of Morris’s concern and the response to him. The delegates may have had little to say on this issue because they agreed with Morris, or because they attached little importance to the clause. Additionally, “others” told Morris that the word “define” allowed for the creation of new offenses, but we have no idea who these “others” were, nor do we know if everyone at the Convention agreed. But if the notes are accurate, this episode shows that the Framers gave Congress a *power to define* the crimes listed because it wanted Congress to have the authority to create new types of piracies, felonies on the high seas, and offenses against the law of nations.

34. See U.S. CONST. art. I, § 3, cl. 1.

35. THE FEDERALIST NO. 43, at 240 (James Madison) (E.H. Scott ed., 1894).

36. Kontorovich, *supra* note 6, at 1704.

37. THE FEDERALIST NO. 84, at 467 (Alexander Hamilton) (E.H. Scott ed., 1894) (“[T]he Constitution proposed by the convention contains, as well as the constitution of this State, a number of such provisions [guaranteeing rights] . . . Section 3, of the same article—‘Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.’”).

38. See also Siegal, *supra* note 6, at 867 (“The participants in the debates over the ratification of the Constitution did not overlook the possibility that Congress, acting under the offenses clause, might infringe individual rights. But there is no evidence that this alarmed them generally.” (footnotes omitted)). Kontorovich

ist even called attention to the danger of allowing Congress to define offenses against the law of nations: Congress might use this power to limit free speech.³⁹ Notably, a Federalist article responding to this concern did not argue that Congress had no such power, only that this hypothetical was unlikely.⁴⁰ But despite such concerns about the breadth of this power, the Constitution was ratified.

B. The power to punish vaguely defined offenses

In a recent case, the United States Court of Appeals for the Eleventh Circuit suggested that Congress may not, pursuant to the Define and Punish Clause, punish offenses against the law of nations that did not exist in 1789.⁴¹ Some in Congress in the nineteenth century made this same argument.⁴² This interpretation of the Define and Punish Clause is almost certainly incorrect. In 1787, very few offenses against the law of nations were clearly defined. The Framers likely gave Congress the *power to define* because they wanted Congress to have the authority to punish more than just the small set of clearly established of-

draws a different conclusion: Congress does not enjoy a broad power to define because “where the defining power is given in reference to an external standard, it was understood to be strictly limited to that standard.” Kontorovich, *supra* note 6, at 1704. However, the Constitution did not define treason “in reference to an external standard”—it provided an internal definition. And regardless, there was no external standard defining offenses against the law of nations at the time of the Framing. See *infra* notes 56–57 and accompanying text. So even if the Framers believed that a “defining power [] given in reference to an external standard . . . [is] strictly limited to that standard,” they probably would have still thought that Congress had the power to define new offenses against the law of nations because there was no external standard for those offenses.

39. See *Cincinnatus I: To James Wilson, Esquire*, N.Y.J., Nov. 1, 1787, reprinted in 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 160, 163 (John P. Kaminski et al. eds., 2009) [hereinafter DHRC] (“[T]he proposed Congress are empowered—to define and punish offences against the law of nations—mark well, Sir, if you please—to define and punish. Will you, will any one say, can any one even think that does not comprehend a power to define and declare all publications from the press against the conduct of government, in making treaties, or in any other foreign transactions, an offence against the law of nations?”).

40. See *Anti-Cincinnatus*, HAMPSHIRE GAZETTE, Dec. 19, 1787, reprinted in 5 DHRC, *supra* note 39, at 36, 39 (“Have we the least possible ground of fear, that the United States in some future period will enter in their public treaties an article to injure the liberty of the press? What concern have foreign nations with the liberty or restraint of the American press?”).

41. See *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1253 (11th Cir. 2012).

42. See CONG. GLOBE APP’X, 27th Cong., 2d Sess. 619 (1842) (statement of Sen. Walker).

fenses against the law of nations. They did not want ambiguity in international law to constrain Congress's powers.

International law was hazy in the late-eighteenth and early-nineteenth centuries. Chief Justice John Marshall acknowledged the inherent uncertainties of divining the "unwritten" law of nations in 1815, noting that countries' interpretations often differ on the subject.⁴³ No state even attempted to codify the law of war, a branch of the law of nations, until 1863, and even then, much of it lacked detail compared to present day.⁴⁴

The Framers did not intend to limit Congress to punishing the few offenses that were well established at the time. Blackstone's chapter on "Offenses Against the Law of Nations" lists only three "principal offenses": "1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy."⁴⁵ The first category included "acts of hostilities against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct."⁴⁶ If the Framers wanted to limit the Define and Punish Clause to Blackstone's offenses, they might have just listed them individually. The clause mentions piracy by name, after all. It would have been easy to list the other two "principal offenses"⁴⁷ as well. That the Framers chose the umbrella term "offenses against the law of nations" implies that the clause allows Congress to punish more than the clearly illegal offenses Blackstone mentions. Additionally, the Define and Punish Clause originated as a Continental Congress resolution specifying several offenses the Congress wanted states to punish (under the Articles of Confederation, Congress had no power to pass this sort of criminal legislation). The resolution referenced one offense not mentioned in Blackstone: "infractions of treaties and conventions to which the United States are a party."⁴⁸ But the delegates to the Continental Congress did not think their list exhaustive. They only mentioned the ones

43. *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. 191, 198 (1815).

44. See JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 372–73 (2012); Howard S. Levie, *History of the law of war on land*, INT'L REV. RED CROSS No. 838 (June 30, 2000), <https://www.icrc.org/eng/resources/documents/article/other/57jqhg.htm> [https://perma.cc/3TUH-LWSC].

45. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *68.

46. *Id.*

47. *Id.*

48. 21 J. CONTINENTAL CONG. 1781, at 1136–37 (Gaillard Hunt ed., 1912).

“which are most obvious.”⁴⁹ The Framers likely had these “obvious” offenses in mind but did not list them in the Constitution, nor did they make the clause refer to “obvious” offenses against the law of nations.⁵⁰

Records from the Philadelphia Convention, in fact, suggest that the clause empowers Congress to punish non-obvious offenses. As the Convention entered its final month, the Define and Punish Clause gave Congress only the *power to punish* offenses against the law of nations.⁵¹ As mentioned earlier, Gouverneur Morris then moved to “let [offenses against the Law of Nations] be *definable* as well as punishable.”⁵² James Wilson, a future Supreme Court Justice, fought the change: “To pretend to *define* the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance that would make us ridiculous.”⁵³ Morris responded, “The word *define* is proper when applied to *offences* in this case; the law of nations being often too vague and deficient to be a rule.”⁵⁴ The Convention passed Morris’s motion, leaving the clause as currently written. Thus, many or most of the delegates probably intended to empower Congress to define and punish offenses against the law of nations that might not be well established under international law.⁵⁵ In the 1820 case of *United States v. Smith*, Justice Joseph Story likely drew on this episode when explaining that Congress has the power to define international law precisely because so much of international law is ambiguous.⁵⁶ No “public code recognised by the common consent of nations” existed that “completely ascertained and defined” offenses against the law of nations. Thus, “there is a peculiar fitness in giving the power to define as well as to punish; and there is not the slight-

49. *Id.* at 1137.

50. *But see* Kontorovich, *supra* note 6, at 1696 (suggesting that the Define and Punish Clause was intended to only cover the “subset of international wrongs” that concerned the Continental Congress).

51. 2 FARRAND’S RECORDS, *supra* note 12, at 595.

52. *Id.* at 614 (emphasis in original).

53. *Id.* at 615 (emphasis in original).

54. *Id.* (emphasis in original).

55. *See* *Al Bahlul v. United States*, 792 F.3d 1, 44 (D.C. Cir. 2015) (Henderson, J., dissenting), *rev’d on other grounds* 840 F.3d 757 (en banc); *Al-Bihani v. Obama*, 619 F.3d 1, 13 (D.C. Cir. 2010) (en banc) (mem.) (Kavanaugh, J., concurring).

56. 18 U.S. (5 Wheat.) 153, 159 (1820).

est reason to doubt that this consideration had very great weight in producing the phraseology in question."⁵⁷

Several scholars have argued that the Morris-Wilson exchange suggests a limit to the power to define: Congress may *clarify* offenses against international law but may not *invent* new offenses.⁵⁸ An 1805 speech from Senator John Quincy Adams⁵⁹ and an 1865 Attorney General Opinion made this same distinction.⁶⁰ The Define and Punish Clause did not give Congress "power to innovate upon those laws," Adams explained, because "the Legislature of one individual in the great community of nations has no right to prescribe rules of conduct which can be binding upon all."⁶¹

But this interpretation is probably wrong. Wilson's objection that Congress would look "ridiculous" if it tried to unilaterally change the law of nations is tangential to the issue at hand. As Kontorovich explains, there is a "difference between a constitutional power to 'define . . . the law of nations' and an attempt to actually tinker with the law of nations itself."⁶² When "[i]ncorporated into the Constitution, the law of nations is no longer a body of rules for the conduct of countries but an enumerated legislative power. When Congress uses this power, the law of nations per se is unaffected . . ."⁶³ The Wilson-Morris debate therefore shows only that Congress may define and punish offenses against the law of nations that lack clear definitions under international law.

57. *Id.*; see also *Al Bahlul*, 792 F.3d at 44 (Henderson, J., dissenting). To be clear, Justice Story's opinion from 1820 in *Smith* is relevant not because it sheds light on Madison's beliefs in 1787. Rather, it simply reflects an accurate description of the law at both his and Madison's time.

58. See, e.g., Kontorovich, *supra* note 6, at 1702. But see Howard S. Fredman, Comment, *The Offenses Clause: Congress' International Penal Power*, 8 COLUM. J. TRANSNAT'L L. 279, 289 (1969).

59. 15 Annals of Cong. 150 (1805).

60. See *Military Commissions*, 11 Op. Atty. Gen. 297, 299 (1865); see also Stephen Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT'L SECURITY L. & POL'Y 295, 331 (2010).

61. 15 ANNALS OF CONG. 150 (1805) (statement of Sen. Adams).

62. Kontorovich, *supra* note 6, at 1702 n.129.

63. *Id.*

C. The clause's purpose

States under the Articles of Confederation did not adequately criminalize offenses against the law of nations.⁶⁴ The Framers included the Define and Punish Clause to fix this problem. Therefore, they likely intended to give Congress sufficient flexibility in deciding what offenses it wished to punish. Otherwise, the judiciary could provoke an international crisis if it disagreed with Congress's interpretation of international law.

The Define and Punish Clause remedied a specific deficiency in the Articles of Confederation. A French diplomat was assaulted in Philadelphia, and while his assailant was eventually convicted in a Pennsylvania court, delegates to the Congress expressed concern that most states lacked civil and criminal remedies for these sorts of offenses against the law of nations.⁶⁵ Failure to punish such a gross violation of the law of nations provided just cause for war.⁶⁶ As mentioned earlier, the Continental Congress had no such power. For this reason, Jefferson encouraged Madison to push the Virginia legislature to adopt legislation punishing offenses against the law of nations like the assault in Philadelphia.⁶⁷ Congress also received reports of Americans seizing Spanish property, which many considered to be offenses against the law of nations because the United States was at peace with Spain.⁶⁸ In the last of these incidents, the Virginia state government initially announced its intention to prosecute Virginians responsible for the attack.⁶⁹ But Governor Edmund Randolph later expressed concern to Madison

64. See, e.g., Jonathan Hafetz, *Policing the Line: International Law, Article III, and the Constitutional Limits of Military Jurisdiction*, 2014 WIS. L. REV. 681, 709–10.

65. 27 J. CONTINENTAL CONG. 1784, at 478, 502–03, 564–65 (Gaillard Hunt ed., 1928).

66. See 4 EMER DE Vattel, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF SOVEREIGNS* § 81 (Joseph Chitty ed., 1863) (1758); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004).

67. See Letter from Thomas Jefferson to James Madison (May 25, 1784), in 8 *THE PAPERS OF JAMES MADISON* 42, 43 (Robert A. Rutland & William M. E. Rachal eds., 1973) [hereinafter *MADISON'S PAPERS*]; see also *infra* Section III.A.1 (describing this theory in greater detail).

68. See 32 J. CONTINENTAL CONG. 1784, at 190 n.3 (Roscoe E. Hill ed., 1936); 24 J. CONTINENTAL CONG. 1783, at 227–28 (Gaillard Hunt ed., 1922); 14 J. CONTINENTAL CONG. 1779, at 857 (Worthington Chauncey Ford ed., 1909).

69. See 4 *JOURNALS OF THE COUNCIL OF THE STATE OF VIRGINIA* 47 (Feb. 28, 1787).

that state law might not criminalize these attacks.⁷⁰ Shortly after, and just a month before the Philadelphia Convention began, Madison composed a list of “Vices of the political system of the U. States.” “Violations of the law of nations and of treaties” was the third item.⁷¹ The Framers thus believed that this failure to punish private actors’ violations of international law posed a real national security threat and wanted the new Constitution to fix this problem.

For this reason, Randolph argued in the first week of the Philadelphia Convention that Congress must have the power to ensure that “infractions of treaties or of the law of nations . . . be punished.”⁷² Madison, who had originally informed Randolph about the attack on the Spanish,⁷³ concurred: “The files of Congs. contain complaints already, from almost every nation with which treaties have been formed.”⁷⁴ At some point “rupture with other powers” would result because “[t]he existing confederacy does [not] sufficiently provide against this evil.”⁷⁵

Notably, the Define and Punish Clause intruded on traditional state prerogatives. Before the Constitution was ratified, local authorities were responsible for punishing offenses against the law of nations.⁷⁶ And this fact does not seem to have been lost on the public. A 1785 letter to John Dickinson, then the President of Pennsylvania (and later a delegate to the Philadelphia Convention representing Delaware), expressed concern that national “laws for punishing the infractions” against

70. See Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 MADISON’S PAPERS, *supra* note 67, at 368, 368 (referencing Randolph’s letter). Randolph’s letter itself seems to have been lost. See 9 MADISON’S PAPERS, *supra* note 67, at 313.

71. See James Madison, *Notes* (Apr. 1787), in 24 LETTERS OF DELEGATES TO CONGRESS 265, 265–66 (Paul H. Smith ed., 1996).

72. 1 FARRAND’S RECORDS, *supra* note 12, at 19.

73. See Letter from James Madison to Edmund Randolph (Feb. 18, 1787), in 8 MADISON’S PAPERS, *supra* note 67, at 271, 273; Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 8 MADISON’S PAPERS, *supra* note 67, 368, 368–69.

74. 1 FARRAND’S RECORDS, *supra* note 12, at 316.

75. *Id.* (second alteration in original). Madison may also have had in mind international law violations other than the attacks on the Spanish, such as southern states’ interference with the payment of pre-war debts to foreign nations, which violated American treaties. See KLARMAN, *supra* note 13, at 349 n.5.

76. See *supra* notes 48–50 and accompanying text.

the law of nations would “entrench[] too much on the sovereignty of the several individual states.”⁷⁷

Channeling Madison and Randolph’s speeches in Philadelphia, *The Federalist Papers* emphasized the importance of avoiding foreign conflict. Madison discussed the Define and Punish Clause explicitly in *Federalist No. 42*. Without this power, the national government would have to rely on the states to punish offenses against the law of nations. If the states refused, “any indiscreet member [might] . . . embroil the Confederacy with foreign nations.”⁷⁸ Speaking in more general terms, Jay argued that compliance with international law was “of high importance to the peace of America . . . [T]his will be more perfectly and punctually done by one National Government, than it could be either by thirteen separate States”⁷⁹ Finally, Hamilton said that the Constitution properly granted federal courts jurisdiction over lawsuits by foreigners because federal courts would be more impartial. That was critical because “[t]he Union will undoubtedly be answerable to foreign [p]owers for the conduct of its members. And the responsibility for an injury, ought ever to be accompanied with the faculty of preventing it.”⁸⁰

Given this context, it seems doubtful that the Framers thought Congress should be limited to punishing extant offenses against the law of nations. If even a few powerful European countries had an idiosyncratic view of international law, the United States might have every interest in abiding by their interpretation to avoid conflict. Otherwise, a federal judge who disagreed with Congress’s interpretation of international law could once again force Congress to rely on the states to punish acts that, if not suppressed, might lead to war.

D. The power to define “felonies on the high seas” and “piracy”

Congress also has the power to “define and punish Piracies and Felonies committed on the high Seas.”⁸¹ Presumably, as Kontorovich writes, “the word ‘define’ transitively conveys the same power in regard to all three kinds of crimes in the sec-

77. Letter from Charles Thomson to John Dickinson (July 19, 1785), in 22 LETTERS OF DELEGATES TO CONGRESS 520, 521 (Paul H. Smith ed., 1995).

78. THE FEDERALIST NO. 42, at 233 (James Madison) (E.H. Scott ed., 1894).

79. THE FEDERALIST NO. 3, at 20–21 (John Jay) (E.H. Scott ed., 1894).

80. THE FEDERALIST NO. 80, at 435 (Alexander Hamilton) (E.H. Scott ed., 1894).

81. U.S. CONST. art. I, § 8, cl. 10.

tion.”⁸² This section shows that Congress has significant discretion when defining felonies on the high seas and piracies. That suggests that Congress has broad power to define offenses against the law of nations too.

1. Felonies

The Framers gave Congress the power to define “felonies on the high Seas” because they did not want Congress to be limited to punishing felonies as defined by English common law. “Felonies” were not sufficiently defined by common law to provide a good external reference point. Additionally, the Framers (or at least Madison) did not want foreign law to limit Congress’s powers. Both concerns applied just as much to offenses against the law of nations.

First, importing English felonies into American law would prove impossible, Madison argued in *Federalist No. 42*, because “[f]elony is a term of loose signification, even in the common law of England.”⁸³ Common law and English statutory law were also inconsistent in their enumeration of felonies.⁸⁴ For instance, Madison explained at the Philadelphia Convention, Parliament considered “running away with vessels” a felony, but common law treated it as a “breach of trust.”⁸⁵ “The proper remedy for all these difficulties was to vest the power proposed by the term ‘define’ in the Natl. legislature.”⁸⁶ Congress needed the power to define “offenses against the law of nations” for that same reason: international law was vague. No “public code,” as Justice Story put it, “completely ascertained and defined” offenses against the law of nations.”⁸⁷

Second, Madison did not think other countries’ domestic laws should limit Congress’s power to define felonies. When he and Randolph moved to give Congress the power to define piracies and felonies committed on the high seas at the Philadelphia Convention, Wilson and Dickinson resisted. They believed that Congress did not need a power to define because

82. Kontorovich, *supra* note 6, at 1719.

83. THE FEDERALIST NO. 42, at 233 (James Madison) (E.H. Scott ed., 1894).

84. *See id.*

85. 2 FARRAND’S RECORDS, *supra* note 12, at 316.

86. *Id.*

87. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820).

felonies were sufficiently defined at common law.⁸⁸ But Madison did not want English law to limit the clause. “[N]o foreign law should be a standard farther than is expressly adopted”⁸⁹ *Federalist No. 42* explains why: Making “any other nation[’s law] . . . a standard for the proceedings of” the United States would be “dishonorable and illegitimate.”⁹⁰ Madison made the same point when discussing the Define and Punish Clause in Virginia’s ratifying convention. Even though “felonies on the high seas” included piracy, the Constitution redundantly includes the word “piracy” as a “technical term of the law of nations” to signal that English law would not set the limits of Congressional power.⁹¹ Making this clear was important because incorporating another country’s definition of this crime into the Constitution would be “dishonorable.”⁹² The clause instead authorizes Congress “to introduce [offenses] into the laws of the United States.”⁹³

Unless Congress had an expansive power to define offenses against the law of nations, foreign law would limit Congress’s powers, albeit indirectly. Courts often interpreted the law of nations at the time of the Framing by consulting other nations’ domestic statutes and interpretations of international law. Foreign municipal legislation constituted evidence of “principles of natural justice in which all the learned of every nation agree,” which Blackstone claimed was the source of the law of nations.⁹⁴ Foreign practice also established “usage” or “the customary law of nations.”⁹⁵ For this reason, Chief Justice Marshall

88. See 2 FARRAND’S RECORDS, *supra* note 12, at 316.

89. *Id.*

90. THE FEDERALIST NO. 42, at 233 (James Madison) (E.H. Scott ed., 1894).

91. *The Virginia Convention, June 20, 1788, Debates*, in 10 DHRC, *supra* note 39, at 163 (“Piracy is a word which may be considered as a term of the law of nations. Felony is a word unknown to the law of nations, and is to be found in the British laws, and from thence adopted in these states. It was thought dishonorable to have recourse to that standard. A technical term of the law of nations is therefore used, that we should find ourselves authorized to introduce it into the laws of the United States.”) (statement of Mr. Madison).

92. *Id.*

93. *Id.*

94. 4 BLACKSTONE, *supra* note 45, at *67.

95. See Thomas Jefferson, Opinion on Offenses against the Law of Nations (Dec. 3, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON 693, 693 (John T. Catanzariti ed., 1990) [hereinafter JEFFERSON’S PAPERS]; 1 VATTEL, *supra* note 66, § 25; David L.

often examined other countries' laws and interpretations of international law, as did early Attorneys General Opinions.⁹⁶ An 1820 House Committee Report thus recommended that Congress declare slave trading to be piracy in order to make it so under international law. If more countries punished slave trading as piracy, then the law-of-nations definition of piracy would eventually encompass it.⁹⁷ And courts today still look to foreign law to interpret customary international law.⁹⁸

If Congress must adhere to extant definitions under the law of nations, then the Constitution would have indirectly made foreign laws a limit on Congress's power to define. Foreign law would shape international law, which would influence Congress's constitutional authorities. Because Madison did not approve of foreign law limiting Congress's power to define felonies, he probably would not have wanted foreign law to limit Congress's power to define offenses against the law of nations either. Thus, Congress's expansive power to define felonies suggests it has an equivalent power to define offenses against the law of nations.⁹⁹

Sloss et al., *International Law in the Supreme Court to 1860*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT* 9 (David L. Sloss et al. eds., 2011).

96. See, e.g., *The Antelope*, 23 U.S. 66, 115 (1825) (holding that slave trading is not an offense against the law of nations as a matter of international law because "[i]t has claimed all the sanction which could be derived from long usage, and general acquiescence"); *Immunities of Foreign Consuls*, 2 Op. Att'y Gen. 725, 726 (1835) ("Vattel thinks [consuls] should be entitled to immunity from criminal prosecution, but no nations do that.").

97. See 36 ANNALS OF CONG. 2210 (1820); see also Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 NW. U.L. REV. 149, 195 (2009).

98. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103(2) (1987).

99. According to William Rawle's treatise, "The power to define either may have been introduced to authorize congress to qualify and reduce the acts which should amount to either under common law." WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 107 (2d ed. 1829) (emphasis added). But this language indicates that Rawle was not certain he was right. And his argument seems to be directly at odds with Madison's discussion of this issue. *But see* Kontorovich, *supra* note 6, at 1724.

Kontorovich points to a case, *The Ulysses*, which purportedly held that Congress cannot punish misdemeanors on the high seas and later label them felonies. *See id.* at 1722. A defense counsel made that argument, and the judge said during oral argument (but not in an opinion) that he agreed with the attorney. *See The Ulysses*, 24 F. Cas. 515, 519 (C.C.D. Mass. 1800) (No. 14,330). But neither person was talking about constitutional constraints. The counsel argued that an offense can be a felony "either by common law, or by the statute." *Id.* at 517. But to make an of-

2. Piracies

The United States has consistently defined piracy more broadly than international law does.¹⁰⁰ Madison hinted in *Federalist No. 42* that Congress is not tied to the law-of-nations' definition of piracy: "The definition of piracies might, perhaps, without inconveniency, be left to the law of nations; though a legislative definition of them is found in most municipal codes."¹⁰¹ Madison thus acknowledged that the power to define piracy would be unnecessary if Congress wanted to stick to the international-law definition. Congress can probably depart from it; otherwise, Congress would, in effect, have no power to define piracy. His reference to municipal piracies is also suggestive, as many European states defined piracy more broadly than did the law of nations.¹⁰² Given that piracy was one of the few well-defined offenses against the law of nations, it would be surprising if Congress did not enjoy similar latitude when defining more ambiguous ones.¹⁰³

Congress exercised this discretion in the early Republic. Following Britain's example, the First Congress's Crimes Act of 1790¹⁰⁴ declared privateering against the United States and murder on the high seas to be piracy, even though neither were piracy under international law.¹⁰⁵ Wilson, then a Supreme Court Justice, ex-

fense a "felony by . . . statute," Congress must clearly say so. *Id.* So this case at most establishes a clear statement rule for one part of the Define and Punish Clause. And it is difficult to attach too much significance to *The Ulysses* because, as Kontorovich acknowledges, it "has never been cited by other decisions." Kontorovich, *supra* note 6, at 1722 n.229.

100. See James J. Woodruff III, *The Prosecution of Piracy Under the Offenses Clause*, 2012 CARDOZO L. REV. DE NOVO 278, 286–89 (listing a series of offenses the U.S. punishes as "piracy" that are not piracy under international law).

101. THE FEDERALIST NO. 42, at 233 (James Madison) (E.H. Scott ed., 1894).

102. See, e.g., *Extradition*, 2 Op. Att'y Gen. 559, 559 (1833) (distinguishing piracy under the law of nations from piracy under the laws of Portugal); see also 1 HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 16, at 164 (1836) (contrasting jurisdiction over "[p]iracy, under the law of nations" and municipal piracies).

103. Compare *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158–59 (1820) (citing THE FEDERALIST NO. 42 (James Madison)), with 1 WHEATON, *supra* note 102, § 16, at 164 ("Offenses, too, against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations.").

104. Crimes Act of 1790, ch. 9, 1 Stat. 112.

105. See 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 251, 252 (8th ed. 1824); Crimes Act of 1790, 1 Stat. at 113–14; *Smith*, 18 U.S. (5 Wheat.) at 161 ("[R]obbery, or forcible depredations upon the sea, animo furandi, is piracy.").

pressed some “doubts” in a 1791 grand jury charge about Congress’s power to punish foreign citizens for murder on the high seas. He seems to have thought that Congress might not be able to exercise extraterritorial jurisdiction in violation of the law of nations.¹⁰⁶ But he was concerned here about Congress’s jurisdiction, not its power to define. Hamilton also seemed to think that Congress had some power to provide for novel definitions of piracy. He defended the Jay Treaty, in which Britain agreed to abandon many of its Northwestern forts in return for the United States making several concessions on neutral rights,¹⁰⁷ against the argument that it unconstitutionally defined piracy by claiming that the lawmaking and treaty powers are “concurrent,” and Congress has the power to define piracy.¹⁰⁸ Additionally, Congress used this power: It declared the slave trade to be piracy in 1820.¹⁰⁹ The Supreme Court also smiled on a broad power to define. Writing for a unanimous Court, Chief Justice Marshall commented in *The Antelope*¹¹⁰ that slave trading, though not piracy under the law of nations, “can be made so . . . by statute.”¹¹¹ And Justice Story wrote

106. See James Wilson, A Charge to the Grand Jury in the Circuit Court for the District of Virginia (May 1791), reprinted in 3 THE WORKS OF THE HONOURABLE JAMES WILSON L.L.D. 355, 377 (Bird Wilson ed., 1804) [hereinafter WILSON’S PAPERS] (expressing “doubts” about Congress’s power to punish foreigners as pirates for murder on the high seas); see also 1 WHEATON, *supra* note 102, § 16, at 164. In the same grand jury charge, Wilson indicated that the 1790 law’s reference to “piracy” implied that the statute incorporated the common-law definition of piracy. But he never said that Congress had no power to depart from the common-law definition. See James Wilson, A Charge to the Grand Jury in the Circuit Court for the District of Virginia (May 1791), reprinted in 3 WILSON’S PAPERS, *supra*, at 355, 371 (“[M]urder, manslaughter, robbery, piracy, forgery, perjury, bribery, and extortion are mentioned as crimes and offenses [in the 1790 act]; but they are neither defined nor described. For this reason, we must refer to some *preexisting* law for their definition or description. . . . The reference should be made to the *common law*.”). But see Kontorovich, *supra* note 6, at 1706.

107. See GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 197 (2009).

108. Alexander Hamilton, *The Defence No. 37* (Jan. 6, 1796), reprinted in 20 THE PAPERS OF ALEXANDER HAMILTON 13, 20 (Harold C. Syrett ed., 1974) [hereinafter HAMILTON’S PAPERS]. Article 21 of the treaty stipulated that any U.S. citizen serving in another country’s military in a war against Britain and any British subject serving against the United States would be tried as a pirate if captured. See Treaty of Amity, Commerce and Navigation, Gr. Brit.-U.S., art. 21, 8 Stat. 116, 127 (1794).

109. Act of May 15, 1820, Pub. L. 16-13, 3 Stat. 600.

110. 23 U.S. (10 Wheat.) 66 (1825).

111. *Id.* at 122 (emphasis added). Furthermore, “the obligation of the statute cannot transcend the legislative power of the state which may enact it,” *id.*, but here, Marshall just meant that the statute could not, on its own, change the under-

in his treatise that “the true intent of” the Define and Punish Clause “was, not merely to define piracy as known to the law of nations, but to enumerate what crimes in the national code should be deemed piracies.”¹¹²

A few paragraphs in *United States v. Furlong*,¹¹³ however, seem to suggest that Congress must adhere to the law-of-nations definition of piracy. Justice William Johnson, writing for a unanimous Court, declared that murder on the high seas was not “punishable by the laws of the United States, if committed by a foreigner upon a foreigner [on a foreign vessel].”¹¹⁴ Robbery on the high seas was piracy under the law of nations, punishable by every country, but murder on the high seas was not a universal jurisdiction offense.¹¹⁵ It would make no difference if “the law declare[d] murder to be *piracy*” because “not even the omnipotence of legislative power can confound or identify” murder on the high seas with piracy.¹¹⁶

lying law of nations. The Court ultimately decided it could not treat slave trading as piracy, but only on choice-of-law grounds: “[T]he legality of the capture of a vessel engaged in the slave trade, depends on the law of the country to which the vessel belongs.” *Id.* at 118. Spain, the home country of the *Antelope*’s owners, did not punish slave trading as piracy, and its law controlled. *But see* Kontorovich, *supra* note 6, at 1717.

Then-Congressman John Marshall gave a speech in the House of Representatives asserting that there is a distinction between “general piracy,” that is, piracy as defined by the law of nations, and “piracy by statute,” and that Congress could only exercise universal jurisdiction over the former. *See* 10 ANNALS OF CONG. 600 (1800). But as a Congressman, he may have made this argument for political reasons. *See generally* Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229 (1990) (discussing the charged political context). And at most, this speech indicates that Congress cannot exercise universal jurisdiction in violation of international law. *See* 10 ANNALS OF CONG. 607 (1800) (statement of Mr. Marshall) (“It has already been shown that the people of the United States have no jurisdiction over offenses committed on board a foreign ship against a foreign nation. Of consequence, in framing a Government for themselves, they cannot have passed this jurisdiction to that Government.”).

112. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1154, at 54 (1833).

113. 18 U.S. (5 Wheat.) 184 (1820). The case was originally called *United States v. Bowers and Matthews*, 5 Wheat. 198, but the Court consolidated it and several other piracy cases as *United States v. Pirates*, 5 Wheat. 184. This Article follows the modern convention of the *United States Reports* by listing the cases under the name *Furlong*.

114. *Furlong*, 18 U.S. (5 Wheat.) at 194.

115. *Id.* at 197.

116. *Id.* at 198.

Both the Eleventh and D.C. Circuits have argued that this language cabins the *power to define* offenses against the law of nations, as have many scholars.¹¹⁷ But interpreting *Furlong* that way is a mistake, for three reasons. First, *Furlong* was a case about statutory, not constitutional interpretation. Second, at most Justice Johnson was arguing in favor of an extraterritoriality limit on Congress's powers, not a broader limit on its power to define. Third, regardless of what Justice Johnson wrote in *Furlong*, the majority of the Court probably did not believe that the power to define was so limited.

Furlong concerned statutory interpretation. Justice Johnson concluded his opinion by asserting, "Congress neither *intended* to punish murder in cases with which they had no right to interfere, nor leave unpunished the crime of piracy in any cases in which they might punish it."¹¹⁸ The "had no right" language admittedly suggests that Justice Johnson inferred that Congress could not have meant to have done what it lacked the power to do. But Justice Johnson was probably referring to the United States' powers under the law of nations, not Congress's powers under the Constitution.¹¹⁹ Under the law of nations, states could exercise universal jurisdiction over piracy as defined by international law, but not over piracies invented by municipal law.¹²⁰ Justice Johnson never referenced the fact that Congress had limited powers as a body. But he did express concern about "offensive interference with the governments of other nations."¹²¹ He also wrote that an "omnipoten[t]" legislature would lack the power to declare murder to be piracy, which implies that the problem came from international law, not the

117. See *Al Bahlul v. United States*, 792 F.3d 1, 15 (D.C. Cir. 2015), *rev'd on other grounds* 840 F.3d 757 (en banc); *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1249 (11th Cir. 2012); Kontorovich, *supra* note 6, at 1720; Curtis S. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 335 n.51.

118. *Furlong*, 18 U.S. (5 Wheat.) at 198 (emphasis added).

119. Kontorovich says that "[t]he *Furlong* Court made clear that that this limitation was not one found in international law, or due process, or the statute itself." Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1214 (2009). But it is unclear to what in *Furlong* he is referring. The page range he cites, 18 U.S. (5 Wheat.) at 194–95, does not seem to address this issue.

120. See *supra* note 102.

121. *Furlong*, 18 U.S. (5 Wheat.) at 198.

Constitution.¹²² But Congress might still have the authority to enact statutes that violate international law.¹²³

Second, even if Justice Johnson was discussing constitutional limits on Congress's powers, he was referring to constitution limits to U.S. jurisdiction, not Article I limits to the power to define. At most, he meant that Congress cannot depart from the law-of-nations definition of piracy when exercising extra-territorial jurisdiction over foreign nationals because doing so violates international law. That does not necessarily mean that Congress cannot invent new piracies when enacting statutes without extraterritorial reach. In fact, as Chancellor James Kent explained in his constitutional treatise, the Crimes Act of 1790 had "enlarg[ed] the definition of piracy" to include murder on the high seas as well.¹²⁴

Third, it is doubtful that the majority of the Court believed that Congress must stick to the law-of-nations definition of piracy. This passage in *Furlong* was dictum,¹²⁵ and, as previously noted, it seems to be at odds with Chief Justice Marshall's opinion in *The Antelope* and Justice Story's treatise.¹²⁶ Additionally, two years earlier in *United States v. Palmer*, Justice Johnson had argued that Congress could only punish piracy as defined by the law of nations, but nobody joined his opinion.¹²⁷ And in a case decided a few weeks before *Furlong*, the Court said that Congress could punish murder committed by a foreign citizen against another

122. *Id.*

123. See, e.g., *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("An act of Congress ought never to be construed to violate the law of nations if any other construction remains . . ." (emphasis added)). Justice Johnson may have thought that this law-of-nations limit was also a constitutional limit, but he did not explicitly say so; see also *supra* note 111 (discussing John Marshall's 1800 speech).

124. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 176 (1826); accord Crimes Act of 1790, ch. 9, § 8, 1 Stat. 112, 113.

125. See *Furlong*, 18 U.S. (5 Wheat.) at 192–93 (explaining the holding); *id.* at 193 ("It would seem to be unnecessary to go further in the cases against *Furlong*, as this conclusion decides his fate; but this Court cannot foresee how far it may be necessary to the administration of justice, against accessories or otherwise, that the question in the cases of murder should also be decided.").

126. See *id.* at 195.

127. See *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 641–42 (1818) (Johnson, J., dissenting) ("[C]ongress cannot make that piracy, which is not piracy by the law of nations, in order to give jurisdiction to its own courts over such offenses.").

foreign citizen on the high seas *as piracy*, even though only robbery on the high seas was piracy under the law of nations.¹²⁸

Moreover, Justice Johnson signaled in *Furlong* that he was only writing for himself when arguing that there were limits to Congress's power to define piracy. After explaining the holding, he switched from writing in the first-person plural to writing in the first-person singular, which he does not seem to have done in any of his other opinions for the Court¹²⁹:

It is true, that the 8th section declares murder as well as robbery to be piracy; but, *in my view*, if any thing is to be inferred from this association, it is only that they meant to assert the right of punishing murder to the same extent that they possessed the right of punishing piracy; which would be carrying the construction beyond *what I contend for*. . . . Testing *my construction* of this section, therefore, by the rule *that I have assumed*, I am led to the conclusion, that it does not extend the punishment for murder to the case of that offence committed by a foreigner upon a foreigner in a foreign ship. . . . Nor is it any objection to this opinion, that the law declares murder to be piracy.¹³⁰

Justice Johnson also spent a few paragraphs explaining his separate opinion in *Palmer*.¹³¹ All of this would have been oddly self-referential if he were speaking for everyone. Perhaps for this reason, while many nineteenth-century legal treatises cited *Furlong's* holdings, none seem to have mentioned Justice Johnson's comments about universal jurisdiction and the power to define.¹³²

128. *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 151–52 (1820). But as a matter of statutory law, after *Palmer*, the murder had to take place on either a U.S. ship or a ship not under the jurisdiction of any country.

129. Justice Johnson shifted from “we” to “I” in the last paragraph beginning at the bottom of *United States v. Furlong*, 18 U.S. (5 Wheat.), 184, 195 (1820). For his other opinions, see, for example *Mut. Assur. Soc’y v. Faxon*, 19 U.S. (6 Wheat.) 606 (1821); *Union Bank v. Hyde*, 19 U.S. (6 Wheat.) 572 (1821); *Leeds v. Marine Ins. Co.*, 19 U.S. (6 Wheat.) 565 (1821); *Campbell v. Pratt*, 18 U.S. (5 Wheat.) 429 (1820); *The Venus*, 18 U.S. (5 Wheat.) 127 (1820); *Murray’s Lessee v. Baker*, 16 U.S. (3 Wheat.) 541 (1818); and *The George*, 15 U.S. (2 Wheat.) 278 (1817).

130. *Furlong*, 18 U.S. (5 Wheat.) at 196, 197, 198 (emphasis added).

131. *Id.* at 195–96.

132. The silence is particularly striking because many nineteenth-century commentators discussed *Furlong*. See, e.g., THOMAS F. GORDON, A DIGEST OF THE LAWS OF THE UNITED STATES, INCLUDING AN ABSTRACT OF THE JUDICIAL DECISIONS RELATING TO THE CONSTITUTIONAL AND STATUTORY LAW 739 (1837); 1 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES & MISDEMEANORS 136 (Daniel Davis ed., 1824); THOMAS SERGEANT, CONSTITUTIONAL LAW 334 (1830); 2 FRANCIS

It would be strange today for a majority of Justices to sign on to an opinion they disagreed with, but between 1815 and 1823, separate opinions were extremely unusual—more so than at any other time during the Marshall Court.¹³³ Because the Justices considered it important to appear unanimous, the Court's opinions during this time generally only reflected the views of the opinions' authors. Often, the Justices failed to even show one another draft opinions because, as G. Edward White explains, "circulation only gave other Justices who concurred in the result an opportunity to object to the opinion's language or reasoning."¹³⁴ In sum, we should not attach too much importance to stray dictum that was written in the first-person singular and at odds with several contemporary cases.

But even if this Article's interpretation of *Furlong* is wrong and the Define and Punish Clause does not grant Congress a power to define piracy for itself, that would not necessarily affect Congress's power to define offenses against the law of nations. Congress would still have a broad power to define felonies, as explained earlier. And "offenses against the law of nations" were more like "felonies" than "piracies" because offenses against the law of nations, like felonies and unlike piracies, lacked a clear external reference point.¹³⁵

* * *

Early constitutional history therefore suggests that Congress's power to define offenses against the law of nations authorizes it, at minimum, to punish vague offenses against the law of nations. It may even be able to use its power to create new ones.¹³⁶

WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 533 (5th ed. 1861); HENRY WHEATON, A DIGEST OF THE OPINIONS OF THE SUPREME COURT OF THE UNITED STATES 14, 117, 167, 401 (1821). The first treatise that seems to have cited the language at issue was published eighty-eight years after *Furlong*. See ALBERT H. PUTNEY, UNITED STATES CONSTITUTIONAL HISTORY AND LAW § 153, at 261 (1908).

133. See G. Edward White, *The Working Life of the Marshall Court, 1815-1835*, 70 VA. L. REV. 1, 42 (1984).

134. *Id.* at 38.

135. See *supra* notes 56–57 and accompanying text.

136. Kontorovich argues that Madison's Report of 1800 indicates "that Congress's use of the define Offenses power is strictly limited by international law can be reviewed against the standard." Kontorovich, *supra* note 6, at 1714 (citing Report of 1800 (Jan. 20, 1800), reprinted in THE VIRGINIA REPORT OF 1799–1800 (J.W.

Randolph ed., 1850)). That is not right. In the Report of 1800, Madison said that the Define and Punish Clause authorizes Congress to exercise two different kinds of powers: (1) a power to punish law-abiding citizens of foreign states that had wronged the United States, and (2) a power to punish any person who violates U.S. law. The former came from the law of nations and was therefore “strictly limited by international law,” in Kontorovich’s words. *Id.* But Madison never said that international law limited the latter.

Some background is necessary. In 1798, a Federalist-dominated Congress passed the Alien Enemies Act and the Alien Friends Act (often referred to together as “The Alien Acts”). The Alien Enemies Act authorized the detention and deportation of nationals of any country at war with the United States. *See* An Act respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798). The Alien Friends Act allowed the President to deport any foreign national that the President determined to be “dangerous to the peace and safety of the United States.” An act concerning Aliens, ch. 58, § 1, 1 Stat. 570, 571 (1798). The Virginia and Kentucky Legislatures then passed resolutions, drafted by Madison and Jefferson, respectively, declaring the Alien and Sedition Acts to be unconstitutional and calling on other legislatures to do the same. No other state did so; in fact, several Northern states defended the Acts. Madison wrote the Report of 1800 as part of a committee for the Virginia Legislature to rebut the Northern states’ arguments. *See generally* WOOD, *supra* note 107, at 269–71. Some had defended the constitutionality of the Alien Acts by claiming that Congress could declare under the Define and Punish Clause “that to be dangerous to the peace of society is, in aliens,” an offense against the law of nations. Report of 1800, *supra*, at 205. Madison responded as follows.

Laws enacted pursuant to the Define and Punish Clauses, Madison explained, are “penal act[s],” so “the punishment [a law] inflicts . . . must be justified by some offense that deserves it.” *Id.* Alien friends may be only “tried and punished” for violating “municipal [that is, federal] law.” *Id.* “Alien enemies,” by contrast, are also “liable to be punished for offences against [the law of nations].” *Id.* By this, Madison did not mean that alien friends cannot be prosecuted for violating criminal statutes enacted pursuant to the Define and Punish Clause. After all, a U.S. statute criminalizing offenses against the law of nations would still be “municipal law.” *Cf. supra* note 102 and accompanying text (distinguishing between “municipal” piracies and piracy under the law of nations). Rather, he meant that alien enemies can be punished for violations of the law of nations committed by their home state.

This punishment power came from international law. Once the United States was at war with another state, Democratic-Republicans believed, it could avail itself of all the privileges and powers of belligerency. *See* Andrew Lenner, *Separate Spheres: Republican Constitutionalism in the Federalist Era*, 41 AM. J. LEGAL HIST. 250, 267 (1997) (citing other Democratic-Republicans who made this argument more clearly than did Madison). Because the power came from international law, the United States could go no further than international law authorized. *See also* 8 ANNALS OF CONG. 1582 (1798) (statement of Mr. Gallatin) (“[A]lien enemies might be removed . . . by a principle which existed prior to the Constitution and coeval with the law of nations.”). Deporting alien enemies was therefore permissible because “the laws of [war] authorize[]” belligerents to expel one another’s citizens as a type of retributive act during war. Report of 1800, *supra*, at 206.

The power to enact municipal criminal legislation under the Define and Punish Clause, by contrast, came from the Constitution alone. And Madison never said that the law of nations limited it. In short, the Report of 1800 has nothing to do

III. NEUTRALITY

Congress passed the Neutrality Act of 1794 pursuant to the Define and Punish Clause. The Act punished conduct that did not actually violate the law of nations. The Third Congress enacted this law only seven years after the Philadelphia Convention without anyone suggesting the law might be unconstitutional. And many of the key players in the debates over the Act—Washington, Hamilton, Jay, and Madison—played a large role in the Convention, the Ratification debates, or both.¹³⁷ Accordingly, as a matter of original public understanding, there is strong evidence that Congress may use its power to define to criminalize acts that do not actually violate the law of nations.¹³⁸ At minimum, this law establishes a strong precedent for a broad understanding of the Define and Punish Clause.¹³⁹

A. *Historical background*

The French Revolution began in 1789. Worried about the Revolution's ideological ramifications, Austria and Prussia formed an alliance against France in February 1792, prompting France to declare war on Austria in April.¹⁴⁰ Prussia and Sardinia joined the fight against France that same year.¹⁴¹ In January 1793, the French Republic executed Louis XVI and, on February 1, declared war on Britain and the Netherlands.¹⁴²

The United States had signed treaties with France, the Netherlands, Britain, and Prussia guaranteeing “a firm, inviolable and universal Peace.”¹⁴³ America was thus committed to re-

with the scope of Congress's power to define offenses against the law of nations when enacting municipal criminal legislation.

137. See CASTO, *supra* note 3, at 1.

138. Cf. *Myers v. United States*, 272 U.S. 52, 136 (1926).

139. See *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015) (noting that the Court places significant weight on “historical practice”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819); *Al Bahlul v. United States*, 840 F.3d 757, 764 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring).

140. See JOHN HAROLD CLAPHAM, *THE CAUSES OF THE WAR OF 1792*, at 201–03 (1898)

141. See 1 JONATHAN ELLIOT, *THE AMERICAN DIPLOMATIC CODE* 10 (1834).

142. See MIKE RAPPORT, *THE NAPOLEONIC WARS: A VERY SHORT INTRODUCTION* 24, 26 (2013).

143. See *Treaty of Amity and Commerce Between the United States of America and His Most Christian Majesty, Fr.-U.S.*, art. 21, 8 Stat. 12, 24 (1782) [hereinafter

main neutral,¹⁴⁴ which was the U.S. government's preference. The United States was too weak to fight another war.¹⁴⁵ As news of the Netherlands and Britain's entry into the war began trickling into the United States by late March and early April,¹⁴⁶ President Washington and his Cabinet unanimously decided that, to stay neutral, they must prevent private Americans citi-

U.S.-France Treaty of Amity and Commerce]; Treaty of Amity and Commerce between their High Mightiness the States General of the United Netherlands, and the United States of America, to wit: New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut [sic], New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, Neth.-U.S., art. 19, 8 Stat. 32, 44 (1782) [hereinafter U.S.-Dutch Treaty of Amity and Commerce]; Definitive Treaty of Peace Between the United States of America and his Britannic Majesty, Gr. Brit.-U.S., art. 7, 8 Stat. 80, 83 (1783); A Treaty of Amity and Commerce Between his Majesty the King of Prussia and the United States of America, Prussia-U.S., art. 20, 8 Stat. 84, 94 (1785) [hereinafter U.S.-Prussia Treaty of Amity and Commerce].

144. See John Jay, Charge to the Grand Jury (May 22, 1793), *Henfield's Case*, reprinted in FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 49, 54 (1849). The United States was bound by treaty to defend France's colonies in the West Indies, but the French national government decided not to invoke this provision "because America was an insignificant military power. . . . Instead of military assistance, France wished the United States to remain neutral and support France by paying off the loan from the Revolutionary War, providing food, and facilitating a French maritime campaign against British shipping." CASTO, *supra* note 3, at 17; see also Treaty of Alliance Between the United States of America and His Most Christian Majesty, Fr.-U.S., art. 11, 8 Stat. 6, 10 (1778).

145. See CHARLES MARION THOMAS, AMERICAN NEUTRALITY IN 1793: A STUDY IN CABINET GOVERNMENT 14, 17 (1931); see also CASTO, *supra* note 3, at 22, 162-63; 1 PHILIP C. JESSUP & FRANCIS DEÁK, NEUTRALITY: ITS HISTORY, ECONOMICS AND LAW 260 (1935); CHARLES S. HYNEMAN, THE FIRST AMERICAN NEUTRALITY 19. In April 1793, Vice President John Adams told Assistant Treasury Secretary Tench Coxe that "absolute total Neutrality is our only hope." 2 PAGE SMITH, JOHN ADAMS 840 (1962) (quoting Letter from John Adams to Tench Coxe (Apr. 25, 1793)). Randolph expressed the same sentiment a few years later to Monroe. See Letter from Edmund Randolph to James Monroe (June 1, 1795), in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 705, 706 (Walter Lowrie & Matthew St. Clair Clarke eds., 1833) [hereinafter AM. STATE PAPERS].

146. See, e.g., Letter from Thomas Jefferson to George Washington (Apr. 1, 1793), in 12 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 395, 395 (Christine Sternberg Patrick & John C. Pinheiro eds., 2005) [hereinafter WASHINGTON'S PAPERS]; Letter from Alexander Hamilton to George Washington (Apr. 5, 1793), in 12 WASHINGTON'S PAPERS, *supra*, at 412, 413; Letter from Thomas Jefferson to George Washington (Apr. 7, 1793), in 12 WASHINGTON'S PAPERS, *supra*, at 419, 419; Letter from Alexander Hamilton to George Washington (Apr. 8, 1793), in 12 WASHINGTON'S PAPERS, *supra*, at 424, 424; Letter from Tobias Lear to George Washington (Apr. 8, 1793), in 12 WASHINGTON'S PAPERS, *supra*, at 434, 434.

zens from joining hostilities.¹⁴⁷ Because Americans were generally sympathetic to the French, the government's failure to act would have unduly disadvantaged the other powers.¹⁴⁸ Washington issued a Proclamation of Neutrality on April 22, which stated that the United States would remain "friendly and impartial toward the belligerent [sic] Powers" and threatened to punish Americans who might compromise American noninvolvement.¹⁴⁹ Thanks to Secretary of State Jefferson's lobbying, Washington did not use the word "neutrality" in the proclamation itself. Jefferson's reasons were two-fold. First, the President lacked constitutional authority to decide whether the United States would enter the war.¹⁵⁰ Second, the United States should use the promise of such a declaration to extract from the belligerents "the broadest privileges of neutral nations."¹⁵¹ But the public quickly came to understand the pronouncement to be a declaration that America would remain neutral.¹⁵²

147. See Letter from George Washington to Alexander Hamilton (Apr. 12, 1793), in 12 WASHINGTON'S PAPERS, *supra* note 146, at 447, 447; Letter from George Washington to Thomas Jefferson (Apr. 12, 1793), in 12 WASHINGTON'S PAPERS, *supra* note 146, at 448, 448; Minutes of a Cabinet Meeting (Apr. 19, 1793), in 12 WASHINGTON'S PAPERS, *supra* note 146, at 459, 459.

148. See THOMAS, *supra* note 145, at 33.

149. The Proclamation of Neutrality (Apr. 22, 1793), reprinted in 1 AM. STATE PAPERS, *supra* note 145, at 140, 140. By then, to discourage attacks on their commercial ships, states often informed belligerents that they planned on staying neutral. See 10 J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 47 (1979).

The administration did not believe that the Proclamation itself gave it the power to prosecute Americans. Under Attorney General Edmund Randolph's legal theory, the United States could prosecute any American who attacked a country at peace with the United States. See Edmund Randolph, Opinion on Gideon Henfield (May 30, 1793), in 26 JEFFERSON'S PAPERS, *supra* note 95, at 145, 145-46. The Proclamation merely warned Americans that they faced prosecution. See George Washington, Fifth Annual Message (Dec. 3, 1793), reprinted in 1 AM. STATE PAPERS, *supra* note 145, at 21, 22 (explaining the Proclamation's purpose).

150. Letter from Thomas Jefferson to James Madison (June 23, 1793), in 15 MADISON'S PAPERS, *supra* note 67, at 37, 37. Alexander Hamilton and James Madison later wrote a series of essays debating this issue under the pseudonyms *Pacificus* and *Helvidius*, respectively, with Hamilton defending the President's power to issue the Proclamation and Madison arguing that the President lacked the authority.

151. *Id.*

152. See THOMAS, *supra* note 145, at 35-36, 45-46.

The Cabinet encouraged U.S. attorneys to prosecute Americans who jeopardized U.S. neutrality.¹⁵³ In one famous case, William Rawle, the U.S. attorney for Philadelphia and future author of a leading treatise on constitutional law, indicted Gideon Henfield for serving on a French privateer, only to see the jury acquit.¹⁵⁴ Shortly after, the administration requested that France recall Edmond Charles Genêt, its minister to the United States, because he “was undertaking to authorize the fitting and arming vessels in that port, enlisting men, foreigners and citizens, and giving them commissions to cruize [sic] and commit hostilities against nations at peace with us.”¹⁵⁵

Worried by Henfield’s acquittal and Genêt’s activities, Washington in December 1793 asked Congress to enact a law to “correct, improve, or enforce” his administration’s neutrality policy.¹⁵⁶ In June 1794, Congress passed the Neutrality Act, which prohibited:

- (1) any American from accepting a commission from a foreign country,
- (2) any person from enlisting himself or recruiting another person for foreign military service,
- (3) any person from fitting out or arming vessels with the intent that such vessels be used by a foreign country to attack countries at peace with the United States,
- (4) any person from “increasing or augmenting the force of any ship” belonging to a foreign state at war with any country that the United States was at peace with, and

153. Letter from Thomas Jefferson to William Rawle (May 15, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 40, 40–41; accord Letter from Thomas Jefferson to Richard Harison (June 12, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 261, 261.

154. See *Henfield’s Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360).

155. Letter from Thomas Jefferson to James Madison (Aug. 11, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 649, 650; see also THOMAS, *supra* note 145, at 227–31 (discussing the administration’s decision to request Genêt’s recall).

156. George Washington, Fifth Annual Message (Dec. 3, 1793), reprinted in 1 AM. STATE PAPERS, *supra* note 145, at 21, 22. Washington acted unilaterally for half a year because Congress was not in session from April through December. See CASTO, *supra* note 3, at 18.

(5) preparing military expeditions against countries at peace with the United States.¹⁵⁷

It also gave federal courts jurisdiction to decide on the legality of prizes captured within territorial waters and authorized the President to enforce these provisions and to expel foreign vessels within United States territory.¹⁵⁸

B. The constitutional basis for American neutrality legislation

When formulating U.S. policy in 1793, the Washington administration consistently referred to neutrality violations as offenses against the law of nations. The legislative history surrounding the bill's passage is less robust, but it too provides strong, albeit indirect, evidence that Congress enacted the Neutrality Act pursuant to the Define and Punish Clause. And in the decades after the Act's passage, prominent American politicians and scholars referred to neutrality violations as offenses against the law of nations and the Neutrality Act as passed pursuant to the Define and Punish Clause.¹⁵⁹

157. Neutrality Act of 1794, ch. 50, §§ 1–5, 1 Stat. 381, 381–84. Prohibitions (1) and (2) are distinct because only officers received “commissions.” See *Commission*, 1 JOHNSON, *supra* note 19. Prohibition (1) thus covered officers, whereas prohibition (2) forbade the levying of ordinary soldiers and seamen. To “fit out” a vessel meant “to furnish; to equip; to supply with necessaries.” *Id.* Prohibitions (3) and (4) are distinct because prohibition (3) punished the *equipping and fitting out of any vessels* if there was *an intent* that such vessels be used by one state against another state which was at peace with the United States. (4), by contrast, only prohibited the *arming* of vessels *owned by a foreign state* at war with a state with whom the United States was at peace. Prohibition (3) thus contained a more stringent mens rea requirement, and prohibition (4) only applied to the arming of vessels already in a foreign state's service.

158. Neutrality Act of 1794, §§ 6–8, 1 Stat. at 384.

159. A few scholars have recently argued that the Neutrality Act could not have been enacted pursuant the Define and Punish Clause because it punished several acts that were not actually offenses against the law of nations. See MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 207 (2007); Jules Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT'L L.J. 1, 16 n.86 (1983). This argument, in short, assumes that Congress has a minimal power to define—the opposite of this Article's thesis.

1. *Pre-Neutrality Act understanding of neutrality*

The Neutrality Act's criminal provisions can be grouped into two general categories.¹⁶⁰ First, the United States punished Americans and U.S. residents who committed or aided and abetted hostilities against any of the belligerents by:

- (1) becoming an officer in a foreign army or navy,
- (2) enlisting himself or someone else to fight for a foreign power as a soldier, seaman, or privateer,
- (3) outfitting or arming a foreign states' vessels, or
- (4) preparing a military expedition against a foreign power at peace with the United States.¹⁶¹

Second, the prohibitions on enlisting Americans and U.S. residents, fitting out or arming war vessels, and preparing military expeditions covered "any person," including foreign government officials.¹⁶² Throughout 1793 and early 1794, American officials referred to both categories as offenses against the law of nations. This Section goes through each in turn.

The Proclamation of Neutrality itself is explicit in stating that any American who commits hostilities against one of the belligerents violates the law of nations. Its operative provisions are reprinted below:

And I do hereby also make known, that whatsoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by *committing, aiding, or abetting hostilities against any of the said Powers . . .* and further, that I have given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, *violate the law of nations, with respect to the Powers at war, or any of them.*¹⁶³

160. The Act's other provisions mentioned above—giving U.S. courts jurisdiction over captures made within territorial powers and the President's enforcement powers—did not prohibit any private conduct. Therefore, those provisions are not relevant for this Article's argument because Congress was not making use of the Define and Punish Clause.

161. Neutrality Act of 1794, §§ 1–5, 1 Stat. at 381–84.

162. *Id.* §§ 2–5, 1 Stat. at 383–84.

163. The Proclamation of Neutrality (Apr. 22, 1793), reprinted in 1 AM. STATE PAPERS, *supra* note 145, at 140, 140 (emphasis added).

The Proclamation thus informed the public that Washington had instructed U.S. attorneys to prosecute anybody who “violate[s] the law of nations” by “committing, aiding, or abetting hostilities against any” belligerents.

The U.S. government soon expanded on the legal theory underlying the Neutrality Proclamation. United States Chief Justice John Jay seems to have offered the first full explanation in his charge to a Virginia grand jury. He argued that “committing, aiding, and abetting” hostilities against the belligerents was an offense against the law of nations because the United States was at peace with the warring parties.¹⁶⁴ He also quoted Vattel for the proposition that states have an obligation under the law of nations to prevent their citizens from harming other states.¹⁶⁵ During Henfield’s trial, Rawle and his panel of three judges, Supreme Court Justices James Wilson and James Iredell and district court Judge Richard Peters, made the same arguments and described Henfield’s conduct as an offense against the law of nations.¹⁶⁶ As Rawle put it, “any aggression on the subjects of other nations done in an *hostile* manner and under *colour of war* [that is, under a foreign state’s commission] is a violation of that neutrality. . . . If *not* under the colour of war it would be an act of *piracy*.”¹⁶⁷ The Cabinet agreed.¹⁶⁸ And in his

164. See John Jay, Charge to the Grand Jury (May 22, 1793), *Henfield’s Case*, reprinted in WHARTON, *supra* note 144, at 49, 56.

165. See *id.* at 55 (“[T]he nation or sovereign ought not to suffer the citizens to do any injury to the subjects of another State.” (quoting 2 VATTEL, *supra* note 66, § 72)).

166. See James Wilson, Charge to the Grand Jury, *Henfield’s Case*, reprinted in WHARTON, *supra* note 144, at 59, 64–65 (citing Vattel for the proposition that failure by the United States to prosecute its citizens would put it in breach of its international legal obligations); Grand Jury Indictment, *Henfield’s Case*, reprinted in WHARTON, *supra* note 144, at 66, 70, 71, 76, 76–77 (indicting Henfield for offenses against the law of nations); William Rawle, Argument, *Henfield’s Case*, reprinted in WHARTON, *supra* note 144, at 78, 79–80 (explaining that Henfield violated treaties of peace, which is an offense against the law of nations); James Wilson, Charge to the Petit Jury, *Henfield’s Case*, reprinted in WHARTON, *supra* note 144, at 83, 84–85 (“It is the joint and unanimous opinion of the Court, that the United States, being in a state of neutrality relative to the present war, the acts of hostility committed by Gideon Henfield are an offence against this country, and punishable by its laws. . . . As a citizen of the United States, he was bound to act no part which could injure the nation; he was bound to keep the peace in regard to all nations with whom we are at peace. This is the law of nations; not an *ex post facto* law, but a law that was in existence long before Gideon Henfield existed.”).

167. William Rawle, Argument, *Henfield’s Case*, reprinted in WHARTON, *supra* note 144, at 78, 78.

letter to then-minister to France Gouverneur Morris outlining America's understanding of neutrality law, Jefferson made the same arguments and sent copies of Wilson and Jay's charges for further elaboration.¹⁶⁹

Turning to the second category, American officials also argued that foreign governments' recruitment of Americans and outfitting and arming of their ships in American ports were offenses against the law of nations. Quoting Vattel, Jay told the Virginia grand jury that to recruit Americans without the U.S. government's permission was to violate U.S. sovereignty.¹⁷⁰ In a letter to Richard Harison, the U.S. attorney for New York, Hamilton made the same argument, calling such acts "offense[s] against the law of Nations."¹⁷¹ Hamilton's memorandum to Washington, written in response to Genêt's recruiting Americans and fitting out French privateers, expanded on the point. He claimed, without citation, that "[t]he equipping manning and commissioning [sic] of Vessels of War" was "essentially of the same nature" as levying troops.¹⁷² Both were

168. See Edmund Randolph, Opinion on the case of Gideon Henfield (May 30, 1793), in 1 AM. STATE PAPERS, *supra* note 145, at 152, 152; Thomas Jefferson, Notes on Neutrality Questions (July 13, 1793), in 26 JEFFERSON'S PAPERS, *supra* note 95, at 498, 498–99 (noting that the Cabinet unanimously agreed with Randolph's opinion).

169. See Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), in 26 JEFFERSON'S PAPERS, *supra* note 95, at 697, 702. To be clear, nobody was arguing, along the lines of Blackstone, that neutrality violations were "acts of hostilities against such as are in amity, league, or truce with [the United States]" that amounted to violations of "a general implied safe-conduct." BLACKSTONE, *supra* note 45, at *68. A safe conduct was a right to "safely pass through the places where he who grants it is master," which included U.S. territory and places where U.S. troops were present. 3 VATTEL, *supra* note 66, § 265 (emphasis added); *accord id.* § 268; see also BLACKSTONE, *supra* note 45, at *68 (discussing "acts of hostilities against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct" (emphasis added)); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 873 (2006) (discussing same). Indirectly harming another country in U.S. territory, by joining the navy of that country's enemy or outfitting its enemy's ships, did not count as "acts of hostilities."

170. John Jay, Charge to the Grand Jury (May 22, 1793), *Henfield's Case*, reprinted in WHARTON, *supra* note 144, at 49, 56 (citing 3 VATTEL, *supra* note 66, § 15).

171. Letter from Alexander Hamilton to Richard Harison (June 13–15, 1793), in 14 HAMILTON'S PAPERS, *supra* note 108, at 539, 539; *accord* Letter from Alexander Hamilton to George Washington (May 15, 1793), in 14 HAMILTON'S PAPERS, *supra* note 108, at 454, 455.

172. Letter from Alexander Hamilton to George Washington (May 15, 1793), in 14 HAMILTON'S PAPERS, *supra* note 108, at 454, 455.

“among the highest and most important exercises of sovereignty,” and it is an offense against the law of nations “for one Nation to do acts of the above description, within the territories of another, without its consent or permission.”¹⁷³ To preserve its neutrality, the United States must ban such practices because it was “contrary to the duty of a Neutral Nation to suffer itself to be made an instrument of hostility, by one power at war against another.”¹⁷⁴ The Cabinet unanimously agreed.¹⁷⁵

Finally, in March 1794, Washington issued a second proclamation with the Cabinet’s unanimous approval forbidding the enlisting of Americans to fight against countries with which the United States is at peace.¹⁷⁶ His administration had heard news that a group of Kentuckians was planning to attack Spanish Florida.¹⁷⁷ Genêt had commissioned General George Rogers Clark, the group’s leader, and promised to fund the expedition.¹⁷⁸ The Proclamation described these “unwarrantable measures” as “contrary to the Laws of nations and to the duties incumbent on every citizen of a neutral state.”¹⁷⁹

2. *The Neutrality Act’s legislative and post-enactment history*

The Neutrality Act’s legislative history provides both direct and indirect evidence that Congress enacted the law pursuant to the Define and Punish Clause. The direct evidence mostly comes from Washington’s request for legislation. He asked Congress to codify his neutrality rules because “penalties on violations of the

173. *Id.*

174. *Id.*

175. See Thomas Jefferson, Notes on Neutrality Questions (July 13, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 498, 498; see also Memorandum from Edmund Randolph (May 28–30, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 137, 137; Memorandum from Henry Knox (May 16, 1793), in 12 WASHINGTON’S PAPERS, *supra* note 146, at 595, 596.

176. Alexander Hamilton, Cabinet Meeting, Opinion on a Proclamation Against Forces to Be Enlisted in Kentucky for the Invasion of Spanish Territory (Mar. 18–19, 1794), in 16 HAMILTON’S PAPERS, *supra* note 108, at 162, 162. By this point, Jefferson had left the Cabinet, Randolph had become Secretary of State, and William Bradford had become Attorney General.

177. CHARLES G. FENWICK, THE NEUTRALITY LAWS OF THE UNITED STATES 24 (1913) (“One army was preparing, it was said, to lay siege to New Orleans, then in the possession of Spain, while another was planning to march across Georgia and invade the Floridas.”).

178. See THOMAS, *supra* note 145, at 178–79.

179. See Proclamation on Expeditions Against Spanish Territory (Mar. 24, 1794), reprinted in 15 WASHINGTON’S PAPERS, *supra* note 146, at 446, 446.

law of nations may have been indistinctly marked, or are inadequate.”¹⁸⁰ This language mirrored notes Jefferson prepared for Washington to consider when composing his speech:

Whether the duties of a nation at peace towards those at war, imposed by the laws and usages of nature, and nations, and such other offences against the law of nations as present circumstances may produce are provided for by the municipal law with those details of internal sanction and coercion, the mode and measure of which that alone can establish?¹⁸¹

In the margin next to this sentence, Jefferson noted that Jay’s and Wilson’s grand jury charges accurately described the United States’ international duties. He also added, “Offences against the Law of Nations. Genet’s conduct is one.”¹⁸² That both Jefferson and Washington wanted Congress to enact a statute to criminalize “violations of the law of nations” and “offenses against the law of nations” suggests that they thought Congress would enact the law pursuant to the Define and Punish Clause.

Congressional debates surrounding the Neutrality Act’s passage offer mostly indirect evidence about the law’s constitutional basis. The bill was undoubtedly controversial. It was raised in Congress on at least thirteen occasions.¹⁸³ But almost none of the Congressional debates were recorded. What has survived reveals that many Congressmen believed that the Neutrality Act would punish offenses against the law of nations. Congressman Fisher Ames thought it important that Congress enact a law specifying neutrality violations because “[j]uries . . . are not equal to the task of determining points of the Law of Nations.”¹⁸⁴ Congressman William Vans Murray said the law was needed because “our Courts of Justice were incapable of enforcing” the law of nations.¹⁸⁵ He also repeated the administration’s argu-

180. George Washington, Fifth Annual Message (Dec. 3, 1793), *reprinted in* 1 AM. STATE PAPERS, *supra* note 145, at 21, 22.

181. Thomas Jefferson, Materials for the President’s Address to Congress (Nov. 22, 1793), *in* 27 JEFFERSON’S PAPERS, *supra* note 95, at 421, 423.

182. *Id.*

183. Those dates were February 12, 13, 14, 18, 20, and 25; March 7, 11, 12, and 13; and June 3, 4, and 5. *See* 4 ANNALS OF CONG. 43, 44, 47, 56, 64, 65, 66–67, 68, 117–18, 120 (1794).

184. *Id.* at 743.

185. *Id.* at 746.

ment that foreign recruitment of American soldiers and seamen violated U.S. sovereignty.¹⁸⁶

The controversy surrounding the bill also provides indirect evidence that it was enacted pursuant to the Define and Punish Clause. The law touched on deep ideological divisions: Democratic-Republicans were more sympathetic to France, whereas Federalists saw the French Revolution as destabilizing. Because both sides assumed that Britain would benefit more from American neutrality, Federalists were more inclined to support stricter neutrality measures than Republicans.¹⁸⁷ *The Annals of Congress* does not record the margin by which the House passed the Neutrality Act. But most of the votes surrounding the bill were very close. Vice President John Adams had to break ties in the Senate:

- (1) to keep in place a provision banning the sale of belligerents' prizes in U.S. ports (the House later struck this part),
- (2) to preserve a section allowing the President to enforce the act with the militia and military,
- (3) to allow the bill to move on to the third reading, and
- (4) to pass the bill.¹⁸⁸

Commenting on one of the votes, Adams wrote his wife that the issue "seemed to me to involve nothing less than Peace and War."¹⁸⁹ The Senate also rejected by two votes an amendment to sunset the bill after six months.¹⁹⁰ The House was more pro-French than the Senate and initially tabled the bill, only taking it up for discussion and passing it after learning of the attempted military expedition against Louisiana, discussed earlier.¹⁹¹

Given the bill's controversy, it seems safe to assume that Republicans who favored more lax neutrality rules would have used every argument they could think of against the bill. But

186. *Id.*

187. See, e.g., WOOD, *supra* note 107, at 175–85.

188. 2 S. JOURNAL, 3rd Cong., 1st Sess. 43, 44, 47 (1794).

189. Letter from John Adams to Abigail Adams (Mar. 12, 1793), in 2 LETTERS OF JOHN ADAMS, ADDRESSED TO HIS WIFE, at 146, 146 (Charles Francis Adams ed., 1841).

190. 2 S. JOURNAL, 3rd Cong., 1st Sess. 43 (1794).

191. See CASTO, *supra* note 3, at 160.

there is no evidence anywhere, in private correspondence or the remaining debates, that anyone had any doubts about the bill's constitutionality. Many at the time believed that Congress could only enact criminal legislation pursuant to the three clauses in the Constitution expressly vesting Congress with punishment powers: the Counterfeiting, Define and Punish, and Treason Clauses. During the Virginia and North Carolina debates over ratifying the Constitution, for example, George Nicholas and James Iredell, a future Supreme Court Justice, made this argument.¹⁹² Madison did too when speaking against the Sedition Act in 1798.¹⁹³ Many others in Congress expressed this view over the next half-century.¹⁹⁴ The Crimes Act of 1790, the country's first federal criminal law, had thus been extremely limited, only criminalizing treason, felonies committed in areas under exclusive federal jurisdiction, piracies, felonies on the high seas, counterfeiting, offenses against the law of nations, and crimes interfering with the function of U.S. courts (like perjury). The Neutrality Act was the second criminal statute Congress ever passed, it had no jurisdictional limits, and it related to a particularly salient foreign policy issue. That nobody argued that it might be unconstitutional suggests that people understood the law to have been passed pursuant to one of Congress's three enumerated criminal punishment powers. The Define and Punish Clause is the likeliest candidate.¹⁹⁵

192. *The Virginia Convention, June 16, 1788, Debates* (statement of Mr. Nicholas), in 10 DHRC, *supra* note 39, at 1299, 1333–34; *Marcus IV, NORFOLK AND PORTSMOUTH J.*, Mar. 12, 1788, reprinted in 16 DHRC, *supra* note 39, at 379, 381.

193. 8 ANNALS OF CONG. 2152 (1798).

194. See 1 REG. DEB. 155 (1825); 12 REG. DEB. 1171 (1836); CONG. GLOBE APP'X, 24th Cong., 1st Sess. 284 (1836); CONG. GLOBE, 33rd Cong., 1st Sess. 1111 (1854).

195. Kontorovich finds it noteworthy that Congress "did not describe the law as Offenses legislation when it was passed" because "Washington repeatedly invoked the law of nations in his proclamation, and it was frequently mentioned in *Henfield's Case*." Kontorovich, *supra* note 6, at 1710. He also notes that the 1790 Crimes Act that punished piracy, violation of safe conduct, and infringement of ambassadors' rights referenced the law of nations. The Neutrality Act of 1794 did not, which implies it was not actually enacted pursuant to the Define and Punish Clause. *Id.* (discussing the Crimes Act of 1790, ch. 9, §§ 8, 25–28, 1 Stat. 112, 113–14, 117–18).

His first argument conflates absence of evidence with evidence of absence. Almost no debates remain, so we should not consider this relative silence to be particularly striking. And as discussed, a few legislators did invoke the law of nations.

There is no other obvious constitutional basis for the legislation. Michael Ramsey and Eugene Kontorovich have proposed two alternatives: a general power to “carry[] into effect the President’s power to . . . declare neutrality” and the Declare War Clause.¹⁹⁶ But the text of the Constitution does not explicitly give Congress a power to carry into effect the President’s foreign policy.¹⁹⁷ Many also doubted that the President had the power to declare neutrality in the first place.¹⁹⁸ So somebody probably would have objected to the Act on constitutional grounds had that been the sole basis for the Act. Finally, in his Fifth Annual Message, Washington said he wished to leave it to “Congress to

Kontorovich’s second argument probably does not work either. The argument takes for granted a level of consistency in draftsmanship across two early Congresses that may not have existed. It also assumes either that whenever Congress punished a criminal offense, it referred to the law’s constitutional underpinnings, or that Congress just did so for offenses against the law of nations. The first possibility does not seem to be true, as the Neutrality Act itself lacks any reference to the constitutional provisions that authorize it. The second possibility seems a little ad hoc, and it does not hold true even for the three provisions Kontorovich mentions in the Crimes Act of 1790. Of those, only people who sued or prosecuted ambassadors were explicitly labeled “violators of the law of nations.” Section 28 also references the law of nations with regards to violating safe-conduct, but only as a catch-all: “any person shall violate any safe-conduct or passport . . . or shall assault, strike, wound, imprison, or in any other manner infract the law of nations.” 1 Stat. at 118 (emphasis added). And, as Kontorovich points out, the piracy provision contains no reference to the law of nations. Kontorovich, *supra* note 6, at 1710; Crimes Act of 1790, § 8, 1 Stat. at 113–14. He notes that this provision was later amended to do so. Kontorovich, *supra* note 6, at 1710 n.160. But Congress enacted that amendment to expand the definition of piracy following *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818), which had narrowed the piracy statute, not to clarify the statute’s constitutional foundation. See Joel H. Samuels, *The Full Story of United States v. Smith, America’s Most Important Piracy Case*, 1 PENN. ST. J.L. & INT’L AFF. 320, 334 (2012). So only one of the three provisions in the Crimes Act could be read as referencing “the law of nations” to explain the constitutional underpinnings of the law. The other two mention it solely to clarify what Congress was punishing. By contrast, defining neutrality violations by reference to the “law of nations” would have made little sense: Washington had asked for the law because he thought the law of nations too unclear a reference point. See George Washington, Fifth Annual Message (Dec. 3, 1793), reprinted in 1 AM. STATE PAPERS, *supra* note 145, at 21, 22.

196. RAMSEY, *supra* note 159, at 207; accord Kontorovich, *supra* note 6, at 1710.

197. See also *supra* notes 192–93 and accompanying text.

198. See, e.g., James Madison, “*Helvidius*” No. II, GAZETTE OF THE U.S., Aug. 31, 1793, reprinted in 15 MADISON’S PAPERS, *supra* note 67, at 80, 86 (“It is certain that a faithful execution of the laws of neutrality may tend as much in some cases, to incur war from one quarter, as in others to avoid war from other quarters. The executive must nevertheless execute the laws of neutrality whilst in force, and leave it to the legislature to decide whether they ought to be altered or not.”).

correct[] [and] to improve" his policy, which implies that Congress could do more than just make his rules more effective.¹⁹⁹

There is next to no historical support for the Declare War Clause theory either. The argument for this view is that prohibiting neutrality violations acts was "necessary and proper" to preserve Congress's power to decide whether to go to war. In his 1793 letter to Morris, Jefferson referred to Americans who attacked foreign countries in violation of neutrality rules as being "at war" with those countries when the Constitution only gives Congress the authority to go to war.²⁰⁰ Justice Wilson made a similar point in his charge to the petit jury in *Henfield's Case*.²⁰¹ But these references to the Declare War Clause were just rhetorical flourishes. Congress, after all, had not yet acted, so they could not have been arguing that the Declare War Clause provided the constitutional basis for the prosecutions. Nor did anybody explicitly state over the following decades that Congress enacted the Neutrality Act pursuant to the Declare War Clause. At most, some people referred to American neutrality violators as making war, just as Jefferson and Wilson did. But often those same people or their contemporaries referred to neutrality violations as offenses against the law of nations.²⁰²

199. George Washington, Fifth Annual Message (Dec. 3, 1793), *reprinted in* 1 AM. STATE PAPERS, *supra* note 145, at 21, 22.

200. Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), *in* 26 JEFFERSON'S PAPERS, *supra* note 95, at 697, 701.

201. James Wilson, Charge to the Petit Jury, *Henfield's Case*, *reprinted in* WHARTON, *supra* note 144, at 83, 84.

202. In 1856, for example, Congressman Lemuel Evans asserted that the power to declare war implies a power to prevent "filibusters," military expeditions launched by private citizens against foreign countries (prohibited by § 5 of the Neutrality Act). But he also said that U.S. neutrality laws punished offenses against the law of nations because "compromis[ing] the pacific relations of [one's] own Government . . . is an offense against . . . the public code of nations." CONG. GLOBE APP'X, 34th Cong., 1st Sess. 1304 (1856). Around the same time, a few other Congressmen and Presidents Millard Fillmore and James Buchanan referred to filibusters as offenses against the law of nations and the Neutrality Acts as passed pursuant to the Define and Punish Clause. *See* CONG. GLOBE, 35th Cong., 1st Sess. 293 (1858) (statement of Rep. Stephens); *id.* at 503 (statement of Rep. Winslow); Millard Fillmore, Second Annual Message (Dec. 2, 1851), *reprinted in* 5 PRESIDENTS' PAPERS, *supra* note 1, at 113, 115; James Buchanan, Message to the Senate of the United States (Jan. 7, 1858), *reprinted in* 5 PRESIDENTS' PAPERS, *supra* note 1, at 466, 466. No other President ever opined on the issue. Some have interpreted President Ulysses S. Grant as implying that the Neutrality Act was passed under the "declare war" clause: "[I]ndividual citizens can not be tolerated in making war." Ulysses S. Grant, Message to the Senate and House of Representatives (June 13,

By contrast, political leaders and legal treatises over the coming decades referred to neutrality violations as offenses against the law of nations and neutrality legislation as enacted pursuant to the Define and Punish Clause. During the 1797 debate surrounding reauthorization of the Neutrality Act (the original bill was set to expire in March 1793), Representative William Vans Murray claimed that the bill criminalized offenses against the law of nations.²⁰³ A 1798 letter from James Madison to Thomas Jefferson likewise argued that only Congress had the power to lift a ban on the arming of merchantmen, a measure

1870), reprinted in 7 PRESIDENTS' PAPERS, *supra* note 1, at 64, 66. But this looks like the same sort of rhetorical device that Jefferson and Wilson used, not a statement about the constitutional source of the law.

Kontorovich also points to an 1866 Report of the House of Representatives' Committee on Foreign Affairs claiming that "[t]he act of 1794 was not passed in pursuance of the provisions of the Constitution making the duty of Congress to punish offenses against the law of nations." Kontorovich, *supra* note 6, at 1710 n.174 (citing the Report of the Committee on Foreign Affairs (July 26, 1866), reprinted in THE COUNTER CASE OF GREAT BRITAIN AS LAID BEFORE THE TRIBUNAL OF ARBITRATION CONVENED AT GENEVA UNDER THE PROVISIONS OF THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND MAJESTY THE QUEEN OF GREAT BRITAIN CONCLUDED AT WASHINGTON, MAY 8 1871, at 677, 678 (1872) [hereinafter THE COUNTER CASE OF GREAT BRITAIN]). But this report did not cite any authority for this assertion. It just pointed out that no other nation had passed a similar law before. See THE COUNTER CASE OF GREAT BRITAIN, *supra*, at 674. Nor did it say that there was any other constitutional basis for the law. For that matter, the report probably would not have bothered making this claim about the Define and Punish Clause unless it was responding to what it believed to be a somewhat widely-held misconception. There is, after all, little point in attacking a view that nobody holds. Finally, the committee's legal judgments come off as politicized and very unreliable. The report's author wanted to repeal U.S. neutrality laws because he wished to legalize private invasions of Canada carried out by the Fenian Brotherhood, an Irish nationalist group that had launched an attack from the United States that same year. See *id.* at 684 ("The recent memorable invasion of Canada offers a signal exhibition of the spirit and character of our Government. Great Britain has given us no cause to respect her sense of justice or her disregard for right."). Lobbying from the shipbuilding industry probably biased the report too. A district court had, pursuant to the Neutrality Act, just blocked the sale of a war vessel to Chile for fear that it might be used in its war against Spain. Repealing neutrality laws would open new markets. See FENWICK, *supra* note 177, at 47–48.

203. 6 ANNALS OF CONG. 2229 (1797) ("The offense which was forbidden by the first section of the [Neutrality Act], was an offense against the Law of Nations . . ."); accord Neutrality Act of 1794, ch. 50, § 10, 1 Stat. 381, 384; see also 35 ANNALS OF CONG. 1273–74 (1820) (statement of Rep. Pindall) ("Congress has power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations. . . . Accordingly, the acts of 1794, 1800, 1807, and other laws on this subject, abound throughout with directions concerning libels, prizes, indictments, definitions of offenses, penalties and imprisonment. These acts are all warranted by that clause of the Constitution . . .").

put into place earlier to enforce the Neutrality Act, because the regulation “comes expressly within the power to ‘define the law of Nations’ given to Congress.”²⁰⁴ In a footnote of his edition of Blackstone, St. George Tucker listed the Neutrality Act’s operative provisions as examples of “offenses against that universal law, committed by private persons.”²⁰⁵ Chancellor James Kent’s legal treatise said that Henfield committed an “offense against the law of nations.”²⁰⁶ Kent also wrote, “The violation of a treaty of peace . . . [was] a violation of the law of nations.”²⁰⁷ Decades after he prosecuted Henfield, Rawle wrote a treatise that was silent about the Neutrality Act but grounded the Neutrality Proclamation under the President’s power to enforce treaties.²⁰⁸ He presumably meant what he said at Henfield’s trial: Henfield had committed an offense against the law of nations because he violated peace treaties. So Rawle’s treatise also provides support for the Define and Punish Clause thesis.²⁰⁹ Finally, Congressman Edward Livingston’s 1828 pro-

204. Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 30 JEFFERSON’S PAPERS, *supra* note 95, at 238, 239; accord Henry Knox, Enforcing the Neutrality Act of 1794 (July 21, 1794), reprinted in 2 AM. STATE PAPERS, *supra* note 145, at 77, 77; see also Lobel, *supra* note 159, at 15 n.86 (treating Madison’s letter as evidence that the Neutrality Act was passed pursuant to the Define and Punish Clause); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 182 n.63 (1997) (same). Madison wrote this letter in response to President John Adams’s announcement that he would lift the ban without Congressional approval. See 8 ANNALS OF CONG. 1272 (1798) (message of President Adams).

205. 5 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 72–73, 73 n.14 (Paul Finkelman & David Cobin eds., 1996) (1803).

206. 1 KENT, *supra* note 124, at 312.

207. *Id.* at 169. That Kent does not mention the Neutrality Act in his chapter on offenses against the law of nations is not too probative. That chapter only addresses the “most obvious” offenses at the time, all of which were, probably not coincidentally, mentioned by Blackstone: “the violations of safe conduct, infringements of the rights of ambassadors, and piracy.” *Id.* at 170. Kent also discussed the slave trade, but only because Congress had declared slave trading to be piracy. See *id.* at 181.

208. See RAWLE, *supra* note 99, at 75.

209. Kontorovich finds it suspicious that Justice Joseph Story, in his treatise, “did not mention the famous and controversial law in [his] discussion of” the Define and Punish Clause. See Kontorovich, *supra* note 6, at 1715. But this silence is not at all suggestive. Story did not mention *any* statutes as having been passed pursuant to Congress’s *define and punish* power, even though, at minimum, the first Congress criminalized piracies, felonies on the high seas, assaults on ambas-

posed national penal code listed neutrality violations as offenses against the law of nations, as did Francis Wharton's mid-nineteenth and John Barbee Minor's late-nineteenth century treatises on criminal law.²¹⁰ There is accordingly strong evidence that the Neutrality Act of 1794 was enacted pursuant to the Define and Punish Clause.

C. *The Neutrality Act and the law of nations*

The United States took on more neutral duties than the law of nations required. Neutrals had to prevent hostilities in their territorial seas but had no obligation to prevent their citizens joining foreign militaries or outfitting belligerents' vessels.²¹¹ By the end of the nineteenth century, the international law of neutrality mirrored the obligations set out by the Neutrality Act,²¹² but the Act was novel in 1794. International law followed America's example, not the other way around. This disconnect between early American neutrality legislation and international law bothered some. Yet nobody seems to have thought that Congress was constitutionally limited to punishing offenses against neutrality recognized by the law of nations.

1. *Respect for neutral territory*

By the middle of the eighteenth century, it was relatively well-established that neutrals must prevent belligerents from conducting hostile acts on their territory.²¹³ This was the first neutral duty to be recognized, neutrality being a new concept in the 1700s.²¹⁴

sadors, and violations of safe passage. See 3 STORY, *supra* note 112, §§ 1152–1162, at 52–58; Crimes Act of 1790, ch. 9, §§ 8–12, 25–28, 1 Stat. 112, 113–15, 117–18.

210. See EDWARD LIVINGSTON, A SYSTEM OF PENAL LAW FOR THE UNITED STATES OF AMERICA 54 (1828); JOHN BARBEE MINOR, EXPOSITION OF THE LAW OF CRIMES AND PUNISHMENTS 18 (1894); FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 80 (2d ed. 1852) (1846).

211. W.E. HALL, INTERNATIONAL LAW § 21, at 64 (1880); FENWICK, *supra* note 177, at 4–5.

212. See GEORGE B. DAVIS, THE ELEMENTS OF INTERNATIONAL LAW, WITH AN ACCOUNT OF ITS ORIGIN, SOURCES AND HISTORICAL DEVELOPMENT 434 (1903).

213. HALL, *supra* note 211, § 209, at 504–05; see also JESSUP & DEÁK, *supra* note 145, at 256, 257 & n.31.

214. See JESSUP & DEÁK, *supra* note 145, at 249 (first neutral duty); GEOFFREY BUTLER & SIMON MACCOBY, THE DEVELOPMENT OF INTERNATIONAL LAW 231 (1928) (duty emerged in the eighteenth century).

Many ignored this obligation, but by 1793, at least seven European states, including Britain, had agreed to it in principle.²¹⁵

The United States complied with this duty. Just ten days after the United States issued the Neutrality Proclamation, British minister to the United States George Hammond informed Jefferson that a French frigate had captured the British ship *Grange* in Delaware Bay. Citing “this infringement on [American] neutrality,” Hammond requested the United States attempt to restore the *Grange* to its British owners.²¹⁶ The Cabinet agreed with Hammond that belligerents may not attack one another in neutral waters, and Jefferson wrote to French Minister Jean Baptiste Ternant on May 15 requesting that the ship be restored to the British.²¹⁷ The Neutrality Act subsequently helped the United States comply with this neutral obligation by giving federal courts jurisdiction to rule such captures unlawful and authorizing the President to expel foreign vessels in territorial waters, as mentioned above.²¹⁸

2. Prohibition on foreign enlistment

As we saw earlier, a major part of American neutrality policy was the prohibition on Americans and U.S. residents joining belligerents’ militaries. The Act banned both groups from ac-

215. See HANNIS TAYLOR, A TREATISE ON INTERNATIONAL PUBLIC LAW § 607, at 639 (1901) (noting that many countries ignored this principle); HALL, *supra* note 211, § 209, at 504–05 (same); THOMAS ALFRED WALKER, THE SCIENCE OF INTERNATIONAL LAW 429 (1893) (same); JESSUP & DEÁK, *supra* note 145, at 256 (“[T]he sanctity of neutral territory had been recognized before the dawn of the nineteenth century by at least Great Britain, France, Genoa, Portugal, the Netherlands, Denmark and Hamburg. The rule was also laid down in numerous treaties. Occasional breaches of the law by the various states do not destroy the recognition of this principle.” (footnotes omitted)); *id.* at 252 (“In 1747 at least, English legal opinion fully recognized that neutral waters must be respected.”); see also BUTLER & MACCOBY, *supra* note 214, at 242.

216. See Memorial from George Hammond to Thomas Jefferson (May 2, 1793), in 25 JEFFERSON’S PAPERS, *supra* note 95, at 637, 637–38.

217. See Edmund Randolph, Opinion on the *Grange* (May 14, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 31, 35; Letter from Thomas Jefferson to Jean Baptiste Ternant (May 15, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 42, 43–44.

218. Neutrality Act of 1794, ch. 50, §§ 6–8, 1 Stat. 381, 384. In this respect, the Act was just codifying the status quo. The Supreme Court in *Glass v. Sloop Betsey*, 3 U.S. (3 Dall.) 6 (1794) had held that district courts could decide on the legality of captures within U.S. territorial waters. And the President had already been using the armed forces to enforce his neutrality rules. See THOMAS, *supra* note 145, at 278–79.

cepting letters of marque or commissions, enlisting, or enlisting others in a foreign army or navy to fight against a country at peace with the United States.²¹⁹ The law of nations did not require the United States to go so far, as can be seen by late-eighteenth-century state practice and the leading treatises of the day. The Washington administration's arguments in favor of its interpretation were, consequently, quite weak.

There was next to no precedent for this American policy. It was common for states to recruit foreign mercenaries from neutral countries; Britain continued this practice through the eighteenth century.²²⁰ In the sixteenth and seventeenth centuries, according to Philip Jessup and Francis Deák, "[t]he practice of permitting levies of troops was common and frequently sanctioned by treaty."²²¹ But just as often, treaties contained "reciprocal provisions by which a state agreed not to permit levies by the enemy of the other contracting party."²²² As of the 1700s, a few states prohibited their subjects from enlisting with foreign armies, but they enacted those laws to prevent their subjects from strengthening hostile powers, not out of a sense of neutral duty.²²³ As the Supreme Court recognized in *The Three*

219. Neutrality Act of 1794, §§ 1–3, 1 Stat. at 381–83.

220. See TRAVERS TWISS, *THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES* § 223, at 454–56 (2d. ed. 1875) (1861); 10 VERZIJL, *supra* note 149, at 93.

221. JESSUP & DEÁK, *supra* note 145, at 25.

222. *Id.* at 27; see also 2 CHARLES CHENEY HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* § 844, at 693 (1922) (same). The United States included such provisions in its treaties with France, the Netherlands, Sweden, and Prussia. See U.S.-France Treaty of Amity and Commerce, *supra* note 143, art. 21, 8 Stat. at 24; U.S.-Dutch Treaty of Amity and Commerce, *supra* note 143, art. 19, 8 Stat. at 44; Treaty of Amity and Commerce Concluded between his Majesty the King of Sweden and the United States of North-America, art. 23, 8 Stat. 60, 74 (1783); U.S.-Prussia Treaty of Amity and Commerce, *supra* note 143, art. 20, 8 Stat. at 94.

223. See HALL, *supra* note 211, § 211, at 511 ("England and Holland for municipal reasons enacted laws expressly to restrain their subjects from entering the service of foreign state" (emphasis added)). Britain, for instance, forbade its subjects from enlisting with foreign militaries as of the beginning of the seventeenth century, and it renewed this statute several times out of fear that its subjects might join armies of the deposed Stuart Kings. See An act to prevent the listing Her Majesties subjects to serve as soldiers without Her Majesties license, 13 Anne, c. 10 (1713); An act to prevent the listing his Majesty's subjects to serve as soldiers without his Majesty's license, 9 George II, c. 30 (1736); Act of 29 George II, c. 17 (1756); CHARLES WARREN, *A MEMORANDUM OF LAW ON THE CONSTRUCTION OF SECTION 10 OF THE FEDERAL PENAL CODE* 10–11 (1915); 2 WHEATON, *supra* note 102, § 14, at

Friends,²²⁴ the Neutrality Act of 1794 was the first such statute enacted as a neutrality law.²²⁵

Only in 1778, 1779, and 1780 did European states (specifically, Hamburg, Venice, Genoa, Tuscany, the Papal States, the Two Sicilies, and the Netherlands) begin issuing neutrality proclamations like Washington's.²²⁶ Seven proclamations in three years might indicate that a new rule under the law of nations was emerging. But these regulations probably did not establish a neutral duty to prevent one's subjects from enlisting in a war, for three reasons.²²⁷ First, nobody in the United States mentioned these proclamations in 1793 or 1794; it is possible that nobody knew they existed.²²⁸ Second, the United States did not subscribe to this principle during the Revolutionary War. Before France entered the war, U.S. agents recruited privateers in France to attack the British.²²⁹ Third, these proclamations differed in scope from Washington's. Some did not forbid their subjects from serving in foreign militaries.²³⁰ Others went further than the American Proclamation. All the Italian states, for instance, barred their subjects from taking belligerent soldiers as passengers, and Venice and the Two Sicilies prohibited their subjects from selling contraband to the belligerents.²³¹ The Washington administration, by contrast, never seems to have considered the first policy and informed the French and British ministers that contraband could be confiscated by the warring parties under the law of nations, but the United States had no obligation to suppress it.²³² If Washington's administration be-

153. The Neutrality Act of 1794 used the same phrases as these statutes, which suggests that Congress used them as a model. See WARREN, *supra*, at 9.

224. 166 U.S. 1 (1897).

225. See *id.* at 52–53; see also 10 VERZIJL, *supra* note 149, at 96.

226. See HALL, *supra* note 211, § 211, at 512–13.

227. See *id.* § 211, at 513 (“Custom in these matters was growing; it was not yet established.”).

228. See HYNEMAN, *supra* note 145, at 16.

229. See Precedents Appealed to by the United States, reprinted in THE COUNTER CASE OF GREAT BRITAIN, *supra* note 202, at 38, 40.

230. See, e.g., Regulations Regarding the Commerce and Navigation of Hamburg during War (Sept. 18, 1778), reprinted in 1 A COLLECTION OF NEUTRALITY LAWS, REGULATIONS AND TREATIES OF VARIOUS COUNTRIES 633, 633–36 (Francis Deák & Philip C. Jessup eds., 1939).

231. See BUTLER & MACCOBY, *supra* note 214, at 243.

232. See Letter from Thomas Jefferson to George Hammond (May 15, 1793), in 26 JEFFERSON'S PAPERS, *supra* note 95, at 38, 39. The administration was on solid legal ground. See VERZIJL, *supra* note 149, at 86.

lieved that these neutrality edicts inaugurated a new rule of the law of nations, they presumably would have cited them or at least copied them more closely.

The leading eighteenth-century international law treatises generally did not recognize such a rule either. To take just two examples, Cornelius Van Bynkershoek's treatise argued that neutrals had a "duty to be every way careful not to intermeddle at all with the war, and not to do more or less justice to one party than to the other."²³³ Emer de Vattel said that "a neutral *nation*" must not "furnish troops, arms, ammunition, or any thing of direct use in war."²³⁴ But they only meant that neutral *states* must not assist the belligerents, not that neutral states *must prevent their subjects* from doing so.²³⁵ Both permitted the levying of troops in neutral territory, at least in some cases.²³⁶ Only G.F. von Martens, in a 1789 passage never cited by anyone in Washington's Cabinet, suggested that a neutral state was obliged to prohibit its people from accepting foreign letters of marque.²³⁷ But he justified this view on the ground that many recent commercial treaties contained such provisions.²³⁸ And as we have seen, treaties guaranteed the right to levy troops in neutral territory just as often.²³⁹ Therefore, no such rule existed.²⁴⁰

As mentioned earlier, the administration had also argued that under rules of state responsibility, all states, not just neutrals in war, must punish their subjects who harm other states.²⁴¹ Failure to punish Americans and U.S. residents who

233. CORNELIUS VAN BYNKERSHOEK, A TREATISE ON THE LAW OF WAR 67 (Peter Stephen Du Ponceau trans., 1810) (1737).

234. 3 VATTEL *supra* note 66, § 104 (emphasis added).

235. See HALL, *supra* note 211, § 210, at 508.

236. See BYNKERSHOEK, *supra* note 233, at 508; 3 VATTEL *supra* note 66, § 15.

237. GEORG FRIEDRICH VON MARTENS, SUMMARY OF THE LAW OF NATIONS, FOUNDED ON THE TREATIES AND CUSTOMS OF THE MODERN NATIONS OF EUROPE; WITH A LIST OF THE PRINCIPAL TREATIES, CONCLUDED SINCE THE YEAR 1748 DOWN TO THE PRESENT TIME, INDICATING THE WORKS IN WHICH THEY ARE TO BE FOUND 312 n.† (William Cobbett trans., 1795) (1789).

238. See *id.*; see also HALL, *supra* note 211, § 210, at 508.

239. See HALL, *supra* note 211, § 210.

240. See, e.g., CASTO, *supra* note 3, at 92–93; 2 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 288, at 351 (3d ed., 1921) (1906); T.J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 479, 480–81, 488 (2d ed. 1899) (1895). Hall, citing the Italian proclamations, seems to be the only commentator who was uncertain as to whether this rule of international law had taken hold before 1793. See HALL, *supra* note 211, § 211, at 511.

241. See HALL, *supra* note 211, § 210.

served in foreign militaries would put the United States in breach of that obligation. This argument was probably not right. In one essay defending the Neutrality Proclamation, Hamilton said that lesser measures would suffice. Simply issuing the proclamation relieved the United States of its “responsibility . . . for secret and unknown violations of the rights of any of the warring parties by its citizens.”²⁴² Additionally, the state responsibility argument would imply that a state could allow foreign recruitment without giving belligerents cause for war under the rules of neutrality, but this permission would give belligerents cause for war under the law of state responsibility. That would make no sense. If anything, neutrality law should impose a greater duty to prevent foreign enlistment because neutrals take on a duty of “impartiality” in war, whereas states have no such obligation in times of peace.²⁴³

3. *Prohibition on fitting out and arming foreign vessels*

Nor did the United States have a neutral duty to prohibit the fitting out and arming of belligerent vessels. Beginning in the seventeenth century, there may have been some duty to stop belligerents from selling prizes in neutral ports. But this duty only became widely accepted after the United States passed the Neutrality Act. Sir Leoline Jenkins, an English admiralty judge cited by Hamilton in an essay, claimed in one case that neutrals had such a duty but said the opposite in another.²⁴⁴ Not even Hamilton was sure on this point. After the House of Representatives struck Section 7 of the draft Neutrality Act, which would have prohibited belligerents from selling prizes in U.S. ports, he wrote to Jay asking him “to collect and communicate exact information with regard to the usage of Europe as to permitting the sale of prizes in neutral countries.”²⁴⁵

242. Alexander Hamilton, *Pacificus No. I*, GAZETTE OF THE U.S., June 29, 1793, reprinted in 15 HAMILTON'S PAPERS, *supra* note 108, at 33, 40–41.

243. See HALL, *supra* note 211, § 210.

244. See 2 WILLIAM WYNNE, THE LIFE OF SIR LEOLINE JENKINS 732 (1724) (denying that such a duty exists); *id.* at 734 (claiming that it does); Alexander Hamilton, *No Jacobin No. IV*, DAILY AM. ADVERTISER, Aug. 10, 1793, reprinted in 15 HAMILTON'S PAPERS, *supra* note 108, at 224, 226; see also 10 VERZIJL, *supra* note 149, at 77 (“In actual practice neutral Powers often gave captors permission to enter their ports, but there are many examples of treaty provisions directed against this practice.”).

245. Letter from Alexander Hamilton to John Jay (June 4, 1794), in 16 HAMILTON'S PAPERS, *supra* note 108, at 456, 457.

But prohibiting belligerents from bringing prizes into U.S. ports is not the same thing as prohibiting belligerents from fitting out and arming their vessels. And the U.S. government only banned the latter. Some treaties, but not all, prohibited outfitting and arming vessels in neutral ports.²⁴⁶ Apart from the 1778–80 neutrality proclamations, no state suggested that all neutrals have an obligation to prohibit belligerents from fitting out their vessels.²⁴⁷ We have already seen that those proclamations did not expand neutral duties under the law of nations: Washington’s Cabinet either did not know of them or did not find them relevant.²⁴⁸ Treatise writers did not say that neutrals could not outfit, equip, and arm belligerent ships either.

The administration nevertheless claimed that this rule was a “deduction[] from the laws of neutrality,”²⁴⁹ for two reasons. First, as mentioned earlier, a neutral must prohibit the fitting out of vessels to disengage itself from any conflict.²⁵⁰ Nobody ever cited any authority for this proposition other than treatise writers’ general insistence that neutrals remain impartial. But it is not obvious why a neutral would violate this duty if it opened its ports to both sides. Further, neutrals could in some cases help belligerents during war. In an exhaustive 1790 study, Hamilton had concluded that the United States could, consistent with the law of neutrality, allow Britain to march through U.S. territory to attack Spanish colonies.²⁵¹ If a neutral

246. See HALL, *supra* note 211, § 212, at 511–12.

247. See *id.* at 512–13; see also 10 VERZIJL, *supra* note 149, at 60, 73 (noting that there were no disputes over belligerents supplying or arming vessels in neutral harbors before 1800).

248. See *supra* notes 227–32 and accompanying text.

249. Alexander Hamilton, Treasury Department Circular to the Collectors of Customs (Aug. 4, 1793), reprinted in 15 HAMILTON’S PAPERS, *supra* note 108, at 178, 178–79; see also John Jay, Charge to the Grand Jury (Mary 22, 1793), *Henfield’s Case*, reprinted in WHARTON, *supra* note 144, at 49, 57 (“What private acts “amount[ed] to committing, or aiding, or abetting hostilities” is not obvious and “must be determined by the laws and approved practice of nations, and by the treaties and other laws of the United States relative to such cases.”).

250. See *supra* notes 174–75 and accompanying text; see also Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 697, 700; Letter from Thomas Jefferson to Edmond Charles Genêt (June 5, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 195, 195; Memorandum from Alexander Hamilton to George Washington (May 15, 1793), in 14 HAMILTON’S PAPERS, *supra* note 108, at 454, 456.

251. See Alexander Hamilton, Answers to Questions proposed by the President of the United States to the Secretary of the Treasury (Sept. 15, 1790), in 6 WASHINGTON’S PAPERS, *supra* note 146, at 440, 443–44. For Washington’s original set of

could allow *one* belligerent to march through its territory to attack another, would it not be more impartial to allow *both* belligerents to equip their vessels in its port?

Second, the administration pointed to its treaty obligations. Article 22 of the France-U.S. Treaty of Amity and Commerce required that the United States prevent France's enemies from outfitting vessels in U.S. ports. The United States was not bound by treaty to permit France to outfit its vessels. Because the United States must deny Britain that privilege and could deny it to France, failure to treat France like Britain would violate the United States' duty of neutrality.²⁵²

This was a bad argument. As a matter of usage, if a state had a treaty pledging military assistance to a belligerent, fulfilling that obligation would not compromise the first state's neutrality.²⁵³ Vattel agreed.²⁵⁴ Allowing a belligerent to outfit ships in neutral ports seems much less offensive than sending that belligerent a division. Madison even made this argument, albeit in a different context. The draft neutrality bill prohibited all belligerents from selling prizes in American harbors. Madison convinced the House to delete this section:

A neutral nation might treat belligerent nations unequally, where it was in consequence of a stipulation prior to the war, and having no particular reference to it. It was laid down expressly, by all the best writers, that to furnish a military force to one of the parties, in pursuance of such a stipulation, without a like aid to the other, was no breach of neutrality; and it amounted to the same thing whether the equilibrium were destroyed by putting an advantage in one scale, or taking a privilege from the other. The executive had expounded the law of nations, and our treaties, in this sense, by leaving the sale of French prizes free, and forbidding the sale of British prizes. For the legislature to decide, that we were bound by the laws of neutrality to forbid the sale of

questions, see Letter from George Washington to John Adams (Aug. 27, 1790), in 6 WASHINGTON'S PAPERS, *supra* note 146, at 343, 343-44.

252. See Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), in 26 JEFFERSON'S PAPERS, *supra* note 95, at 697, 700-01.

253. See HALL, *supra* note 211, § 211, at 509; 2 HYDE, *supra* note 222, § 844, at 692; LAWRENCE, *supra* note 240, § 244, at 478; 2 OPPENHEIM, *supra* note 240, § 291, at 358; TAYLOR, *supra* note 215, § 601, at 626; 10 VERZIIL, *supra* note 149, at 86.

254. See 3 VATTEL, *supra* note 66, § 105.

French prizes also, would be to make themselves the expositor of the law of nations²⁵⁵

He never seems to have made the connection, but by this same logic, forbidding belligerents from fitting out vessels would also “make [Congress] the expositor of the law of nations.”

4. *How much did the United States care about the law of nations?*

So far, we have seen that Congress passed the Neutrality Act pursuant to the Define and Punish Clause and that the Act went further than international law required. This subsection argues that the administration probably knew that its legal arguments were thin at best. But nobody seems to have suggested, either during the 1790s or the decades after, that American neutrality legislation would be constitutionally deficient if it prohibited more than was necessary. Some even said that Congress had the power to punish what the law of nations did not proscribe.

The administration seemed to believe that it was merely complying with its neutral duties. In private letters, for instance, Jefferson and Hamilton made the same arguments as they did in public documents.²⁵⁶ But the administration must have realized that its legal position was weak. As mentioned earlier, Washington’s Cabinet considered “usage” (state practice) to be an important source of the law of nations.²⁵⁷ The

255. 4 ANNALS OF CONG. 754 (1794).

256. Letter from Thomas Jefferson to James Monroe (July 14, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 501, 501–02. Compare Letter from Alexander Hamilton to George Washington (May 15, 1793), in 14 HAMILTON’S PAPERS, *supra* note 108, at 454, 454–60, with Alexander Hamilton, *No Jacobin No. IV*, DAILY AM. ADVERTISER, Aug. 10, 1793, *reprinted in* 15 HAMILTON’S PAPERS, *supra* note 108, at 224, 224–28.

257. See *supra* note 95 and accompanying text. For a sample of the administration’s references to “usage” on questions of the law of nations, see, for example, Thomas Jefferson, Opinion on the Treaties with France (Apr. 28, 1793), in 25 JEFFERSON’S PAPERS, *supra* note 95, at 608, 609 (“The Law of Nations, by which this question is to be determined, is composed of three branches. 1. the Moral law of our nature. 2. the Usages of nations. 3. their special Conventions.”); *id.* at 612 (“But I deny that the reception of a minister has any thing to do with the treaties. There is not a word, in either of them, about sending ministers. This has been done between us under the common usage of nations, and can have no effect either to continue or annul the treaties.”); Questions for the Supreme Court (July 18, 1793), in 26 JEFFERSON’S PAPERS, *supra* note 95, at 534, 535 (“10. Do the laws and usages of nations authorize her, as of right, to erect such courts for such purpose?”); *id.* at 536 (“20. To what distance, by the laws and usages of nations, may the US. exercise the right of prohibiting the hostilities of foreign powers at war with each oth-

Neutrality Proclamation pegs the definition of “contraband” to “the modern usage of nations.”²⁵⁸ The administration also appealed to usage when arguing about neutrals’ commercial rights and determining the extent of United States’ territorial waters.²⁵⁹ Yet the only precedent that *anyone* mentioned for the ban on outfitting and arming belligerent ships was a 1792 Swedish proclamation forbidding foreign privateers from outfitting in its ports.²⁶⁰ Hamilton referenced this decree in a his essay *No Jacobin No. IV*. He was content with the one example because “[t]he governments of Europe know, by long experience, the usages of war, and without consulting the authorities or precedents, are able to pronounce with facility, on what is lawful, what unlawful.”²⁶¹ Put another way, Hamilton did not know of any other precedents, but he assumed Sweden did. And nobody cited any case in which a neutral had banned its citizens from serving in foreign armies, navies, or privateers.

er, within rivers, bays, and arms of the sea, and upon the sea along the coasts of the US?”); Alexander Hamilton, *Pacificus No. II*, GAZETTE OF THE U.S., July 3, 1793, reprinted in 15 HAMILTON’S PAPERS, *supra* note 108, at 55, 59 (“France committed an aggression upon Holland in declaring free the navigation of the Scheldt and acting upon that declaration; contrary to Treaties in which she had explicitly acknowledged [sic] and even guaranteed the exclusive right of Holland to the navigation of that River and contrary to the doctrines of the best Writers and established usages of Nations, in such cases.” (footnotes omitted)); Letter from Thomas Jefferson to Thomas Pinckney (Sept. 7, 1793), 27 JEFFERSON’S PAPERS, *supra* note 95, at 55, 56 (“This article is so manifestly contrary to the law of nations, that nothing more would seem necessary than to observe that it is so. Reason and usage have established that when two nations go to war, those who chuse [sic] to live in peace retain their natural right to pursue their agriculture, manufactures and other ordinary vocations, to carry the produce of their industry, for exchange, to all nations, belligerent or neutral, as usual, to go and come freely without injury or molestation, and in short, that the war among others shall be for them as if it did not exist.”); Letter from Thomas Jefferson to George Washington (Oct. 9, 1793), in 27 JEFFERSON’S PAPERS, *supra* note 95, at 224, 224–25 (“The memorialists seem to expect that an indemnification may be made them by this government out of the monies due from us to France. But this would be an act of reprisal, which the usage of nations would not justify until justice has been required from France, and formally denied.”).

258. The Proclamation of Neutrality (Apr. 22, 1793), reprinted in 1 AM. STATE PAPERS, *supra* note 145, at 140, 140.

259. See Thomas Jefferson, Notes on the Proclamation of Neutrality and the Law of Nations (Dec. 20, 1793), in 27 JEFFERSON’S PAPERS, *supra* note 95, at 598, 598–600; Letter from Thomas Jefferson to Certain Foreign Ministers in the United States (Nov. 8, 1793), in 27 JEFFERSON’S PAPERS, *supra* note 95, at 328, 328.

260. See Alexander Hamilton, *No Jacobin No. IV*, DAILY AM. ADVERTISER, Aug. 10, 1793, reprinted in 15 HAMILTON’S PAPERS, *supra* note 108, at 224, 227.

261. *Id.*

Some outside the administration even expressed doubts about the administration's legal position. At trial, Henfield's counsel seems to have pointed out that Bynkershoek said that belligerents may levy soldiers in neutral territory.²⁶² In a letter to Jefferson, then-Senator James Monroe also rejected the argument that belligerents can hold neutrals responsible for their citizens' voluntarily enlisting with foreign militaries: "If we had hired him to France or Britain, as the Swiss in particular do, we could not be [held responsible]."²⁶³ And as mentioned earlier, Madison may have understood that the United States was not obliged to prohibit the fitting out and arming of French vessels in U.S. ports.²⁶⁴ American political leaders, therefore, must have known that the international legal foundation for U.S. neutrality policy was wanting.²⁶⁵

Yet nobody suggested that Congress lacked the constitutional power to prohibit more than it was required to under international law. When Madison argued that the United States would make itself "the expositor of the law of nations" if it

262. Henfield's counsel at least cited the relevant portions of Bynkershoek; there are no records of counsel's actual arguments. See Peter Duponceau et al., *Defense, Henfield's Case*, reprinted in WHARTON, *supra* note 144, at 83, 83.

263. Letter from James Monroe to Thomas Jefferson (June 27, 1793), in 26 JEFFERSON'S PAPERS, *supra* note 95, at 381, 383.

264. There are not many other instances in which people challenged the administration's interpretation of the law of nations. But that should not be too surprising. The British government had little reason to object to excessively zealous neutrality regulations. Genêt was either incapable of understanding or uninterested in international law. He dismissed Jefferson's justifications as "aphorisms of Vattel," which, while true, is not much of an argument. Letter from Edmond Charles Genêt to Thomas Jefferson (June 22, 1793), in 1 AM. STATE PAPERS, *supra* note 145, at 155, 155. Many inside and outside the administration, including even Monroe, wanted to stay out of war at all costs and thus had little reason to question U.S. policy too much. See CASTO, *supra* note 3, at 22, 163. As for public opinion, some wanted to help France for ideological reasons. Others thought the President lacked the constitutional power to implement neutrality rules without Congress's consent. But subtleties of neutrality law were less salient. See, e.g., *Veritas* (May 30, 1793), reprinted in 12 WASHINGTON'S PAPERS, *supra* note 146, at 647, 647-48; *Veritas No. II* (June 3, 1793), reprinted in 13 WASHINGTON'S PAPERS, *supra* note 146, at 17, 17-19; *Veritas No. III* (June 6, 1793), reprinted in 13 WASHINGTON'S PAPERS, *supra* note 146, at 34, 34-36.

265. Rawle, Henfield's prosecutor, and Judge Peters, who presided over Henfield's trial, were hesitant about the government's case, but we do not know what their concerns were. See Letter from Thomas Jefferson to James Monroe (July 14, 1793), in 26 JEFFERSON'S PAPERS, *supra* note 95, at 501, 502. Because of these doubts, Rawle requested Hamilton and Randolph's help when writing his indictment. See THOMAS, *supra* note 145, at 172.

prohibited the selling of prizes, he just said that this would be bad policy: It would “arm Britain with a charge against the United States, of having violated their neutrality” and “give extreme disgust to the French Republic.”²⁶⁶ But the Constitution never came up. Nor did anyone raise constitutional objections three years later when Congress voted to extend the Neutrality Act through 1800 (the original Act was set to expire in March 1797).²⁶⁷ Initially, Federalist Congressman William Smith moved to make the Act permanent.²⁶⁸ But Albert Gallatin, by then a leader of the Democratic-Republican party, argued that the Act should only be extended another two years because the law went further than the law of nations required: “In no other nation, he said, was it considered as a high misdemeanor to enter into the service of a foreign Power.”²⁶⁹ Gallatin did not think that the law was unconstitutional, just that it was “a kind of novelty” that should only last “until the expiration of the present European war.”²⁷⁰ Many others entered the debate, but nobody argued that Congress was constitutionally limited to incorporating the law of nations.

In fact, both before and after the Neutrality Act’s passage, many indicated that Congress could, pursuant to the Define and Punish Clause, punish many acts that did not violate the law of nations. In 1792, Randolph wrote that Congress could punish acts of hostility by Americans against Spanish Florida because this conduct was “injurious to our harmony with foreign nations,” even if not “absolutely offenses against the law of nations.”²⁷¹ Randolph also told Jefferson six months earlier that Congress could “regulate” the law of nations “to be binding upon the departments of their own government in *any form whatsoever*.” Making “change[s]” was permissible, but “every change is at the peril of the nation, which makes it.”²⁷² In 1793, Washington suggested that Congress had sig-

266. 4 ANNALS OF CONG. 754 (1794).

267. Neutrality Act of 1794, ch. 50, § 10, 1 Stat. 381, 384.

268. See 6 ANNALS OF CONG. 2227 (1797).

269. *Id.* at 2228.

270. *Id.*

271. Edmund Randolph, Opinion on Offenses against the Law of Nations (Dec. 5, 1792), in 24 JEFFERSON’S PAPERS, *supra* note 95, at 702, 703.

272. Letter from Edmund Randolph to Thomas Jefferson (June 26, 1792), in 24 JEFFERSON’S PAPERS, *supra* note 95, at 127, 127 (emphasis added) (discussing a possible infringement of an ambassador’s rights).

nificant ability to innovate upon his neutrality rules. In part, he wanted Congress to codify penalties. But he also thought Congress should “correct [and] improve” his regime.²⁷³ Madison’s 1798 letter to Jefferson criticizing Adams’s neutrality regulation, mentioned earlier, also implied that Congress could go further than international law. Neutrality regulations “were in pursuance of the law of Nations, & consequently in execution of the law of the land.” The President could not argue “that the law of Nations leaves this point undecided, & that every nation is free to decide it for itself” either. If that were so, “the regulation . . . comes expressly within [Congress’s] power to ‘define the law of Nations.’”²⁷⁴ Finally, a few decades later, the Supreme Court recognized that the Neutrality Act banned more than the law of nations required. As the Court explained in *The Brig Alerta & Cargo v. Blas Moran*,²⁷⁵ neutrals must either allow all belligerents to fit out their vessels or deny that privilege to all belligerents.²⁷⁶ The United States took the stricter course, prohibiting states from arming and fitting out vessels. But the Court never suggested that this posed a constitutional problem.²⁷⁷

D. Lessons from the Neutrality Act

We can draw two lessons from the Neutrality Act about the scope of the Define and Punish Clause. First, “offenses against the law of nations” was a broad term. The American government did not accuse Americans who violated neutrality rules of having committed universally condemned crimes like piracy. Rather, as discussed earlier, they argued that any such person violated treaties of peace. But this obligation to preserve peace was binding upon the United States as a country, not upon its citizens. These acts were offenses against the law of nations because states must suppress acts of hostility by their

273. See Speech of President Washington (Dec. 3, 1793), reprinted in 1 AM. STATE PAPERS, *supra* note 145, at 21, 21.

274. Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 30 JEFFERSON’S PAPERS, *supra* note 95, at 238, 239.

275. 13 U.S. (9 Cranch) 359 (1815).

276. *Id.* at 365.

277. *Id.*; see also *The Estrella*, 17 U.S. 298, 309 (1819) (same); Violation of Neutrality and Act of Congress of 1818, 3 Op. Att’y Gen. 741, 745–46 (1842) (“[T]he Supreme Court, in the case of the *Estrella*, declare[d] that the statute of 1818 has gone further than the law of nations.”).

citizens against other countries.²⁷⁸ Likewise, the government justified its ban on equipping and arming foreign vessels on the grounds that the United States was obliged to suppress such acts under the law of neutrality. The government, accordingly, understood “offenses against the law of nations” to mean any acts that the United States had an obligation to suppress under the law of nations.²⁷⁹

Second, international law is not much of a constraint on Congress’s exercise of the Define and Punish Clause. Congress adopted an idiosyncratic understanding of the law of nations when it enacted the Neutrality Act. The executive and legislative branches both seemed to believe that the United States had a legal obligation to ban the outfitting of belligerent ships and foreign enlistment. But there was no good precedent for these policies. The fact that nobody suggested that U.S. neutrality legislation might be unconstitutional suggests that Congress’s power to define gives it significant creative powers. The only law-of-nations predicate for Congressional action was a broad duty to remain impartial and an even vaguer duty of state responsibility.

IV. SUPREME COURT PRECEDENT ANALYZING THE DEFINE AND PUNISH CLAUSE

Four Supreme Court cases have addressed the scope of the power to define offenses against the law of nations. We have already seen that in the first case, *United States v. Smith*, the Court said that this power is quite broad.²⁸⁰ The second case, *United States v. Arjona*,²⁸¹ concerned Congress’s power to criminalize the counterfeiting of foreign currencies, and the other two, *Ex parte Quirin*²⁸² and *Hamdan v. United States*,²⁸³ related to Congress’s power to try law of war offenses in military tribu-

278. See *supra* note 165 and accompanying text.

279. As discussed earlier, the government also argued that enlistment by a foreign government agent violated the United States’ sovereignty. See *supra* notes 164–69 and accompanying text. But the Neutrality Act barred *everyone*, not just foreign governments, from enlisting Americans to fight in foreign armies. This broader prohibition was predicated on neutrality law.

280. See 18 U.S. (5 Wheat.) 71, 73–74 (1820); see also *supra* notes 22–23, 56–57 and accompanying text.

281. 120 U.S. 479 (1887).

282. 317 U.S. 1 (1942).

283. 548 U.S. 557 (2006).

nals. On each occasion, the Court has suggested that Congress may depart from preexisting definitions of offenses against the law of nations.

A. Arjona

United States v. Arjona contains the Court's most extensive analysis of the Define and Punish Clause and establishes that Congress may punish any criminal conduct if doing so helps the United States comply with its international legal obligations.²⁸⁴ A federal statute criminalized the counterfeiting of foreign money.²⁸⁵ The defendant faced charges under Sections 3 and 6 of the relevant statute.²⁸⁶ Section 3 made it criminal to "[f]alsely mak[e], forg[e], or counterfeit[]" foreign banknotes, and Section 6 punished mere possession of counterfeit foreign bank notes.²⁸⁷ *Arjona* upheld Sections 3 and 6 as constitutional on the grounds that international law "requires every . . . government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation," including those who "counterfeit the money of another nation."²⁸⁸ The Court cited Vattel for the proposition that countries may not "allow[] and protect[] false coiners" and to argue that this protection extended more broadly to all types of commercial exchange, including publicly and privately issued securities, even though Vattel did not discuss either.²⁸⁹ Notably, the Court did not examine whether any other states prohibited the counterfeiting of foreign banknotes.

The Court next wrote that the United States had a strong interest in enshrining this principle of international law because U.S. currency was "practically composed" of government and bank securities, notes, and certificates.²⁹⁰ If other countries did not punish the forging and counterfeiting of these securities abroad, "a great wrong will be done to the United States," as "uncertainty about the genuineness of the security necessarily depreciates its value . . . and against this international comity

284. See *Arjona*, 120 U.S. at 479.

285. *Id.* at 480.

286. *Id.* at 482.

287. *Id.* at 481–82.

288. *Id.* at 484.

289. *Id.* at 485–86.

290. *Id.* at 486.

requires that national protection shall, as far as possible, be afforded.”²⁹¹ Because the United States could call on other governments to punish counterfeiting of U.S. securities, they could ask the same of the United States; “international obligations are of necessity reciprocal in their nature.”²⁹² The federal government has the power to punish these offenses against the law of nations because it is “necessary and proper . . . to carry into execution a power conferred by the constitution on the government of the United States exclusively.”²⁹³ Thus, Congress may punish offenses against the law of nations if doing so is “necessary and proper” for the United States to comply with its own international legal obligations.²⁹⁴

Two final points bear mentioning. First, the Court did not claim that failure to punish these offenses might lead to war, Merely “disturb[ing] that harmony between the governments” was enough to give it pause.²⁹⁵ Second, it did not matter that the statute itself did not “declare[] [counterfeiting] . . . to be ‘an offense against the law of nations’” because “[w]hether the offense as defined is an offense against the law of nations *depends on the thing done, not on any declaration to that effect by congress.*”²⁹⁶ The D.C. and Eleventh Circuits have pointed to the emphasized text as evidence that *Arjona* limits Congress’s power to define.²⁹⁷ But in doing so they have ignored the language’s context. The Court just meant that the government does not waive its power to punish offenses against the law of nations by failing to reference the clause in a statute.²⁹⁸

291. *Id.*

292. *Id.* at 487.

293. *Id.* The use of the word “exclusively” does not mean that states cannot punish the same offenses. *See id.* (“This, however, does not prevent a state from providing for the punishment of the same thing, for here, as in the case of counterfeiting the coin of the United States, the act may be an offense against the authority of a state as well as that of the United States.”).

294. *See id.* at 487.

295. *Id.*

296. *Id.* at 488 (emphasis added).

297. *See* *Al Bahlul v. United States*, 792 F.3d 1, 15 (D.C. Cir. 2015), *rev’d on other grounds* 840 F.3d 757 (en banc); *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1249 (11th Cir. 2012).

298. *See Arjona*, 120 U.S. at 488.

B. *Quirin and Hamdan*

When weighing in on military commissions cases, the Supreme Court has stated that Congress is not limited to punishing offenses that are clearly established under international law. America's views on the international law of war matter more than the international community's.

Ex parte Quirin upheld a military commission's conviction of several belligerents for espionage pursuant to the Articles of War. Article 15 granted military commissions jurisdiction over "offenders or offenses that by statute or by the law of war may be triable by such military commissions or other military tribunals."²⁹⁹ The Court held that the Define and Punish Clause permitted Congress, through the Articles of War, to "sanction[] . . . the jurisdiction of military commissions to try persons for offenses which, according to . . . the law of war, are cognizable by such tribunals."³⁰⁰

The Court implied that Congress's power to define is not completely limited by international law. "Congress," the Court said, "had the choice of crystallizing in permanent form and in minute detail every offense against the law of war."³⁰¹ But Congress would have no such choice if a single departure from a "minute detail" of an offense could invalidate an offense. Suppose, for example, that the law of war required at least a knowledge *mens rea*, but Congress permitted conviction upon a showing of mere recklessness. If preexisting international law limits Congress's power, that statute would be unconstitutional. Additionally, the law of war evolves. Other states may change their interpretation of international law, and countries may codify and alter vague areas of international law. That must have occurred to the Court. The law of war had transformed from a series of hazy offenses to an international set of codified rules between the Civil War and the Second World War.³⁰² Foreign developments could thus render the same minutely defined statute constitutional today but unconstitutional tomorrow. The Court likely would not have considered that

299. *Ex parte Quirin*, 317 U.S. 1, 27 (1942).

300. *Id.* at 18.

301. *Id.* at 30.

302. *See supra* note 44 and accompanying text.

outcome acceptable because the statutory scheme would then no longer have “permanent form.”

Quirin also noted that other countries’ list of “offenses against the law of war” might not overlap completely with the offenses “recognized by our courts as violations of the law of war.”³⁰³ This quotation does not answer whether the Court thought that it or Congress was to decide whether a crime was an offense against the law of war. But a sentence earlier in the opinion suggests that Congress gets the last word. After amassing evidence that Congress believed that spies could be tried by military commissions, the Court wrote, “It must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.”³⁰⁴ Congress’s understanding of the law of war, accordingly, is dispositive.³⁰⁵

Hamdan v. Rumsfeld also establishes that Congress has the power to define and punish offenses against the law of nations that other countries do not recognize. Part V of Justice Stevens’s opinion (joined by Justices Souter, Ginsburg, and Breyer) set aside a conspiracy conviction in a military commission because Congress had not “positively identified ‘conspiracy’ as a war crime.”³⁰⁶ But Congress may grant military commissions jurisdiction over law of war offenses “defined by statute,” and the plurality did not say that offenses “defined by statute” must be pegged to international law.³⁰⁷ Though his opinion did not “address the validity of the conspiracy charge,” Justice Kennedy’s concurrence also indicated that Congress need not tie offenses to extant international law: “Congress may choose to provide further guidance in this area. Congress, not the Court, is the branch in the better position to undertake the ‘sensitive task of establishing a principle not inconsistent with the national interest or with international justice.’”³⁰⁸

303. 317 U.S. at 29.

304. *Id.* at 35–36 (emphasis added).

305. The possibility that Congress could take away defendants’ right to jury trial might seem frightening, but this does not necessarily follow from *Quirin*. The Court also said in this same passage that some law of war violations are “constitutionally triable only by a jury,” thus implying that there is an Article III limit on military commissions’ jurisdiction separate from the Article I limit. *Id.* at 29.

306. *Hamdan v. Rumsfeld*, 548 U.S. 557, 602 (2006) (plurality opinion).

307. *Id.*

308. See *id.* at 636 (Kennedy, J., concurring in part) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)).

Implicit in both *Ex parte Quirin* and *Hamdan* is the notion that Congress has the power to punish “offenses against the law of war” committed by other countries’ combatants against the United States. This provides a new ground for punishing private conduct separate from the *Arjona* theory that Congress can punish private conduct it has a duty to suppress.

Finally, it is worth noting that the Court in *Hamdan* and *Quirin* did not use the term “violation against the law of war” in the same way. The *Hamdan* Court seemed to understand “violation against the law of war” as synonymous with the modern definition of a “war crime”: “a serious violation of the laws and customs of international humanitarian law [that] has been criminalized by international treaty or customary law.”³⁰⁹ But the *Quirin* Court assumed that “espionage” was an “offense against the law of war,” even though no treaty or rule of customary international law criminalized it. Spies just lost the privilege of belligerency and could therefore be punished if captured.³¹⁰ Judge Rogers speculated in *Bahlul* that the *Quirin* Court made a basic legal error.³¹¹

But the *Quirin* Court never claimed that international law required that the defendants be punished, just that they were unlawful belligerents and could therefore, under the law of war, be punished.³¹² For that reason, the indictment against the *Quirin* defendants “plainly allege[d] [a] violation of the law of war.”³¹³ Thus, the term “violation of the law of war” meant something different in *Quirin* than “war crime” does today.³¹⁴

309. Alexander Schwarz, *War Crimes*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Sept. 2014), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690e431?rskey=EnfR3i&result=10&prd=EPIL> [<https://perma.cc/HXE2-FQNY>].

310. See, e.g., U.S. WAR DEP’T, FIELD MANUAL 27-10: RULES OF LAND WARFARE 58, ¶ 2013 (1940).

311. See *Al Bahlul v. United States*, 840 F.3d 757, 817–18 (D.C. Cir. 2016) (en banc) (Rogers, J., dissenting), *reh’g denied* (Nov. 28, 2016).

312. See *Ex parte Quirin*, 317 U.S. 1, 36 (1942).

313. *Id.* at 36.

314. See also Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2133 n.374 (2005) (“In addition to war crimes, such as purposeful targeting of civilians, the jurisdiction of military commissions has always extended more generally to actions on the battlefield by unlawful combatants. There is a debate about whether such actions are best construed as war crimes, or as crimes that, because they are committed by unlawful combatants, are not shielded from prosecution by combatant immunity.” (citations omitted)).

At that time, international lawyers referred to both “unprivileged” and “illegal” acts of belligerency as “violations of the laws of war.”³¹⁵ Hence, in 1865, Attorney General James Speed described unprivileged acts, like espionage, blockade running, and sabotage, as “offenses against the laws of war,” even though they were “not crimes” in an ordinary sense of the word.³¹⁶ The 1886 and 1920 editions of William Winthrop’s treatise on military law likewise described acts lacking the privileges of belligerency, including “espionage,” as “violations of the laws of war.”³¹⁷ Henry Halleck’s 1861 international law treatise likewise referred to guerrillas, who did not commit war crimes but lacked combatants’ privilege, as having committed “violations of the laws of war.”³¹⁸ Every edition of Lassa Oppenheim’s treatise on the law of war published before *Quirin* declared that “persons committing acts of espionage or treason are . . . considered war criminals,” even though “the employment of spies and traitors is considered lawful on the part of

315. Charles Cheney Hyde, *Aspects of the Saboteur Cases*, 37 AM. J. INT’L L. 88, 91 n.10 (1943) (“The proof that it is unlawful is found in the fact that its commission is penalized. All acts for the commission of which international law prescribes a penalty are in the sense of that law unlawful.” (quoting John Bassett Moore, *Contraband of War*, 51 PROC. AM. PHIL. SOC’Y 18, 20 (1912))). Moore was admittedly talking about contraband, not espionage, but the principle is the same: selling contraband is not a war crime, but international law allows belligerents to punish it. For another explanation of this broader formulation, see Schwarz, *supra* note 309 (“A wider approach defines war crimes as all acts constituting a violation of the laws or customs of war, irrespective of whether the conduct is criminal.”). This Article’s account, that “violations of the law of war” included both unprivileged belligerent acts and what we would now call war crimes, is thus broadly consistent with the Government’s position in *Bahlul*. See Respondent’s Brief at 45–46, *Al Bahlul v. United States*, 792 F.3d 1 (D.C. Cir. 2015) (No. 11-1324), 2015 WL 6689466 (“Instead, *Quirin* interpreted the category of ‘offense[s] against the law of war’ to include offenses that were traditionally triable by military commission under domestic precedents but that were not viewed as violations of international law.”).

316. Military Commissions, 11 U.S. Op. Atty. Gen. 297, 312–13 (1865).

317. 2 WILLIAM WINTHROP, *MILITARY LAW* 69 (1886); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 838 (2d ed. 1920).

318. HENRY WAGNER HALLECK, *INTERNATIONAL LAW* 386 (1861) (States do not “recognize [guerrillas’] acts nor attempt to save them from the punishment due for their violations of the laws of wars. . . . The perpetrators of such acts, under such circumstances, are not enemies, legitimately in arms, who can plead the laws of war in their justification, but they are robbers and murderers, and as such, may be punished.”).

belligerents.”³¹⁹ U.S. courts and commentators continued this usage from the second half of the nineteenth through the early twentieth centuries.³²⁰ Britain did so too during the First World War.³²¹ To be sure, at the time of *Quirin*, plenty of legal opinions, treaties, and U.S. government publications, including some that the Court cited, noted that international law did not per se prohibit espionage.³²² But plenty of contemporary commentary referred to unprivileged acts of belligerency as “violations of the law of war.”³²³ Situating *Quirin* in this tradition avoids the awkward and implausible conclusion that, as Judge Kavanaugh put it, “Justices such as Harlan Fiske Stone, Felix Frankfurter, Robert Jackson, and Hugo Black— [were] ignorant of the content of international law.”³²⁴

319. 2 LASSA OPPENHEIM, INTERNATIONAL LAW § 288, at 337 (5th ed. 1935); 2 LASSA OPPENHEIM, INTERNATIONAL LAW § 288, at 287 (4th ed. 1926); 2 OPPENHEIM, *supra* note 240, § 288, at 223 (edition published in 1921); 2 LASSA OPPENHEIM, INTERNATIONAL LAW § 288, at 197 (2d ed. 1912); 2 LASSA OPPENHEIM, INTERNATIONAL LAW § 288, at 160 (1st ed. 1906).

320. *See, e.g.*, Thompson v. Wharton, 70 Ky. 563, 566 (1871) (espionage is a “violation of the laws of war”); Dillard v. Alexander, 56 Tenn. 719, 720–21 (1872) (trading with the enemy is a “violation of the *Laws of War*”); JAMES REGAN, THE JUDGE ADVOCATE AND RECORDER’S GUIDE 47 (1877) (stating that guerrilla warfare is an offense against the law of war); AUSTIN WAKEMAN SCOTT, HANDBOOK OF MILITARY LAW § 44, at 60 (1918) (stating that selling abandoned or captured property is an offense against the law of war); *id.* § 46, at 61 (same for spying); Trial of Spies by Military Tribunals, 31 U.S. Op. Atty. Gen. 356, 364–65 (1918) (listing espionage as a war crime).

321. *See* JAMES M. LOWRY, MARTIAL LAW WITHIN THE REALM OF ENGLAND 48 (1914) (espionage can be tried as a “war crime”); MANUAL OF EMERGENCY LEGISLATION 519 (Alexander Pulling ed., 1914) (same); MANUAL OF MILITARY LAW 302 (6th ed. 1917) (“The term ‘War Crime’ is the technical expression for such an act of enemy soldiers and enemy civilians as may be visited by punishment or capture of the offenders.”).

322. *See* Richard R. Baxter, *So-Called “Unprivileged Belligerency”: Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT’L L. 323, 329–33 (1951). But even if international law had, before *Quirin*, narrowed the meaning of “law of war violation” to no longer include unprivileged acts of belligerency, then that would not demonstrate that the Court was confused. Rather, it would show that the constitutional meaning of “violation against the law of war” is not tied to current international law.

323. *But see* Marty S. Lederman, *If George Washington Did It, Does that Make It Constitutional?: History’s Lessons for Wartime Military Tribunals*, 105 GEO. L.J. (forthcoming August 2017) (manuscript at 53–54), <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2813&context=facpub> [<https://perma.cc/6HJD-9FXX>] (arguing that *Quirin* mistakenly assumed that “‘unprivileged’ belligerency automatically violates the law of war”).

324. *Al Bahlul v. United States*, 840 F.3d 757, 764 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring). Judge Kavanaugh, by contrast, argued that Congress’s war powers give it the power to punish these offenses in military commissions

C. Lessons

From these cases, we can draw seven lessons about the scope of the Define and Punish Clause. First, as *Arjona* makes clear, Congress may define and punish offenses that did not exist at the time of the Framing.³²⁵ International law, after all, did not prohibit the counterfeiting of securities in the 1700s. Second, in all three cases, state practice was not constitutionally relevant to Congress's power to define. *Arjona* did not examine other countries' views on counterfeiting, and both *Quirin* and *Hamdan* implied that Congress did not need to peg its statutes to extant international law. Third, *Arjona* held that Congress, through some combination of the Necessary and Proper and Define and Punish Clauses, had the power to punish any conduct if doing so would help the United States comply with its international legal obligations.³²⁶ Congress thus can do more than punish what international law already forbids. Fourth, *Quirin* and *Hamdan* also permitted the United States to punish other offenses against the law of war committed by nationals of other countries. Fifth, "violation of the law of war" may include unprivileged acts of belligerency. Sixth, when deciding if the U.S. had an obligation to punish the conduct, the *Arjona* Court considered U.S. national interests relevant to its analysis. Seventh, Congress did not need to specify in its statute that the

even though they were not violations of the law of war. *See id.* at 761. This approach would not force the courts to clarify the scope of the Define and Punish Clause, *see id.*, but therein lies the rub: as we saw earlier, the Court in *Quirin* explicitly tied the scope of military commissions' jurisdiction in part to that Clause. Judge Kavanaugh cited two other historic sources for this claim, William Winthrop and Joseph Story's treatises, but Winthrop, on the page Judge Kavanaugh cited, explicitly mentioned the Define and Punish Clause as a basis for military commissions' jurisdictions. *See* WINTHROP, MILITARY LAW AND PRECEDENTS, *supra* note 317, at 831. And the Story passage never actually mentioned "military commissions." 3 STORY, *supra* note 112, § 1192.

325. *See* Note, *The Offenses Clause After Sosa v. Alvarez-Machain*, 118 HARV. L. REV. 2378, 2386 (2005) ("*Arjona* established that an exercise of Offenses Clause power must be measured against international law as it exists at the time when Congress acts, not as it existed at the time of the founding.>").

326. *See also id.* at 2386–87 ("[T]he Offenses Clause not only allows Congress to act against direct violations of the law of nations, but also allows Congress to criminalize acts a step removed from the demands of international law."); Fredman, *supra* note 58, at 297–98 (same).

crime was an offense against the law of nations for the executive to raise that argument in court.³²⁷

V. WHAT CAN CONGRESS PUNISH?

Generally, international law binds states, not individuals. Until the twentieth century, international law treated very few private acts as criminal offenses. So what exactly may Congress punish under the Define and Punish Clause? The previous Sections establish that this clause gives Congress an expansive power, but all powers have limits. This Section describes those limits.

This Article categorizes the different types of offenses that Congress might try to punish as *type one* through *type five* offenses. *Type one* offenses are offenses against the law of war³²⁸ or universally punishable private criminal acts, like attacks on ambassadors, violations of safe conduct, and piracy. *Type two* offenses cover private conduct that, though not illegal under international law itself, the United States has an obligation to punish.³²⁹ The *Arjona* prohibition on making and possessing counterfeit foreign currency is a good example of a *type two* offense: Those specific acts were not international crimes, but the United States had an obligation to suppress them. *Type three* offenses are like *type two* offenses, but it may be ambiguous whether international law requires that states condemn the conduct in question. Preexisting international law does not require states to punish *type four* offenses. Congress must believe that the United States is legally obliged to ban such conduct, but no other country agrees. *Type five* offenses tick off none of these boxes: There is no connection between punishing a *type five* offense and complying with an existent or developing rule of customary international law. Table 1 summarizes each offense.

327. See Note, *supra* note 325, at 2386 (“[A]s is the case with Congress’s other legislative powers, Congress can exercise the power without formally invoking it.”).

328. See *supra* Section IV.B. Here, this Article uses the modern, narrower understanding of “violations of the law of war,” not *Quirin*’s broader understanding of the term, to emphasize that *type one* offenses are currently illegal under international law whereas unprivileged belligerent acts are probably not illegal in present day.

329. See *supra* Section IV.A. (explaining the Court’s reasoning in *Arjona*).

Table 1

	Type one	Type two	Type three	Type four	Type five
Universally proscribed?	Yes.	No.	No.	No.	No.
State obliged to prevent it, or law of war permits states to punish it?	N/A	Yes.	Unclear.	No.	No.
Logical nexus for punishment?	N/A	Yes.	Yes.	Yes.	No.
Constitutional to punish?	Yes.	Yes.	Yes.	Probably.	No.

Congress obviously can punish *type one* offenses, including ones that did not exist at the time of the Framing.³³⁰ And it obviously cannot punish *type five* offenses because there is no nexus to international law at all. *Type two*, *type three*, and *type four* offenses present harder cases. The subsections below argue that Congress may constitutionally proscribe each of those three categories. But *type four* offenses are a closer call.

A. Type two offenses

Congress punishes a *type two* offense if it proscribes private conduct that, while not an international crime like piracy, the United States has an international legal obligation to suppress. The crime at issue in *Bahlul*, conspiracy to commit offenses against the law of war, probably falls under this category: Penalizing conspiracy to commit those crimes makes it easier to punish law of war violations.³³¹

Congress can punish *type two* offenses because it has discretion in deciding how to comply with its international duties.

330. See *supra* note 325 and accompanying text.

331. It makes more sense to view conspiracy to violate the law of war as a *type two* offense, an alternative means of punishing clearly illegal acts, because the United States has never claimed that conspiracy to violate the law of war was itself a war crime. Rather, the government has argued that the law should be sustained as a convenient means “for the United States to carry out its international obligation to prevent terrorism as a mode of warfare.” Respondent’s Brief at 57, *Al Bahlul v. United States*, 792 F.3d 1 (D.C. Cir. 2015) (No. 11-1324), 2015 WL 6689466.

This is so for four reasons. First, the text and structure of the Constitution suggest that the power to define an offense against the law of nations is separate from the power to punish those offenses.³³² Congress should therefore, at minimum, have the power to define an offense that it is obliged to suppress slightly differently than other nations do. Otherwise, the power would amount to very little.

Second, early American political leaders probably thought the power to define included the power to create new offenses.³³³ The idea that Congress could do no more than ape clearly defined offenses under international law may have never occurred to the Framers. They wanted Congress to be able to punish offenses against the law of nations that were indeterminate.³³⁴ They also considered the clause to be a powerful tool to defuse one of the main national security threats of the day: private actions that could spark war.³³⁵ That tool would not be very helpful if Congress could not act until it had significant international precedent on its side. Congress's expansive power to define piracies and felonies on the high seas further implies that it has a similarly broad power to define offenses against the law of nations.³³⁶

Third, early American neutrality legislation punished *type two* offenses. The administration never argued that neutrality violations themselves were like piracy. Rather, its argument was that the United States had a duty to suppress the conduct in question. That made the violations offenses against the law of nations.³³⁷

Fourth, *Arjona* upheld Congress's authority to punish a *type two* offense. Congress may criminalize the counterfeiting of foreign banknotes because the United States had an obligation under international law "to use due diligence to prevent any injury to an-

332. See *supra* Section I.

333. See *supra* Section II.A.

334. See *supra* Section II.B.

335. See *supra* Section II.C.

336. See *supra* Section II.D.

337. See *supra* Section III.B. It is probably more appropriate to characterize the Neutrality Act as punishing *type four* offenses because there was next to no precedent for this legislation. See *infra* Section V.C.1. The point here is that the Washington administration and Congress assumed that neutrality violations were offenses against the law of nations *because* the United States had an obligation to suppress them.

other nation or its people by counterfeiting its money or its public or *quasi* public securities.”³³⁸ Suppressing conduct that could put the United States in breach of its international legal obligations is “a means to” international law compliance³³⁹ and therefore a “necessary and proper” means of defining and punishing offenses against the law of nations.³⁴⁰ For this reason, the statute at issue was constitutional even though the Court never pretended that international law requires countries to punish mere possession of counterfeited documents.³⁴¹ Congress’s discretion in choosing how to comply with international law accordingly empowers it to punish *type two* offenses.

B. Type three offenses

Type three offenses are like *type two* offenses, but it is ambiguous whether international law requires that states condemn the conduct in question. The *type two* arguments also suggest that Congress has the power to define and punish *type three* offenses: Nothing in the preceding section depended on the international community agreeing with the United States’ interpretation of international law. In fact, the Framers wanted to give Congress the power to criminalize offenses against the law of nations where international law was ambiguous. They did not want foreign law to limit Congress’s powers.³⁴² And every time the Supreme Court has examined the Define and Punish Clause, it has implied that other countries’ views of international law are not constitutionally relevant.³⁴³

*Banco Nacional de Cuba v. Sabbatino*³⁴⁴ provides an additional reason why Congress can punish *type three* offenses. The Court held that the judiciary should not decide on questions of customary international law unless there is a

338. *United States v. Arjona*, 120 U.S. 479, 488 (1887).

339. *Id.* at 488.

340. *See id.* at 487; *see also* *United States v. Comstock*, 560 U.S. 126, 135 (2010); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and 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.”).

341. *Arjona*, 120 U.S. at 485–86.

342. *See supra* Sections II.B & II.D.1.

343. *See supra* Section IV.

344. 376 U.S. 398 (1964).

“great[] . . . degree of codification or consensus concerning a particular area.”³⁴⁵ This will help judges:

focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle *not inconsistent with the national interest* or with international justice. . . . [T]he less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.³⁴⁶

Inversely, the more important an issue for U.S. foreign relations, the stronger the justification for exclusivity in the political branches.³⁴⁷ This point echoes the *Arjona* Court, which looked to U.S. interests when deciding what international law forbade.³⁴⁸ *Sabbatino* would thus caution against overriding a statute when customary international law lacks clarity or U.S. interests are at stake. And, in the Define and Punish context, consulting the *Statutes at Large* is probably the best way to determine U.S. interests on a question of international law.

C. Type four offenses

The United States is alone in believing that, as a matter of international law, it has a duty to suppress *type four* conduct. Many of the same arguments for *type two* and *type three* apply to *type four*. The Framers thought the power to define entailed the power to invent, they did not want foreign law to constrain U.S. law, and they would not have wanted judges to hobble the political branches when they were protecting the United States from international controversy. This subsection shows why the Supreme Court’s foreign relations case law provides additional reasons to believe that the United States can punish *type four* offenses and explains the limits of Congress’s power under the Define and Punish Clause.

1. Foreign relations deference

In his *Youngstown Sheet & Tube Co. v. Sawyer* concurrence, Justice Jackson wrote that a President acting pursuant to a

345. *Id.* at 428.

346. *Id.* (emphasis added).

347. See *supra* note 308 and accompanying text (citing *Sabbatino* when interpreting the Define and Punish Clause).

348. See *supra* notes 290–294 and accompanying text.

Congressional grant of authority, what Jackson called Category One, is at the height of his power.³⁴⁹ To claim that it is unconstitutional to punish *type four* offenses is to say that “the Federal Government as an undivided whole” lacks the power to adopt its own understanding of customary international law with criminal legislation.³⁵⁰ But the federal government probably *does* have that power.

The judiciary generally respects the political branches’ legal and factual judgments in foreign relations cases. *Abbott v. Abbott*,³⁵¹ for example, accepted the State Department’s treaty interpretation because State understood “the likely reaction of other contracting states and the impact on” its ability to accomplish the ends of the treaty.³⁵² *Sabbatino* likewise emphasized the propriety of deferring to the President on customary international law because the executive “speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns.”³⁵³ Granted, these cases concerned judicial deference to the *President*, not Congress. But it would be structurally odd if the President had more law-making power than the Legislature.³⁵⁴

Any contrary interpretation of the Define and Punish Clause would make a statute’s constitutionality change because other countries changed their laws.³⁵⁵ Congress might punish an of-

349. 343 U.S. 579, 635 (1952) (Jackson, J., concurring). *Youngstown* is the appropriate framework to use here because this Article is ultimately addressing a separation of powers question: whether Congress or the Judiciary has the final say on what counts as an offense against the law of nations.

350. *Id.* at 636–37.

351. 560 U.S. 1 (2010).

352. *Id.* at 16.

353. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432–33 (1964); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 112, cmt. c (1987) (noting that (1) courts prefer that “the United States speak with one voice on such matters,” (2) U.S. views constitute “state practice, creating or modifying international law,” and (3) “the Executive Branch will have to answer to a foreign state for any alleged violation of international law resulting from the action of a court” (citations omitted)).

354. Cf. *Youngstown*, 343 U.S. at 587–88 (majority opinion) (“[T]he President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker The first section of the first article says that ‘All legislative Powers herein granted shall be vested in a Congress of the United States’”).

355. See *supra* Introduction.

fense pursuant to a well-established principle of international law at t_0 that became unconstitutional at t_1 if international law changed. It would also force Congress, as Judge Henderson put it, to play “Mother, may I?” with the international community.³⁵⁶ Justice Douglas thought it wrong for the judiciary to serve as a mere “errand boy” of the executive branch when crafting federal common law.³⁵⁷ But deferring to *international* definitions of the offenses against the law of nations in a *constitutional* context seems worse. The Court would instead be foreign nations’ “errand boy,” and Congress could not override its decisions. This deference would effectively delegate American constitutional law to foreign governments and international organizations.³⁵⁸ That seems at odds with Madison’s preference that foreign law not limit the scope of the Define and Punish power.³⁵⁹

The Supreme Court’s decision in *Sosa v. Alvarez-Machain*³⁶⁰ provides four other reasons to believe that judges should not second-guess Congress’s interpretation of international law.³⁶¹ First, “a judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision.”³⁶² Setting outward limits on Congress’s define and punish power would therefore be more an exercise in “creat[ing]” constitutional limits, not “discover[ing]” them.³⁶³ That seems especially bad in *type four* cases because customary international law changes. Court decisions could shape international law’s future development around the world, possibly to the detriment of U.S. interests. Had courts struck down early neutrality legislation, for example, other countries might not have coalesced around American views of neutrality.³⁶⁴ Second,

356. *Al Bahlul v. United States*, 792 F.3d 1, 49 (D.C. Cir. 2015) (Hendrickson, J., dissenting), *rev’d on other grounds* 840 F.3d. 757 (en banc).

357. *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 773 (1971) (Douglas, J., concurring in the judgment).

358. *See Medellin v. Texas*, 552 U.S. 491, 517 (2008) (noting that any interpretation of a treaty that delegated to a foreign body the right to make binding legal judgments should “give pause”).

359. *See supra* notes 88–99 and accompanying text.

360. 542 U.S. 692 (2004).

361. *See Note, supra* note 325, at 2391 (“*Sosa* suggests that the limitations . . . flow from concerns about judicial overreaching, not from general concerns that would apply equally well to congressional action.”).

362. *Sosa*, 542 U.S. at 726.

363. *Id.* at 725.

364. *See DAVIS, supra* note 212, at 434.

the judiciary prefers “to look for legislative guidance before exercising innovative authority over substantive law,” especially when “exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.”³⁶⁵ Because the Court has never curbed Congress’s power to define offenses against the law of nations before, it should tread carefully before doing so now. Third, limiting Congress’s power to develop rules of customary international law by punishing *type four* offenses might “imping[e] on the discretion of the Legislative and Executive Branches in managing foreign affairs.”³⁶⁶ Fourth, and applicable as much to the Define and Punish Clause as it is to the Alien Tort Statute, “[w]e have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity.”³⁶⁷

There may be greater reason for deference in military commission cases. Even when the President acts contrary to congressional will, Justice Jackson wrote that he would “indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.”³⁶⁸ In a *type four* situation, the President acts pursuant to congressional will, not against it, which might make Jackson’s “widest latitude” even wider.

Finally, early American neutrality legislation provides a significant precedent for punishing *type four* offenses. Congress used the Define and Punish Clause to invent new offenses against the law of nations, yet nobody suggested that this posed a constitutional problem.³⁶⁹

2. What can’t Congress punish?

Congress obviously cannot punish *type five* offenses with no connection to international law whatsoever. But *type four* offenses might seem indistinguishable from *type five* offenses considering

365. *Sosa*, 542 U.S. at 726; see also *supra* Section II.C.

366. *Sosa*, 542 U.S. at 727.

367. *Id.* at 728.

368. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring).

369. See *supra* Section IV.B.3–4.

Arjona's clarification that “[w]hether the offense as defined is an offense against the law of nations depends on the thing done, not on any declaration to that effect [in the statute].”³⁷⁰ It seems like the government could belatedly defend statutes by asserting that Congress had an idiosyncratic view of international law. If so, then Congress could punish anything it wanted.

This objection is troubling. But courts could distinguish *type four* from *type five* offenses by requiring some predicate evidence, separate from the statute itself, that the political branches believe that the statute reflects U.S. obligations under international law. Congress can still pass resolutions expressing its opinions on international law, the executive can advocate changes at international conferences and vote for U.N. General Assembly resolutions, and the branches can foster piecemeal changes in customary international law by treaty. Forcing them to take these diplomatic steps would make it harder to opportunistically defend suspect statutes under the Define and Punish Clause. Congress might also constitutionally justify a law by pointing to a vague and broad international obligation to which it is trying to give teeth. The Neutrality Act’s prohibition on foreign enlistment was, after all, a much more specific instantiation of the international legal duty to prevent one’s subjects from harming another state.³⁷¹ *Arjona* sustained the foreign counterfeiting law on similar grounds.³⁷² If that sort of vague duty sufficed for Washington’s administration and *Arjona*, it should today. What matters is that there be some separate evidence that Congress really believes it is punishing an offense against the law of nations.

Foreign policy consequences would check congressional overreach. If Congress claimed it had an international legal obligation to punish a certain type of conduct, other countries might punish U.S. citizens for doing the same thing. For example, several lawyers in the Obama administration disfavored prosecuting a Guantanamo detainee for “conspiracy” in a military commission for fear of creating an international precedent that could harm U.S. interests.³⁷³ Consider another part of the Define and Punish

370. *United States v. Arjona*, 120 U.S. 479, 488 (1887) (emphasis added).

371. See *supra* notes 241–43 and accompanying text.

372. See *supra* notes 288–89 and accompanying text.

373. See CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY* 499 (2015).

Clause: Congress's power to define and punish felonies committed "on the high Seas." The "high Seas" refers to waters not within any country's territory,³⁷⁴ but courts defer to the political branches on territorial claims under the political question doctrine.³⁷⁵ Congress and the President could thus expand Congress's jurisdiction by changing their views on territorial claims. But nobody worries about such an improbable scenario.³⁷⁶

VI. CONCLUSION

This Article has defended a broad understanding of the Define and Punish Clause. Congress has a separate power to define offenses against the law of nations. This power to define gives it authority to punish universally recognized offenses against the law of nations (*type one*) and private conduct that the United States has (or may have) an international legal obligation to punish (*type two, type three*). Finally, Congress probably may punish private conduct under an idiosyncratic theory of international law to which only the United States subscribes (*type four*).

374. See, e.g., *United States v. Louisiana*, 394 U.S. 11, 23 (1969) ("Outside the territorial sea are the high seas.").

375. See *Jones v. United States*, 137 U.S. 202 (1890).

376. Additionally, if Congress has the power to define and punish offenses against treaties, which it most likely does, see generally Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. 2202 (2015), the same risk of overreach exists. "[T]he President and the Senate [might] find in some foreign state a ready accomplice" to enact a treaty designed to expand congressional power. *Bond v. United States*, 134 S. Ct. 2077, 2102 (2014) (Scalia, J., concurring in the judgment). Ratifying a new treaty with a client state might carry fewer foreign policy consequences and thus face fewer domestic obstacles than adopting a new understanding of customary international law, which powerful nations might enforce against the United States.

HALF-COCKED: THE REGULATORY FRAMEWORK OF SHORT-BARREL FIREARMS

INTRODUCTION	493
I. HISTORY OF THE NATIONAL FIREARMS ACT OF 1934	496
II. CONSTITUTIONAL CHALLENGES TO THE NFA....	501
A. The First Prong of the Ninth Circuit’s Second Amendment Scrutiny Test.....	505
B. Second Prong of the Test for Second Amendment Scrutiny.....	508
1. Intermediate Scrutiny.....	509
2. Strict Scrutiny	514
III. INFIRMITIES IN THE NFA REGULATORY REGIME	518
A. <i>Auer</i> Deference and the ATF’s Regulation of Vertical Fore-Grips	520
B. <i>Chevron</i> Deference and the ATF’s Regulation of Vertical Fore-Grips	524
C. Further Complications from the ATF’s Fore-Grip Regulation Regime.....	526
D. The Sig Sauer Brace Controversy	528
IV. CONCLUSION	536

INTRODUCTION

John Doe is a responsible citizen who desires to purchase his first firearm. After entering a federally-licensed gun store, an AR-15 catches John’s eye.¹ This popular firearm, a semiautomatic ver-

1. This Note will focus on the AR-15 as it is the easiest and most prominent example of a firearm having both rifle and pistol variants. Other firearms, including so-called “assault weapons,” have pistol variants with varying degrees of interchangeability. The AK-47 style of rifle, which is typically converted from a saiga or other firearm, has pistol variants available such as the Arsenal, Inc., SAM-7K Pistol or the Century Arms Zastava PAP M92. See *Arsenal Inc SAM7k-02 SAM-7k Pistol 7.62x39mm 10.5in 30rd Black*, TOMBSTONE TACTICAL, <https://www.tombstonetactical.com/catalog/arsenal/sam7k-02-sam-7k-pistol-7.62x39mm-10.5in-30rd-black/> [https://perma.cc/385V-43P7] (last visited Apr. 8,

sion of the rifle utilized by the United States Armed Forces, has become the quintessential tactical arm.² Due to size and weight considerations, John opts to purchase an AR-15 pistol, which has a barrel shorter than sixteen inches and lacks a buttstock. After clearing his background check and paying, John walks out the door and heads home with his pistol locked securely in his trunk. Once home, he begins to browse the Internet for attachments that can be added to the gun. He settles on a forward grip, which will increase stability, accuracy, comfort, and functionality. While an obvious buy, John's decision is fraught with peril. If he adds a vertical forward grip, he may be fined up to \$10,000, be forced to forfeit the firearm, and face up to ten years in prison for violating the National Firearms Act of 1934 ("NFA").³ However, if John adds an angled grip, which is simply a vertical grip fashioned at roughly a 45-degree angle, he has not violated the law.⁴

This quagmire is the result of regulations and interpretations promulgated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (the "ATF" or the "Bureau") over the past decade. The Bureau's efforts to implement the NFA have created a legal minefield requiring firearm owners to be well-versed in the law and agency regulation to avoid crushing fines and imprisonment. Some have unfortunately fallen prey to this regulatory scheme,

2017); *Century Arms HG3089CN Zastava PAP M92 7.62x39 10in 30rd Black, TOMBSTONE TACTICAL*, <https://www.tombstonetactical.com/catalog/century-arms/hg3089cn-zastava-pap-m92-7-62x39-10in30rd-black/> [https://perma.cc/2M2P-4GBR] (last visited Apr. 8, 2017).

2. The United States Court of Appeals for the Fourth Circuit provided a useful accounting of the popularity of AR-15 and similar rifles:

In 2012, semi-automatic sporting rifles accounted for twenty percent of all retail firearm sales For perspective, we note that in 2012, the number of AR- and AK-style weapons manufactured and imported into the United States was more than double the number of Ford F-150 trucks sold, the most commonly sold vehicle in the United States.

Kolbe v. Hogan, 813 F.3d 160, 174 (4th Cir. 2016).

3. See National Firearms Act of 1934, §§ 7(a), 14, 26 U.S.C. §§ 5871, 5872(a) (2012); see also *United States v. Black*, 739 F.3d 931 (6th Cir. 2014) (defendant charged with making an unregistered "any other weapon" in violation of the NFA); *United States v. Fix*, 4 F. App'x 324 (9th Cir. 2001) (defendant convicted of keeping an unregistered pistol with a vertical fore-grip in violation of the NFA); Report of the Magistrate and Order of Dismissal, *United States v. Davis*, Cr. No. 8:93-cr-00106-GRA (D.S.C. June 21, 1993) (defendants charged with possessing unregistered pistols with attached vertical grips in violation of the NFA).

4. See U.S. Dep't of Justice, *Adding a Vertical Fore Grip to a Handgun* (Aug. 5, 2011), <https://www.atf.gov/firearms/docs/open-letter/all-ffls-may2006-open-letter-adding-vertical-fore-grip-handgun/download> [https://perma.cc/6XB7-MY9B].

such as the defendants in *United States v. Davis*,⁵ *United States v. Fix*,⁶ and *United States v. Black*.⁷ For John, if he really wanted a firearm with a vertical fore-grip, the law requires him to either purchase another AR-15 in a rifle configuration or register his pistol as a short-barrel rifle.

These legal consequences stem from the federal government's first attempt to regulate firearms, an area traditionally regulated by the states.⁸ The NFA, signed into law on June 26, 1934, by President Franklin Roosevelt, enacted new regulations for manufacturers, transferors, and owners of (1) machine guns; (2) short-barrel rifles; (3) short-barrel shotguns; (4) "any other weapon[s];" (5) antique firearms; and (6) silencers.⁹ The law originally required individuals desiring to own one of these restricted firearms to be at least twenty-one years old, pass a background check, submit two copies of their fingerprints and two copies of a recent passport-sized picture to the ATF, seek approval by a Chief Law Enforcement Officer in the individual's jurisdiction, pay a \$200 tax stamp that must be kept with the firearm at all times, and register it with the ATF.¹⁰

Congress envisioned these restrictions and taxes as a means to deter the population at-large from seeking to own these firearms, while also ensuring that the government could track them. While some of these NFA-regulated firearms have discernable and legitimate operational differences from firearms not regulated by the NFA, short-barrel rifles, short-barrel shotguns, and "any other weapon[s]" have fallen prey to an arbitrary set of regulations rooted in fear, not fact.

5. Report of the Magistrate and Order of Dismissal, *United States v. Davis*, Cr. No. 8:93-cr-00106-GRA (D.S.C. June 21, 1993).

6. 4 F. App'x 324 (9th Cir. 2001).

7. 739 F.3d 931 (6th Cir. 2014).

8. State laws regulating or banning the carry of concealed firearms were common in the early Republic, mainly as a means for preventing slave rebellion. See CLAYTON E. CRAMER, *CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC* 2-3 (1999).

9. 26 U.S.C. § 5845 (2012).

10. National Firearms Act of 1934, § 4, Pub. L. No. 73-474, 48 Stat. 1236, 1237-38; see also 26 U.S.C. § 5841. Prior to the ATF promulgation of new regulations in June 2016, another popular applicant for NFA-restricted firearms was a revocable trust. Under the new regulations, the fingerprint, picture, and background requirements are now imposed on *all* members of the trust. See 27 C.F.R. § 479(III)(A)(1) (2016). ATF regulations also now require only the notification of, but affirmative approval by, a Chief Law Enforcement officer in the applicant's jurisdiction. *Id.*

This Note presents two arguments. First, short-barrel firearms regulated by the NFA have no discernable operational differences from firearms excluded from the Act, and thus the NFA's registration, taxation, and notification requirements for short-barrel firearms are unconstitutional. Second, the ATF has added insult to injury by using administrative action to expand these regulations far beyond the scope Congress provided. By allowing these practices to continue, law-abiding citizens risk imprisonment for attempting to increase the stability and safety of their firearm.

This Note proceeds in three parts. It will begin by discussing the history of the NFA, including its subsequent amendments, related statutes, and judicial decisions. Next, the analysis will demonstrate that the NFA unconstitutionally restricts short-barrel firearms that are in "common use."¹¹ Finally, this Note will argue that the ATF's interpretations of the NFA and associated regulations with respect to firearms attachments have no persuasive logical basis. Such interpretations should not receive judicial deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,¹² *Skidmore v. Swift & Co.*,¹³ or *Auer v. Robbins*,¹⁴ and regulations based upon them plainly exceed the authority granted to the Bureau by Congress.

I. HISTORY OF THE NATIONAL FIREARMS ACT OF 1934

The National Firearms Act of 1934 was enacted as part of President Roosevelt's effort to combat Prohibition-era violence.¹⁵ During the hearings of the Act before the House Com-

11. *Dist. of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

12. 467 U.S. 837 (1984).

13. 323 U.S. 134 (1944).

14. 519 U.S. 452 (1997).

15. See 73 CONG. REC. 11,400 (1934) (statement of Rep. Robert L. Doughton) ("For some time this country has been at the mercy of gangsters, racketeers, and professional criminals."); *National Firearms Act: Hearing on H.R. 9066 Before the H. Comm. on Ways & Means*, 73rd Cong. 4, 4 (1934) [hereinafter *NFA Hearing*] (statement of Homer S. Cummings, Att'y Gen. of the United States) ("[T]here are more people in the underworld today armed with deadly weapons, in fact, twice as many, as there are in the Army and the Navy of the United States combined."); see also *Lomont v. O'Neill*, 285 F.3d 9, 11 (D.C. Cir. 2002) ("The emergence of organized crime as a major national problem led to the enactment of the National Firearms Act of 1934.") (internal citation omitted); *United States v. Gonzales*, 2011 U.S. Dist. LEXIS 127121, at *11 (D. Utah Nov. 2, 2011) ("During the Great Depression, the nation faced the difficulty of controlling violence by gangsters.").

mittee on Ways and Means, Attorney General Cummings testified before Congress to highlight the need of the NFA to combat criminals who crossed state lines.¹⁶ Attorney General Cummings also postulated which machine guns or other arms were particularly suited for criminal use.¹⁷ Citing Article I's interstate commerce and taxing powers, the NFA required manufacturers of short-barreled rifles, short-barreled shotguns, machine guns, silencers, and "any other weapon" (collectively, "NFA items" or "NFA-regulated firearms") to register restricted firearms with the Department of Treasury.¹⁸ These registrations then had to be transferred to the individual purchasing the NFA item prior to his taking possession of the firearm. In so doing, Congress sought to restrict the free access to firearms preferred by criminals. The Act also required anyone owning these restricted firearms to register them with the Treasury Department prior to transferring it to anyone else, again in an effort to keep them from criminals.¹⁹ Finally, and as another deterrent for those seeking to own a restricted firearm, the Act

16. *NFA Hearing*, *supra* note 15, at 4 (statement of Homer S. Cummings, Att'y Gen. of the United States) ("We have gangs organized, as of course you all know, upon a Nation-wide basis and, on account of the shadowy area or twilight zone between State and Federal power, many of these very well instructed, very skillful, and highly intelligent criminals have found a certain refuge and safety in that zone, and there lies the heart of our problem—the roaming groups of predatory criminals who know, by experience, or because they have been instructed and advised, that they are safer if they pass quickly across a State line, leaving the scene of their crime in a high-powered car or by other means of quick transportation.").

17. *See id.* ("In other words, roughly speaking, there are at least 500,000 of these people who are warring against society and who are carrying about with them or have available at hand, weapons of the most deadly character."); *id.* at 6 ("A machine gun, of course, ought never to be in the hands of any private individual. There is not the slightest excuse for it, not the least in the world, and we must, if we are going to be successful in this effort to suppress crime in America, take these machine guns out of the hands of the criminal class."); *id.* at 11 ("I think [Colt Co.] is the only manufacturer now of the type of machine gun used by gangsters [the Thompson submachinegun]."); *id.* at 14 (stating that the Browning machine gun "is not easily transportable" and is a "large, cumbersome weapon that would probably not be used by the criminal class," an as such, "it is not absolutely necessary to bother with it" through the provisions of the NFA).

18. *See* National Firearms Act of 1934, § 2, Pub. L. No. 73-474, 48 Stat. 1236, 1237.

19. *See Gonzales*, 2011 U.S. Dist. LEXIS 127121, at *11 ("Congress responded with a collection of legislation, including the National Firearms Act, targeting 'the roaming groups of predatory criminals who know . . . they are safer if they pass quickly across a state line.'" (quoting *NFA Hearing*, *supra* note 15, at 4 (statement of Homer S. Cummings, Att'y Gen. of the United States))).

directed the Secretary of the Treasury to levy a \$200 tax on the manufacture and transfer of most NFA items. When adjusted for inflation, this tax would be equivalent to \$3,582.19 in 2016.²⁰

The category of firearms considered NFA items is ambiguously and arbitrarily defined. The NFA originally defined short-barrel rifles and short-barrel shotguns as firearms “having a barrel or barrels of less than 18-inches in length [or] a weapon made from a [firearm] if such weapon as modified has an overall length of less than 26-inches or a barrel or barrels of less than 18-inches in length.”²¹ Congress settled on these length requirements based on the ability to conceal a firearm.²² Still, that logic does not hold true in all cases. For instance, a shotgun with a 17.5 inch barrel is just as concealable (which is not very concealable) as a shotgun with an 18 inch barrel. Additionally, a rifle with an overall length of twenty-five inches and a 16 inch barrel is not practically more concealable than a rifle with a 26 inch overall length and an 18 inch barrel, even though the latter is not subject to the NFA.

Further arbitrary regulation arises with firearms that do not neatly conform to categories of firearms in the NFA. There are numerous firearms that do not fall in the NFA’s definitions for short-barrel rifles, short-barrel shotguns, and non-regulated firearms,²³ and Congress believed the “space” between these statutory definitions could establish a safe harbor for dangerous weapons. As a result, the NFA creates another all-encompassing category of firearms labeled “any other weapon.” The statute defines “any other weapons” as:

[A]ny weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with a combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a sin-

20. See *Inflation Calculator*, BUREAU OF LABOR STAT. (Feb. 4, 2017), https://www.bls.gov/data/inflation_calculator.htm [<https://perma.cc/3CPC-DLFR>].

21. National Firearms Act of 1934, § 1, 48 Stat. at 1236.

22. See H.R. REP. NO. 73-1780, at 2 (1934) (“The term ‘firearm’ is defined to mean a shotgun or rifle having a barrel of less than 18 inches in length [and] any other gun (except a pistol or revolver) if the gun may be concealed on the person.”).

23. For the purposes of this Note, a “non-regulated pistol” or “non-regulated firearm” constitutes a firearm not subject to the NFA, but may be regulated by other federal and state firearms regulations.

gle discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire. Such term shall not include a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.²⁴

As written, this category aims to restrict concealable firearms that do not qualify as another category of arms and are not a pistol or revolver with a rifled bore or bores. Congress still feared these firearms, but they were hard to label in a consistent manner and were mainly sought after by collectors, not criminals.²⁵ Unfortunately, “any other weapon” has grown into a behemoth, manipulated by the ATF to include a wider array of firearms which are not neatly classified as rifles, pistols, or shotguns than Congress intended.

The tax and regulatory scheme for firearms qualifying as “any other weapon” demonstrates that Congress tentatively accepted that a legitimate use existed for some of these firearms.²⁶ Unlike the \$200 tax levied on other NFA-regulated firearms, “any other weapon[s]” are taxed at \$5 per gun.²⁷ In these and other regulatory provisions, Congress exerted a potentially deadly force upon this ambiguous class of firearms. By taxing manufacturers and transferors and imposing harsh registration requirements, Congress likely believed it could deter the mass-marketing and sale of firearms believed likely to perpetuate violence. Additionally, would-be manufacturers of firearms in this category are required to submit an application to the Secretary of the Treasury,²⁸ who must approve the application prior to manufacture.²⁹

Since the NFA was originally adopted, it has been amended a number of times. It was first amended in 1936 to exempt .22

24. 26 U.S.C. § 5845(e) (2012).

25. See STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK § 6:15 (2011); see also *United States v. Fogarty*, 344 F.2d 475, 477 (6th Cir. 1965) (“[I]t appears doubtful that criminal elements use these types of weapons to any significant extent in their criminal activities.” (internal citation omitted)).

26. See NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT 371 (2012) (citing HALBROOK, *supra* note 25, § 614).

27. See 26 U.S.C. § 5811(a).

28. This authority was later transferred to the Attorney General, who delegated it to the Director of the ATF. See ATF Noticed of Proposed Rulemaking: Machine Guns, Destructive Devices and Certain Other Firearms, 78 Fed. Reg. 55,014, 55,014 (Sept. 9, 2013).

29. See 26 U.S.C. § 5822.

caliber rifles with barrels 16 inches or more from NFA regulations.³⁰ This amendment was enacted so as to remove the discriminatory effect of the NFA on several “manufacturers of the ordinary small-caliber hunting or target rifles not employed by the criminal element.”³¹ In this respect, the 1936 amendment exacerbated the NFA’s tendency to draw arbitrary length restrictions between equally concealable firearms.

In response to the assassinations of Dr. Martin Luther King, Jr., and Robert F. Kennedy in 1968, Congress rewrote the NFA by enacting Title II of the Gun Control Act of 1968.³² Among other revisions to federal firearms laws, the Gun Control Act exempted rifles of all calibers from the NFA if the barrel was sixteen-inches in length or longer.³³ It did not lower the acceptable barrel length of a shotgun to below 18 inches, although Congress’s reasoning for deciding not to do so is not apparent.³⁴ The Act also defined a “handgun” as a firearm “which has a short stock and is designed to be held and fired by the use of a single hand.”³⁵ Additionally, the Gun Control Act of 1968 added revocable trusts and corporations to the list of entities that could purchase and possess NFA

30. See *United States v. Gonzalez*, 2011 U.S. Dist. LEXIS 127121, at *16–17 (D. Utah Nov. 2, 2011) (“The amended language stated the definition of ‘firearm’ did not include any rifle which is within the foregoing provisions solely by reason of the length of its barrel of the caliber of such rifle is .22 or smaller *and* if its barrel is sixteen inches or more in length.” (quoting Act of April 10, 1936, Pub. L. No. 74-490, 49 Stat. 1192, 1192) (emphasis added)).

31. *Id.* at *17–18 (internal citation omitted).

32. Pub. L. No. 90-618, 82 Stat. 1213 (codified at 18 U.S.C. § 921 (2012)). It is worth noting that neither of these assassinations involved a firearm regulated by the NFA. Sirhan Sirhan used a .22 caliber Iver-Johnson Cadet Revolver to assassinate Robert F. Kennedy, and James Earl Ray used a .30-06 Remington Gamemaster pump-action rifle to assassinate Dr. Martin Luther King, Jr. See James Nye, *The guns that killed the presidents: From Lincoln to Kennedy the chilling catalogue of assassins weapons over 148 years*, DAILY MAIL (Nov. 19, 2013, 8:24 PM), <http://www.dailymail.co.uk/news/article-2510306/From-Lincoln-JFK—variety-guns-used-assassinate-American-presidents.html> [https://perma.cc/E65V-YJ6N]; see NAT’L ARCHIVES, FINDINGS ON MLK ASSASSINATION 294, <https://www.archives.gov/research/jfk/select-committee-report/part-2a.html#ray> [https://perma.cc/V83B-ZUV7].

33. See *Gonzales*, 2011 U.S. Dist. LEXIS 127121, at *18–19 (“The current language differs from the 1936 Amendment in that it removes the distinction between .22 caliber rifles and those of a greater caliber, and exempts all rifles with a barrel longer than sixteen inches from the Act.” (internal citation omitted)).

34. *Id.* at *16–17.

35. 18 U.S.C. § 921(a)(29).

items.³⁶ Finally, the Act restructured the NFA by shifting its enforcement authority from Treasury's Alcohol Tax Unit to its Alcohol and Tobacco Tax Division. In 1972, the tax and regulatory functions of the Alcohol and Tobacco Tax Division were separated, creating the ATF.³⁷

The NFA was again amended in 2002 by the Homeland Security Act,³⁸ which transferred the ATF from the Department of the Treasury to the Department of Justice.³⁹ The transfer was intended to accomplish greater efficiency in criminal prosecution by allowing the ATF to work more closely with the Attorney General to create and maintain NFA regulations, and to prosecute both criminal and civil violations.⁴⁰

Unfortunately, coherence in these regulations has become more difficult to maintain in recent years. As the firearm industry continues to make advancements in the technology, concealability, accuracy, ergonomics, and tactical functions of its products, the traditional lines separating the categories of what constitutes a rifle, pistol, or shotgun have become increasingly blurred. Long-settled NFA definitions are at risk of becoming obsolete.

II. CONSTITUTIONAL CHALLENGES TO THE NFA

The constitutional legitimacy of the NFA has rarely been reviewed by the courts, and never with careful or informed legal reasoning. The Supreme Court decided the preeminent case evaluating the NFA's constitutionality, *United States v. Miller*,⁴¹ under highly peculiar circumstances just four years after the statute was enacted. Jackson "Jack" Miller and Frank Layton, unsuccessful bank robbers, were stopped by the Arkansas and Oklahoma state police on April 18, 1938.⁴² After a brief search,

36. See 82 Stat. at 1222 (codified as amended at 18 U.S.C. § 923).

37. See *History of the Alcohol and Tobacco Tax and Trade Bureau*, DEP'T OF THE TREASURY (last accessed Feb. 4, 2017), <https://www.treasury.gov/about/history/Pages/ttb.aspx> [<https://perma.cc/46D7-WX2E>].

38. Homeland Security Act of 2002, § 1111, Pub. L. No. 107-296, 116 Stat. 2135, 2139 (codified at 6 U.S.C. § 101 (2012)).

39. See 28 U.S.C. § 599A(c)(1) (2012).

40. This Act provides the legal basis under which the ATF may promulgate regulations pursuant to the Administrative Procedure Act due to its specialized expertise in regulating firearms. *Id.*

41. 307 U.S. 174 (1939).

42. See Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J.L. & LIBERTY 48, 48 (2008).

the police discovered an unregistered short-barrel shotgun and charged Miller with attempting to “unlawfully, knowingly, willfully, and feloniously transport in interstate commerce” the firearm in violation of the NFA.⁴³ The District Court refused to accept the guilty plea of Miller and Layton and appointed Paul Gutensohn as pro-bono counsel.⁴⁴ The judge presiding over the case quashed the indictment, holding that the “NFA violates the Second Amendment by prohibiting the transportation of unregistered covered firearms in interstate commerce.”⁴⁵ Miller and Layton were permitted to leave as free men, but the constitutional issues were left unresolved.

On January 30, 1939, the government appealed *Miller* directly to the Supreme Court, which granted review.⁴⁶ Gutensohn, Miller’s appointed attorney, was embroiled in a controversy concerning an unrelated political appointment and was uninterested in continuing the case pro bono.⁴⁷ Gutensohn did not submit a brief on behalf of Miller and Layton, so the Court decided the case on the basis of the appellant’s brief alone, written by the Solicitor General’s office.⁴⁸ Without an attorney representing the respondent, the Court held:

[I]n the absence of any evidence tending to show that possession or use of a “shotgun having a barrel of less than eighteen inches in length” at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.⁴⁹

Put simply, the court did not have judicial notice that the firearm in question formed “any part of the ordinary military equipment or that its use could contribute to the common defense.”⁵⁰ For seventy years, *Miller* stood for the proposition that only those firearms which were used by the

43. *Id.* at 48–49; see also *United States v. Miller*, 307 U.S. 174, 175 (1939).

44. See Frye, *supra* note 42, at 59–60.

45. *Id.* at 60; see also *United States v. Miller*, 26 F. Supp. 1002 (W.D. Ark. 1938).

46. See Frye, *supra* note 42, at 65.

47. *Id.* at 65–66.

48. *Id.* at 66–67.

49. *United States v. Miller*, 307 U.S. 174, 178 (1939).

50. *Id.*

militia (except automatic firearms) are protected from federal regulation by the Second Amendment.⁵¹

When a proposition or fact is not within the judicial notice of a court, it is counsel's duty to present evidence justifying the point asserted. In *Miller*, Gutensohn had no interest in the controversy and failed to correct the Court's mistaken belief that short-barrel firearms have no military purpose.⁵² The Court's ignorance, whether willful or innocent, undermines its holding. Short-barrel firearms have played an integral role in military operations since firearms first appeared on the battlefield. One early example familiar to many is the blunderbuss. The blunderbuss is a flintlock shotgun, noted for its wide mouth and commonly associated with pirates.⁵³ Like modern shotguns, the blunderbuss propels multiple projectiles in a wide pattern when fired.⁵⁴ The first reference to this firearm was in Holland in 1598, "where it [was] described as a kind of gun useful for repelling boarders on ships."⁵⁵ These firearms, boasting very short barrels, were popular for self-defense and occasionally used by militaries, notably by navies as deck-sweepers.⁵⁶ Military units used these and improved versions of the short-barrel shotgun and short-barrel rifles through the Civil War.⁵⁷ In 1861,

51. *Id.* In *Heller*, Justice Scalia would eventually remove the militia requirement of *Miller*, deeming the Second Amendment an individual right. See *Dist. of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

52. For these purposes, a "short-barrel firearm" refers to either a short-barrel rifle or a short-barrel shotgun, as they may be used interchangeably in many of the discussed situations. It is imperative to remember, however, that a shotgun not regulated by the NFA must have a barrel of at least eighteen inches, whereas a rifle requires a barrel of at least sixteen inches in length.

53. See Garry James, *Large-Mouth Brass: Barbar Blunderbuss Review*, GUNS AND AMMO (Nov. 1, 2013), <http://www.gunsandammo.com/reviews/large-mouth-brass-barbar-blunderbuss-review/> [https://perma.cc/RDE3-WVDL] ("[B]lunderbusses were basically nothing more than attenuated shotguns, the load followed the main portion of the bore, continuing on in a tight cluster even past where the bell flared in the manner of any other shotgun.").

54. See *id.* ("The pattern dispersion increased the farther away it was from the muzzle, just like any other shotgun. As most blunderbusses had very short barrels, this meant the spread would begin sooner than it would with a standard sporting arm, but that's about it" for differences between modern shotguns and blunderbusses.).

55. HAROLD L. PETERSON & ROBERT ELMAN, *THE GREAT GUNS* 56–57 (1971).

56. *Id.*

57. See BRUCE N. CANFIELD, *U.S. INFANTRY WEAPONS OF THE FIRST WORLD WAR 131* (2000) ("Short-barreled percussion shotguns were used (primarily by Confederate Cavalry) during the Civil War with awesome effectiveness on many occa-

“the Federal government purchased 10,000 Augustin carbines,” a short rifle initially used by cavalry units, with a 14.5 inch rifled barrel.⁵⁸ Even during the World Wars, shotgun barrels longer than eighteen inches were only tolerated to accommodate a larger magazine tube or to aid in attaching a bayonet; they provided no increased accuracy or ergonomic benefit.⁵⁹ The United States Military, indeed, adopted the 10.5-inch Thompson submachine gun in 1928.⁶⁰

Today, short-barrel firearms are an essential part of the military loadout. The United States Army issues 14.5-inch M4 carbines to its recruits.⁶¹ The United States Marine Corps, which had maintained a twenty inch barrel version of the M4, also recently opted to issue its infantry and security units the shorter M4 carbine.⁶² United States Marine Corps Commandant Robert Neller cited the shortened barrel, adjustable configuration, and reduction in weight to conclude that the 14.5-inch barrel M4 was tactically superior to other firearms.⁶³

The Supreme Court has not addressed the flaw at the root of its *Miller* decision, and the case remains good law with respect to the NFA’s barrel length provisions. Had the Court known about the common military use of short-barrel firearms, they would likely have upheld the NFA on other grounds or stuck down the NFA as it relates to short-barrel firearms because the militia used such firearms for the common defense.

Nevertheless, *Miller’s* analysis of the individual right to bear arms has been overridden by *Heller* and new standards for evaluating Second Amendment legislation have been established.⁶⁴ Namely, the Court in *Heller* held that statutes that encroach on the

sions. Some Cavalry troopers carried their pet double-barrel shotguns during the ‘Indian Wars’ as well.”).

58. FREDERICK P. TODD, *AMERICAN MILITARY EQUIPAGE 1851-1872*, at 134–35 (1980).

59. See BRIAN C. PUCKETT, *UNITED STATES V. MILLER AND SHORT-BARRELED SHOTGUNS* 39 (2003).

60. See *Thompson Submachine Gun*, *ENCYCLOPAEDIA BRITANNICA* (2008).

61. See U.S. ARMY, *UNIT AND DIRECT SUPPORT MAINTENANCE MANUAL (INCLUDING REPAIR PARTS AND SPECIAL TOOLS LIST) RIFLE, 5.56MM, M16 ET AL.*, at 1-4.2 (1991).

62. See Christian Beekman, *Here’s Why the US Military is Replacing the M16*, *BUSINESSINSIDER* (Oct. 28, 2015, 5:13 P.M.), <http://www.businessinsider.com/heres-why-the-us-military-is-replacing-the-m16-2015-10> [<https://perma.cc/N947-6KUS>].

63. *Id.*

64. See *Dist. of Columbia v. Heller*, 554 U.S. 570, 622 (2008).

Second Amendment must be evaluated by some form of heightened scrutiny, as with other fundamental rights.⁶⁵ The Court, however, declined to determine when a certain level of scrutiny applies to a specific Second Amendment issue.⁶⁶ The Ninth Circuit, in the absence of instruction from the Supreme Court, has formulated a test for determining which level of scrutiny should apply.⁶⁷ Under this test, courts must first ask “whether the challenged law burdens conduct protected by the Second Amendment.”⁶⁸ If so, courts are “to apply an appropriate level of scrutiny.”⁶⁹ Applying this test to the NFA suggests that the statute’s barrel length provisions are unconstitutional.

A. *The First Prong of the Ninth Circuit’s Second Amendment Scrutiny Test*

The first prong of the Ninth Circuit’s scrutiny assessment test “asks whether the prohibited conduct ‘was understood to be within the scope of the right at the time of [the Second Amendment’s] ratification.’”⁷⁰ Conduct considered to be within to the scope of the right includes that which “touches on ‘pre-

65. *Id.* at 628 n.27 (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with separate constitutional provisions on irrational laws, and would have no effect.”).

66. There are typically three levels of constitutional scrutiny that apply: rational basis, intermediate scrutiny, and strict scrutiny. *See e.g.*, *Nebbia v. New York*, 291 U.S. 502 (1934) (formally applying rational basis review); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (applying intermediate scrutiny); *United States v. Windsor*, 191 U.S. 771 (2013) (applying strict scrutiny). Judges trying Second Amendment cases have begun to identify another level of scrutiny between the intermediate and strict scrutiny levels. This level, not discussed here, is applied according to the degree of severity of the impact of legislation on the right enumerated by the Second Amendment. *See Murphy v. Guerrero*, 2016 U.S. Dist. LEXIS 135684, at *17–18 (D.N. Mar. I. Sept. 28, 2016) (citing *Ezell v. City of Chi.*, 651 F.3d 684, 708 (7th Cir. 2011)). In such an instance, when the impact to the right comes close to implicating the core of the Second Amendment, the government is required to make a “rigorous showing” that does not quite rise to the level of strict scrutiny. *Id.*

67. *See United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). This test has been widely adopted by other circuits and presents a coherent method of analyzing the scope of Second Amendment protections. *See Heller v. Dist. of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011); *Ezell v. City of Chi.*, 651 F.3d 684 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010).

68. *Chovan*, 735 F.3d at 1136 (citing *Chester*, 628 F.3d at 680; *Marzzarella*, 614 F.3d at 89).

69. *Id.*

70. *Murphy*, 2016 U.S. Dist. LEXIS 135684, at *13.

serving the militia' or 'self-defense and hunting.'"71 If this conduct is restricted by the legislative enactment, the "Government must present evidence that the conduct fell outside of the scope of the right."⁷² If the inquiry produces evidence that "conclusively shows that the challenged conduct falls outside the scope of the Second Amendment . . . the analysis is over and the law stands."⁷³

This first prong can also be satisfied where the regulation is a "longstanding prohibition," which is "presumptively lawful."⁷⁴ The Court in *Heller* held that Second Amendment rights, like other fundamental rights, are not unlimited,⁷⁵ and cited several firearms restrictions that the Court sought not to overturn in its holding: "(1) [prohibiting the] 'the possession of firearms by felons and the mentally ill,' (2) 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings,' and (3) 'laws imposing conditions and qualifications on the commercial sale of arms.'"76 Furthermore, courts have "acknowledged the traditional absence of any individual right to 'dangerous and unusual weapons.'"77 Fully automatic firearms, such as the M-16, "that are most useful in military service" are presumptively beyond the scope of individual rights enumerated in the Second Amendment despite their use-

71. *Id.* at *13–14 (citing *Dist. of Columbia v. Heller*, 554 U.S. 570, 599 (2008)).

72. *Id.*; see also *Chovan*, 735 F.3d at 680 (holding that the government failed to show that domestic violence misdemeanants have historically been restricted from bearing arms); *Ezell*, 651 F.3d at 703 ("[I]f the historical evidence is inconclusive or suggests that the regulated activity is *not* categorically unprotected—then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights." (emphasis in original)); *Marzzarella*, 614 F.3d at 95 (applying intermediate scrutiny because "we cannot be certain that the possession of unmarked firearms in the home is excluded from the right to bear arms").

73. *Id.* ("[T]he history relevant to both the Second Amendment and its incorporation by the Fourteenth Amendment lead to the same conclusion: The right of a member of the general public to carry a concealed firearm in public is not, and never has been, protected by the Second Amendment." (citing *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 929 (9th Cir. 2016))).

74. *Heller*, 554 U.S. at 626, 627 n.26.

75. See e.g., *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol*, 700 F.3d 185, 200 (5th Cir. 2012) ("As the Supreme Court recognized in *Heller*, the right to keep and bear arms has never been unlimited." (citations omitted)).

76. *Murphy*, 2016 U.S. Dist. LEXIS 135684, at *14–15 (quoting *Heller*, 554 U.S. at 626–27).

77. *Id.* (quoting *Heller*, 554 U.S. at 627); see also *Jackson v. City & Cnty. of S.F.*, 746 F.3d 953, 960 (9th Cir. 2014).

fulness to a modern militia.⁷⁸ Still, even if a particular law were found to be “longstanding and presumptively lawful, a plaintiff may rebut the presumption by showing that ‘the regulation [has] more than a de minimis effect upon his right.’”⁷⁹

Evaluation of the NFA under the first prong of the test is simple. Although modern “assault weapons” did not exist at the time of the ratification of the Second Amendment, arguments alleging that only flintlock and percussion firearms are protected by the Second Amendment have been deemed “bordering on frivolous.”⁸⁰ The requirement that the restricted conduct “touches” on protected Second Amendment rights, such as preserving the militia, hunting, and self-defense, is a low burden. But the NFA is undoubtedly a long-standing prohibition that is presumptively legal because it has stood firm since 1934. Therefore, a plaintiff would need to show that the registration, notification, and tax provisions of the NFA are more than a de minimis burden.⁸¹ This burden is likely satisfied considering that even a registration requirement that did not require an additional tax or other notification requirements was struck down in *Heller*.⁸²

78. *Heller*, 554 U.S. at 627–28.

79. *Murphy*, 2016 U.S. Dist. LEXIS 135684, at *15 (quoting *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011)); see also *Heller*, 670 F.3d at 1253 (holding that the District of Columbia’s registration requirements are “self-evidently de minimis, for they are similar to other common registration schemes, such as those for voting or for driving a car, that cannot reasonably be considered onerous”).

80. *Heller*, 554 U.S. at 582.

81. The registration requirement must be more burdensome than the District of Columbia scheme ultimately upheld by the D.C. Circuit, see *Heller*, 670 F.3d at 1253, but need not be as strict as the registration requirement struck down by the Court in *Murphy*.

82. See *Heller*, 554 U.S. at 635. The registration scheme before the Supreme Court in *Heller* prohibited the registration of handguns and forbade the carrying of a handgun without a license. See *id.* at 575. Although the NFA registration requirements do not legally forbid (in most states) the registration of short-barrel firearms, they very well may do so de facto. The NFA requires a tax stamp to be paid, burdensome wait times for registration, notification of the chief law enforcement officer in the county where the transferor lives, and submission of two copies of fingerprints and pictures, among other requirements. See 27 C.F.R. § 479(III)(A)(1) (2016). For the poor—and quite frankly for anyone without significant resources to navigate this federal labyrinth—these requirements can be insurmountable. Indeed, the NFA registration requirement is perhaps most similar to that of *Murphy*, which a district court decisively struck down. 2016 U.S. Dist. LEXIS 135684, at *18–21. Put simply, *Heller* cannot stand for the proposition that only a resulting *ban* on a class of firearms surpasses the de minimis threshold.

Although short-barrel firearms are not the most popular choice for self-defense or recreational shooters, these firearms are by no means the “dangerous and unusual weapons” that may be restricted according to *Heller*.⁸³ Short-barrel firearms, unlike modern “assault weapons,” *did* exist at the time of the Second Amendment’s drafting and ratification. It is likely that at least one of the Founding Fathers who served in the Continental or British Army would have encountered or used firearms like the blunderbuss. Today, short-barrel firearms also fail to meet the standard for “unusual.” The ATF reported that it processed 1,426,211 NFA items the transfer or manufacture of in the fiscal year of 2015.⁸⁴ For comparison, the Bureau only processed 147,484 NFA items in the fiscal year of 2005.⁸⁵ No data for 2016 is available.⁸⁶ Beyond the reach of the NFA, it is estimated that “[o]ut of the 57 million firearm owners in the United States . . . 5 million own AR-type rifles.”⁸⁷ Additionally, “[f]irearm industry analysts estimate that 5,128,000 AR-type rifles were produced in the United States for domestic sale, while an additional 3,415,000 were imported.”⁸⁸ These numbers do not even consider other platforms of “assault weapon” pistols. Even if short-barrel firearms are not the most popular arms chosen by citizens, these statistics prove they are by no means “unusual” and are therefore protected by *Heller*.⁸⁹

B. Second Prong of the Test for Second Amendment Scrutiny

Because the NFA burdens protected Second Amendment conduct (such as preservation of the militia and, to a lesser de-

83. *Heller*, 554 U.S. at 626.

84. See BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, DATA & STATISTICS, <https://www.atf.gov/resource-center/data-statistics> [<https://perma.cc/Z6P7-T2SS>]; see also Machine Guns, Destructive Devices and Certain Other Firearms; Background Checks for Responsible Persons of a Corporation, Trust or Other Legal Entity with Respect to Making or Transferring a Firearm, 78 Fed. Reg. 55014, 55016 (2013) (reporting that the number of applications to make or transfer an NFA item from legal entities that are “neither individuals nor Federal Firearms Licensees (FFLs) increased from approximately 804 in 2000 to 12,600 in 2009 and to 40,700 in 2012”).

85. See *id.*

86. See *id.*

87. *Friedman v. City of Highland Park*, 784 F.3d 406, 415 n.3 (7th Cir. 2015) (Manion, J., dissenting).

88. *Id.*

89. See *Dist. of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

gree, self-defense) beyond the de minimis standard set forth in the first prong of the Ninth Circuit's scrutiny assessment test, a court would then proceed to the second step. The court must gauge "(1) 'how close the law comes to the core of the Second Amendment right', and (2) 'the severity of the law's burden on the right.'"⁹⁰ Laws that ban classes of firearms, such as the handgun bans at issue in *Heller* and *McDonald v. City of Chicago*⁹¹ or the "assault weapons" ban at issue in *Kolbe v. Hogan*,⁹² "are irredeemable regardless of how compelling a state's interest may be."⁹³ Laws that regulate the "manner in which the right may be exercised are subject to intermediate scrutiny."⁹⁴ If the NFA provisions regarding the registration and taxation of short-barrel firearms are to survive intermediate scrutiny, the NFA "must advance an important, significant, or substantial government interest. . . . [and] must reasonably fit that interest, although it need not be the least restrictive means of doing so."⁹⁵ A court evaluating the NFA under intermediate scrutiny has discretion to weigh the significance of government interests and its nexus to the enacted legislation.

1. Intermediate Scrutiny

The legislative history of the NFA shows that the purpose of the statute was to stem Prohibition-era violence.⁹⁶ Since the end of Prohibition, the government has also cited "public safety, crime prevention, and the need to keep firearms favored by criminals off the streets" as reasons for the NFA's continued existence.⁹⁷ While these interests are undoubtedly important,⁹⁸

90. *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (quoting *Ezell v. City of Chi.*, 651 U.S. 684, 703 (7th Cir. 2011)).

91. 561 U.S. 742 (2010).

92. 813 F.3d 160 (4th Cir. 2016).

93. *Murphy v. Guerrero*, 2016 U.S. Dist. LEXIS 135684, at *16 (D.N. Mar. I. Sept. 28, 2016).

94. *Id.* at *16; see also *United States v. Marzzarella*, 614 F.3d 85, 96–98 (3rd Cir. 2010) (characterizing the criminalization of the possession of a firearm with an obliterated serial number as merely a regulation of the manner of exercising the right to bear arms and applying intermediate scrutiny).

95. *Murphy*, 2016 U.S. Dist. LEXIS 135684, at *14.

96. See *supra* Section I.

97. *United States v. Gonzales*, 2011 U.S. Dist. LEXIS 127121, at *25 (D. Utah Nov. 2, 2011).

98. See *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002) ("[W]e find that reducing crime is a substantial government interest."); *United States v. Grif-*

the NFA registration scheme must nonetheless be “substantially related” to those interests.⁹⁹

A reasonable court presented with adequate information regarding the function, design, history, and statistics of the regulated firearms would likely be left little choice but to determine that the NFA’s registration and tax requirements do not advance the purpose of crime prevention. In *Murphy v. Guerrero*, a district court held that unlike individual licensing schemes, “which likely prevent[] felons from obtaining firearms,” registration provisions “only inform [the government] that a certain individual has a certain firearm.”¹⁰⁰ Such provisions do not “prevent dangerous individuals from getting their hands on firearms or otherwise safeguard public safety, and so [do] not further” the stated goals of crime prevention.¹⁰¹ Instead, “[b]ecause registration is a prerequisite to firearm possession . . . the effect of this provision is generally to prevent people” from possessing firearms.¹⁰²

Even under the balancing approach suggested by Justice Breyer in his dissent in *Heller*, registration requirements fail constitutional muster. The dissent suggests that the Court ask:

[H]ow the statute seeks to further the governmental interests that it serves, how the statute burdens the interests that the Second Amendment seeks to protect, and whether there are practical less burdensome ways of furthering those interests. The ultimate question is whether the statute imposes a burden that, when viewed in light of the statute’s legitimate objectives, are disproportionate.¹⁰³

Even though the statute is longstanding, the NFA’s registration requirements for short-barrel firearms are unlikely to prevent criminal activity. Unless the criminal uses a firearm that is reg-

fin, 7 F.3d 1512, 1517 (10th Cir. 1993) (“Important government interests include effective crime detection and prevention, and minimizing the risk of harm to officers and the public.”); *Gonzalez*, 2011 U.S. Dist. LEXIS 127121, at *25; *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1235 (D. Utah 2009) (finding the government has a compelling interest in “keeping firearms out of the hands of those . . . pos[ing] a prospective risk of violence to an intimate partner or child.”).

99. *United States v. Reese*, 627 F.3d 792, 803 (10th Cir. 2010); see *Gonzales*, 2011 U.S. Dist. LEXIS 127121, at *25.

100. 2016 U.S. Dist. LEXIS 135684, at *31–32 (D. N. Mar. I. Sept. 28, 2016).

101. *Id.* at *32.

102. *Dist. of Columbia v. Heller*, 554 U.S. 570, 693 (2008) (Breyer, J., dissenting).

103. *Id.*

istered to him, such a requirement only serves the purpose of identifying a stolen firearm registered to an innocent person. If the firearm is disposed of after a crime is committed, the registration requirement, without more, would prove useless. In such a situation, the firearm would merely be traced back to the original victim of the firearm theft, not the perpetrator of the crime. This consideration must be weighed against with the fact that short barrel firearms are ideal for self-defense in the home or elsewhere due to their size and capacity.

Additionally, these registration requirements are necessarily coupled with wait periods. For instance, the NFA imposes a registration requirement for each gun purchased within an entire class of firearms, which entails wait times of several months to a year.¹⁰⁴ The *Murphy* Court found that a similar registration requirement on non-restricted firearms that entailed only a fifteen-day wait period was unconstitutional.¹⁰⁵ Wait periods may be appropriate for background checks, but not for mere registration of a firearm.¹⁰⁶ Thus, due to the severity of the burden of long-lasting wait times of several months, the NFA's process of issuing stamps to persons wishing to own NFA-regulated firearms should be evaluated under intermediate scrutiny.

Furthermore, the underlying premise of crime prevention and public safety is dubious. The NFA's restriction on a subset of firearms does not actually reduce firearm violence, as illustrated by crime statistics that involve rifle and pistol variants of firearms, such as the AR-15. Although the ATF does not provide separate statistics of crimes committed with NFA-regulated firearms, such restricted firearms are included within their broader data set. First, the price of these non-NFA firearms—usually greater than \$1,000—presumably discourages their use for nefarious purposes, since other cheaper firearms exist that are more apt to be tossed away after a crime is committed. In fact, the ATF has noted that no variant of “assault weapon,” pistol or otherwise, ranks among the top ten firearms

104. See *Transfer Tracking*, NFA TRACKER (last visited Mar. 21, 2017), <http://www.nfatracker.com/nfa-transfer-time-tracking/> [https://perma.cc/39AE-FH2Z].

105. See *Murphy v. Guerrero*, 2016 U.S. Dist. LEXIS 135684, at *31–34 (D.N. Mar. I. Sept. 28, 2016).

106. See *id.*

seized as a result of criminal activity.¹⁰⁷ Additionally, according to the FBI Criminal Justice Information Services Division, there were 8,454 firearms-related homicides committed in 2013, only 285 of which were committed with rifles of any type, including short-barrel rifles.¹⁰⁸ The real impact of short-barrel rifle restrictions narrows even further since national statistics show that “[n]o more than .8% of homicides are perpetrated with rifles using military calibers.”¹⁰⁹ Indeed, only 4% of homicides were committed with any type of rifle.¹¹⁰

The category of military caliber rifles is misleading because many common types of rifles use calibers employed by the military. For instance, many bolt-action rifles use 5.56x45 NATO (commonly referred to as .223¹¹¹) or 7.62x51mm NATO cartridges (commonly referred to as .308 Winchester¹¹²). Many wilderness and self-defense rifles use 9mm or .45 ACP rounds.¹¹³ All these firearms are included in the .8% figure, despite many of these firearms not falling within the category of either short-barrel firearms or the broader category of “assault weapons.”¹¹⁴ In sum, of the hundreds of millions of firearms owned in the United States, only a portion of those are rifles of any type. Of rifles, only a portion utilize military calibers and even fewer are “assault weapons.” In this subset—firearms that

107. See Elaine Shannon, *America's Most Wanted Guns*, TIME (July 12, 2002), <http://content.time.com/time/nation/article/0,8599,320383,00.html> [<https://perma.cc/9RGY-GYC9>].

108. See FBI Criminal Justice Information Services Division, *Expanded Homicide Data Table 8: Murder Victims by Weapon, 2010–2014*, https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/expanded-homicide-data/expanded_homicide_data_table_8_murder_victims_by_weapon_2010-2014.xls [<https://perma.cc/P5NT-829Z>].

109. David B. Kopel, *Rational Basis Analysis of “Assault Weapon” Prohibition*, 20 J. CONTEMP. L. 381, 410 (1994).

110. *Id.*

111. There is actually a slight, but important, difference between .223 ammunition and 5.56x45 NATO. A rifle chambered for 5.56x45mm NATO may safely fire .223 ammunition, but a rifle chambered for .223 cannot fire a 5.56x45mm NATO round without catastrophic failure—the rifle could explode—due to the higher pressure of the 5.56x45mm NATO cartridge.

112. See MICHAEL BUSSARD ET AL., AMMO ENCYCLOPEDIA FOR ALL RIMFIRE AND CENTERFIRE CARTRIDGES, PLUS SHOTSHELLS! 419–20 (2014).

113. See generally Brad Fitzpatrick, *11 Great Pistol Caliber Carbines*, GUNS AND AMMO (Aug. 3, 2015), <http://www.gunsandammo.com/shoot101/choosing-the-right-self-defense-ammo/> [<https://perma.cc/W4H3-DQ85>].

114. See Kopel, *supra* note 108, at 410.

are assault weapons that fire military calibers— exists another unknown quantity of rifles that are restricted by the NFA, which may have been used in a negligible amount of crime. While no court has yet ruled on this particular question, the fact that short-barrel firearms produce a seemingly nonexistent amount of crime despite their ever-increasing commonality favors striking the registration requirement.¹¹⁵

Additionally, despite claims to the contrary,¹¹⁶ “assault weapons” cannot be easily converted into automatic firearms.¹¹⁷ Even the Supreme Court has fallen prey to the mistaken belief that semi-automatic firearms can be easily converted into weapons of war through a careful filing away of the firing mechanism. In *Staples v. United States*,¹¹⁸ the Court held that the defendant could not be convicted of violating the NFA’s provision prohibiting possession of an unregistered machine gun because the ATF failed to prove that the defendant had knowledge that the firearm had been tampered with.¹¹⁹ Such a conversion would require a skilled machinist with sophisticated tools: an automatic firearm receiver (which could also be carefully drilled), an automatic sear and sear spring, an automatic disconnect, and possibly an automatic bolt carrier group and its associated springs, depending on the model of rifle.¹²⁰ Some of these parts, such as the automatic sear, are im-

115. See *Dist. of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (“[T]he 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.’” (citations omitted)). The rule in *Heller* that extends Second Amendment protection to weapons that are not dangerous or unusual makes the criminal statistics in this Section relevant. As discussed above, NFA firearms are not unusual. See *supra* notes 83–89 and accompanying text. Additionally, these firearms cannot be deemed unusually dangerous or more dangerous than other firearms that receive protection by the Second Amendment if they are not used in criminal activity. See *Kolbe v. Hogan*, 813 F.3d 160, 177 (4th Cir. 2016) (“[B]ecause all firearms are dangerous by definition, the State reasons that *Heller* must mean firearms that are ‘unusually dangerous’ fall altogether outside the scope of the Second Amendment.”).

116. See generally VIOLENCE POL’Y CTR., TEN KEY POINTS ABOUT WHAT ASSAULT WEAPONS ARE AND WHY THEY ARE SO DEADLY (2003), <http://www.vpc.org/studies/hoseone.htm> [<https://perma.cc/SU3B-7TRZ>].

117. See FULL AUTO: AR-15 MODIFICATION MANUAL 47 (1981).

118. 511 U.S. 600 (1994).

119. See *id.* at 602.

120. See FULL AUTO: AR-15 MODIFICATION MANUAL 47 (1981).

possible to buy on the unregulated civilian market since they are themselves regulated by the NFA.¹²¹

2. *Strict Scrutiny*

Even if these provisions of the NFA are found to satisfy intermediate scrutiny, they are very unlikely to overcome strict scrutiny. Strict scrutiny “asks whether the law is narrowly tailored to serve a compelling government interest.”¹²² The government must show that the policy is narrowly tailored, which often means using “the least restrictive means” to achieve the compelling interest.¹²³ Because of their size and tactical maneuverability, short-barrel firearms are ideal for self-defense. As “the inherent right of self-defense has been central to the Second Amendment,” strict scrutiny is likely applicable to the registration and tax provisions of the NFA.¹²⁴ These requirements are unlikely to withstand strict scrutiny.¹²⁵ Beyond self-defense, a secondary consideration of the Second Amendment in preserving the militia might also be implicated by these restrictions on short-barrel firearms.

Registration requirements simply do not serve the purpose of preventing crime. The same is true of tax schemes implemented on firearms or ammunition. After all, “the Second Amendment protects the right to armed self-defense, which includes the right to acquire such arms.”¹²⁶ Otherwise the right to bear arms would be rendered “useless.”¹²⁷ The United States District Court for the

121. See 26 U.S.C. § 5845(b) (2012); see also 18 U.S.C. § 922(o) (2012); ATF Rul. 81-4 (1981), <https://www.atf.gov/firearms/docs/ruling/1981-4-auto-sear/download> [<https://perma.cc/9WDT-QYRY>] (determining that an AR-15 auto sear is regulated by the NFA).

122. *Murphy v. Guerrero*, 2016 U.S. Dist. LEXIS 135684, at *17 (D.N. Mar. I. Sept. 28, 2016) (citing *United States v. Marzzarella*, 614 F.3d 85, 96 n.14 (3rd Cir. 2010)).

123. *Id.* (citing *Kolbe v. Hogan*, 813 F.3d 177, 179 (4th Cir. 2016)).

124. *Dist. of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

125. See *Murphy*, 2016 U.S. Dist. LEXIS 135684, at *17; *Kolbe*, 813 F.3d at 168 (holding that strict scrutiny applies to a state assault weapon and large-capacity magazine ban because it substantially burdens the core protection of the Second Amendment: self-defense).

126. *Murphy*, 2016 U.S. Dist. LEXIS 135684, at *78; see also *Teixeira v. Cnty. of Alameda*, 822 F.3d 1047, 1055–56 (9th Cir. 2016) (zoning restriction on gun shop burdened the Second Amendment by limiting firearm sales and training); *Jackson v. City & Cnty. of S.F.*, 746 F.3d 953, 968 (9th Cir. 2014) (ammunition sales are also protected).

127. *Murphy*, 2016 U.S. Dist. LEXIS 135684, at *78.

District of the Northern Mariana Islands, in *Murphy v. Guerrero*, is the latest to overturn a tax on firearms, and although the tax scheme in that case was more extreme, the case's reasoning still holds true for the NFA. In that case, the territory's local law applied a \$1,000 tax on all handguns.¹²⁸ Due to variability in handgun prices, the tax ranged from between 13% to 667% of the value of the handgun.¹²⁹ Although the NFA imposes a tax of only \$200 for short-barrel firearms, explosive devices, machine guns, and suppressors, and a five dollar tax for "any other weapon[s]," the existence of the tax may be considered more than a mere de minimis burden.¹³⁰ Using public safety as a reason to tax firearms is not a legitimate interest, unless the government "seeks to safeguard the community by disarming the poor."¹³¹ Even if the tax portion of the NFA increases revenue, despite no record of such a purpose being advanced in the legislative history, it lacks "the necessary tailoring to survive taxing a constitutionally protected item."¹³² The *Murphy* Court suggested that the government has many alternative means of raising revenue without burdening the Second Amendment, such as taxing income.¹³³ Even the *Miller* Court did not suggest that an outright ban on short-barrel firearms was constitutional,¹³⁴ and as discussed earlier, that Court should have held that such firearms were protected. What the government "cannot do by ban or regulation, it cannot do by taxation."¹³⁵ Admittedly, however, a five dollar tax on "any other weapons" does seem de minimis when considered in isolation.

More fundamentally, however, the power to exert a tax, no matter how inconsequential it may seem, is the power to exert a deadly force on a fundamental right.¹³⁶ This is not a new concept. Fundamental rights must be available for the enjoyment of the citizenry free from governmental intrusion. In *Grosjean v. American Press Co.*,¹³⁷ the Court struck down a tax that was levied on

128. *Id.* at *2.

129. *Id.* at *80.

130. *Id.* at *83 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327 (1819)).

131. *Id.* at *82.

132. *Id.* (citing *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 n.7 (1983)).

133. *See id.*

134. *United States v. Miller*, 307 U.S. 174, 180 (1939).

135. *Id.* at *83 (citing *Minneapolis Star & Tribune*, 460 U.S. at 585).

136. *Id.* (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 313, 327 (1819)).

137. 297 U.S. 233 (1936).

“any newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week . . . of two per cent.”¹³⁸ Instead of upholding the tax, the Court held that “[t]he word ‘liberty’ contained in the Fourteenth Amendment embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well.”¹³⁹ The Court, in likening the tax of publications to the Stamp Act, noted that the “aim of the [American Revolution] was not to relieve taxpayers from a burden, but to establish and preserve the right.”¹⁴⁰ As the First Amendment is a fundamental right subject to the protections of the Fourteenth Amendment, so too, is the Second Amendment.¹⁴¹

Similarly, in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,¹⁴² the Supreme Court struck down a “use tax” imposed on “the cost of paper and ink products consumed in the production of a publication” in excess of \$100,000.¹⁴³ As with the Court’s analysis in *Heller* of the Second Amendment, the *Minneapolis Star & Tribune Co.* Court recognized that the First Amendment does not exempt the press from all government regulation.¹⁴⁴ Still, the Court held that “[a] tax that burdens the rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest.”¹⁴⁵ However, the tax at issue in *Minneapolis Star & Tribune Co.* was not a general sales tax, but one that “singled out the press.”¹⁴⁶ Such “[a] power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected.”¹⁴⁷

Grosjean and *Minneapolis Star & Tribune Co.* are not concerned with the actual burden of the tax imposed, but with the force

138. *Id.* at 240.

139. *Id.* at 244 (citing *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897)).

140. *Id.* at 247.

141. See *McDonald v. City of Chi.*, 561 U.S. 742, 858 (2010).

142. 460 U.S. 575 (1983).

143. *Id.* at 577.

144. Cf. *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol*, 700 F.3d 185, 200 (5th Cir. 2012) (“As the Supreme Court recognized in *Heller*, the right to keep and bear arms has never been unlimited.” (citations omitted)).

145. *Minneapolis Star & Tribune Co.*, 460 U.S. at 582 (citing *United States v. Lee*, 455 U.S. 252 (1982)).

146. *Id.* at 583.

147. *Id.* at 585.

such a tax exerts on a fundamental right. Although the reasons for protecting the press differ markedly from the reasons for protecting firearm ownership, the Second Amendment is nonetheless a fundamental right.¹⁴⁸ It does not matter whether the tax is five dollars or two million dollars, a tax on a fundamental right is a burden that must satisfy “achieve an overriding governmental interest.”¹⁴⁹ Courts “as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation” and “the possibility of error inherent . . . cannot be tolerate[d].”¹⁵⁰ Simply put, courts cannot be expected to arbitrarily draw a line of permissible tax between the five dollar amount for “any other weapons” and the two hundred dollar tax for other NFA-regulated firearms. The tax, in and of itself, is a burden on the fundamental right of the Second Amendment to self-defense which should not stand.¹⁵¹

Another reason that the NFA’s restrictions on short-barrel firearms would fail the narrow tailoring requirement of strict scrutiny is because there is no functional or tactical advantage to short barrel lengths that would lend itself to increased use by criminals. The NFA is an expansive law that encompasses a range of firearms including automatic firearms, firearm accessories, and explosives.¹⁵² Some of these items, such as grenades and light machine guns, were likely the types of weapons that Congress was worried about when drafting the NFA.¹⁵³ The function and effectiveness of these items was so alien to the general public that they were only used by criminals and could be regulated more strictly.¹⁵⁴ The idea of regulating firearms based on their length is arguably nonsensical on its face since the difference between a short-barrel rifle and a non-restricted rifle is, in many cases, only 1.5 inches. Barrel length, after all, only matters until the barrel reaches

148. See *McDonald v. City of Chi.*, 561 U.S. 742, 799–800. (2010).

149. *Minneapolis Star & Tribune Co.*, 460 U.S. at 582 (citing *Lee*, 455 U.S. 252 (1982)).

150. *Id.* at 589–90.

151. Sales tax and other general tax schemes that apply to products other than firearms (but include firearms in their scheme) are of course permissible. See *id.* at 581–82; *Grosjean v. Am. Press Co.*, 297 U.S. 233, 240 (1936). What tax schemes cannot do is target firearms solely for punitive treatment.

152. 26 U.S.C. § 5845 (2012).

153. See *NFA Hearing*, *supra* note 15, at 4, 6 (statement of Homer S. Cummings, Att’y Gen. of the United States).

154. See *id.* at 6.

its optimal chamber pressure and the gas from the propelled bullet reaches its peak expansion point.¹⁵⁵

One negative effect of a shortened barrel is the loss of accuracy at long distances.¹⁵⁶ After the peak expansion point of a bullet is reached, the barrel becomes less important, despite public perception.¹⁵⁷ In fact, a barrel that is too long may become a hazard if the bullet succumbs to friction and slows in the barrel.¹⁵⁸ While a shorter barrel may lead to a drop in muzzle velocity in rifles such as the AR-15, “the drop in velocity and accuracy [may be] small enough to be of little concern . . . at normal range.”¹⁵⁹ Even if one supposes that short-barrel firearms are regulated precisely because they remain accurate while being more concealable than other semi-automatic firearms, that justification still fails to account for the fact that around 300 people are killed with *all* rifles—both short- and long-barrel—annually,¹⁶⁰ and that non-restricted pistols are far more commonly used in firearm-related crime.¹⁶¹

III. INFIRMITIES IN THE NFA REGULATORY REGIME

Not only is the NFA itself constitutionally infirm, but the regulations promulgated pursuant to the NFA are defective under basic administrative law principles. Section 12 of the NFA originally granted “[t]he Commissioner [of the Internal Revenue Service], with the approval of the Secretary [of the Treasury], [the authority to] prescribe such rules and regulations as may be necessary for carrying the provisions of this Act into effect.”¹⁶² In 2002, Congress transferred this authority to the Director of the ATF in coordination with the Attorney

155. See ROBERT A. RINKER, UNDERSTANDING FIREARM BALLISTICS 117 (2010).

156. *Id.* See generally Brandon Louis Clark, Effect of Barrel Length on the Muzzle Velocity and Report from a *Mosin-Nagant* 7.62x54R Rifle (May 2011) (unpublished Honors College Thesis, University of South Florida), <http://honors.usf.edu/documents/thesis/u82488180.pdf> [<https://perma.cc/JRQ6-SMFW>].

157. Cf. RINKER, *supra* note 155, at 117.

158. Cf. *id.* at 118.

159. *Id.* at 120 (discussing in the hunting context).

160. See Expanded Homicide Data Table 8, *supra* note 108.

161. See *id.*

162. National Firearms Act of 1934, § 12, Pub. L. No. 73-474, 48 Stat. 1236, 1240.

General of the United States.¹⁶³ The ATF has since adopted a variety of interpretations that are arbitrary and irrational given the functionality of firearms regulated by the Act.

Take, for example, regulations related to unrestricted pistol variants of commonly available “assault weapons.”¹⁶⁴ These pistols, which are not themselves regulated by the NFA, can easily fall within the purview of the NFA as either short-barrel rifles or “any other weapons” if certain attachments are added. First, the ATF has determined that a “pistol” with a *vertical* fore-grip attached is an “any other weapon” regulated under the NFA yet does not affirmatively place a pistol with an *angled* fore-grip in that category—potentially exempting the latter from NFA regulation.¹⁶⁵ Second, the ATF has taken inconsistent positions in ruling letters. It now holds that a person who “misuses” a firearm attachment may be prosecuted for making an unregistered short-barrel firearm in violation of the NFA, in contradiction to its previous position.¹⁶⁶ Applying the appropriate standard of deference to the ATF, these interpretations are “plainly erroneous or inconsistent” with the language of the regulations promulgated pursuant to the NFA, and should not be granted deference.¹⁶⁷

163. See Homeland Security Act of 2002, § 1111(c)(1), Pub. L. No. 107-296, 116 Stat. 2135, 2275 (codified at 28 U.S.C. §§ 599A(c)(1) (2012)).

164. It is important to note that pistol versions of “assault weapons,” which have walked the tight rope between remaining a non-regulated “pistol” and falling under NFA regulations as an “any other weapon” or short-barrel rifle, were rare when the NFA was enacted. See generally WAR DEP’T, TECHNICAL MANUAL IN ORDINANCE MAINTENANCE: THOMPSON SUBMACHINE GUN, CAL. .45, M1928A1, at 8 (1942).

165. See U.S. Dep’t of Justice, *Adding a Vertical Fore Grip to A Handgun*, (May 4, 2006), <https://www.atf.gov/firearms/docs/open-letter/all-fpls-may2006-open-letter-adding-vertical-fore-grip-handgun/download> [<https://perma.cc/GCW5-N6PP>].

166. Compare Acting Chief Max M. Kingery, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Open Letter on the Redesign of “Stabilizing Braces”* (Jan. 2015) [hereinafter Current Letter], <https://www.atf.gov/file/11816/download> [<https://perma.cc/FJ35-BMD5>], with Letter from John R. Spencer, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, Firearms, and Explosives 3 (Aug. 30, 2010) [hereinafter Spencer Letter], <https://www.guntrustlawyer.com/files/2015/02/ATF-Response-AFG-on-AR-Pistol.pdf> [<https://perma.cc/U6CE-BUZZ>].

167. Separate from the *Auer* argument forwarded here are arguments that the ATF’s interpretation is contrary to the NFA and that the interpretation is arbitrary and capricious. In that case a court may set aside the regulation. See 5 U.S.C. § 706(2)(A) (2012); see also *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (holding that an agency decision is arbitrary and capricious

A. *Auer Deference and the ATF's Regulation of Vertical Fore-Grips*

The ATF's interpretation of the regulatory definition of "pistol," with regards to vertical and angled fore-grips is "plainly erroneous and inconsistent" with the meaning of the regulation and therefore does not deserve judicial deference under *Auer v. Robbins*. The Court in *Auer* ruled that an agency's interpretation of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation'" at issue.¹⁶⁸ The ATF has determined that the Gun Control Act's definitions of firearms exempted from regulation by the NFA (such as pistols) left too much space for individuals to circumvent the statute, so it promulgated its own, more restrictive definition of "pistol."¹⁶⁹ The new definition was then interpreted to prohibit the attachment of vertical foregrips to pistols. This interpretation is "plainly erroneous and inconsistent" with the ATF's promulgated definition of "pistol."

The Gun Control Act of 1968 defines terms not regulated by the NFA, including the definition of a "handgun" as "a firearm which has a short stock and is designed to be held and fired by the use of a single hand."¹⁷⁰ The key part of this definition is the term "designed," which means to "develop according to a plan" or "the arrangement of parts, details, form, color, etc. so as to produce an artistic unit."¹⁷¹ Under such a definition, an AR-15 pistol could have a vertical or angled fore-grip attached to it by the user, but it would still be considered a "pistol" because that was how the firearm was originally designed.

Despite this clear definition, the ATF determined that it needed fine-tuning, and promulgated a new definition through notice-and-comment rulemaking procedures. The ATF's definition of a pistol is:

if the agency has relied on factors which Congress did not intend for it to consider, if it has entirely failed to consider an important aspect of the problem, has offered an explanation contrary to the evidence, or the decision is too implausible). The ATF offered a mere four sentences of explanation in the Final Rule establishing the current regulatory definition of "pistol." See ATF Final Rule: Commerce in Firearms and Ammunition, 53 Fed. Reg. 10,480, 10,482 (Mar. 31, 1988).

168. 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

169. See ATF Final Rule: Commerce in Firearms and Ammunition, 53 Fed. Reg. at 10,491 (codified at 27 C.F.R. § 479.11 (2016)).

170. 18 U.S.C. § 921(a)(29) (2012).

171. *Design*, WEBSTER'S NEW COLLEGE DICTIONARY 391 (2005).

[A] weapon originally designed, made, and intended to fire a projectile (bullet) from one or more barrels when held in one hand, and having (a) a chamber(s) as an integral part(s) of, or permanently aligned with, the bore(s); and (b) a short stock designed to be gripped by one hand and at an angle to and extending below the line of the bore(s).¹⁷²

The phrase “designed, made and intended,” adds a degree of ambiguity to the now convoluted and hard-to-follow definition. This definition allows the ATF to classify firearms that would otherwise be considered pistols as “any other weapon” because of a temporarily attached vertical fore-grip, and purports to receive nearly absolute deference under *Auer*.

The ATF’s reasoning, which may be inferred from its promulgated definition, is one of textual contortion and manipulation. To classify a firearm as an “any other weapon,” the ATF must first determine that the arm does not fit the categories of the NFA or Gun Control Act. Following this mission, the ATF argues that the addition of a vertical fore-grip renders the firearm “no longer designed to be held and fired by the use of a single hand.”¹⁷³ The ATF then reasons that an AR-15 pistol with a vertical fore-grip is not a pistol at all.¹⁷⁴ Furthermore, an AR-15 pistol with a vertical fore-grip cannot be a “rifle” because it lacks a buttstock.¹⁷⁵ If the firearm qualified as a “rifle,” the owner would be allowed to attach a fore-grip to the gun without fear of violating the NFA. However, if the firearm cannot be a pistol or a rifle, the ATF can then argue that the gun falls under the Act.

172. 27 C.F.R. § 479.11.

173. U.S. Dep’t of Justice, *Adding a Vertical Fore Grip to A Handgun* (May 4, 2006), <https://www.atf.gov/firearms/docs/open-letter/all-fifs-may2006-open-letter-adding-vertical-fore-grip-handgun/download> [https://perma.cc/GCW5-N6PP].

174. *See id.* The inconsistency arises with the angled fore-grip, the attachment of which does not transform the pistol into an “any other weapon” under current ATF regulations. *See id.*

175. *See* 26 U.S.C. § 5845(c) (2012); *see also* 27 C.F.R. § 479.11; ATF Rul. 2011-4 (July 25, 2011), <https://www.atf.gov/firearms/docs/ruling/2011-4-pistols-configured-rifles-rifles-configured-pistols/download> [https://perma.cc/J2GD-VNDV] (A rifle is “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 the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.”). Necessary for a rifle to be classified as such, therefore, is the presence of an attached buttstock.

Next, the Bureau points to the NFA's definition of "any other weapon." It claims that because the firearm does not meet the criteria of the definitions of a "rifle" or the ATF's definition of "pistol," it may be classified as an NFA-regulated "any other weapon."¹⁷⁶ "Any other weapon" includes "*any weapon . . . capable of being concealed on the person from which a shot can be discharged.*"¹⁷⁷ If the AR-15 pistol were still legally classified as a "pistol," it could not be classified as an "any other weapon" because that category expressly excludes such firearms.¹⁷⁸ But the ATF seemingly maintains that the vertical fore-grip transforms the "pistol" into something else, despite its rifled bore.¹⁷⁹ Because the firearm does not qualify as a "rifle" or a "pistol" under the NFA or ATF regulations, it is classified as an "any other weapon."¹⁸⁰

Courts have already rejected the ATF's attempts to reclassify nonregulated pistols as regulated "any other weapons" due to the attachment of vertical fore-grips. The first case involving the attachment of a vertical fore-grip was *United States v. Davis*.¹⁸¹ The defendants were charged with violating several provisions of the NFA, including manufacturing suppressors without a tax stamp, attempting to sell suppressors without a license, and possessing unregistered pistols with attached vertical fore-grips.¹⁸² The Magistrate Judge dismissed the charges, holding that "[e]ven after being modified with grips, the pistols are still 'pistols' . . . and not 'any other weapon' as defined by 26 U.S.C. section 5845(e)."¹⁸³

176. See *supra* note 23–25 and accompanying text.

177. 26 U.S.C. § 5845(e) (emphasis added).

178. *Id.* ("Such term shall not include a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition."). A "rifled bore" is the inner part of the barrel which has "rifling." "Rifling" is a series of lands and grooves inside the barrel which "create[s] the spin to the projectile that is needed for gyroscopic stability and accuracy" (similarly to a properly thrown football). RINKER, *supra* note 155, at 412.

179. See U.S. Dep't of Justice, *Adding a Vertical Fore Grip to A Handgun* (May 4, 2006), <https://www.atf.gov/firearms/docs/open-letter/all-fpls-may2006-open-letter-adding-vertical-fore-grip-handgun/download> [<https://perma.cc/GCW5-N6PP>].

180. See *id.*

181. Report of Magistrate and Order of Dismissal, *U.S. v. Davis*, Cr. No. 8:93-cr-00106-GRA (D.S.C. June 21, 1993).

182. *Id.* at ¶¶ 1, 4, 5.

183. *Id.* at ¶ 27.

The Ninth Circuit reached the same conclusion in *United States v. Fix*.¹⁸⁴ The court addressed a defendant appealing his conviction for violating the NFA by keeping an unregistered pistol with a vertical fore-grip.¹⁸⁵ The court held that the “weapon does not fit the definition required” of the section defining “any other weapon.”¹⁸⁶ A “pistol,” as defined by the ATF, requires only that the firearm be “a weapon *originally* designed, made, and intended to fire a projectile.”¹⁸⁷ Thus, the court determined that the “definition does not consider modifications of the weapon by the owner.”¹⁸⁸ Additionally, the Court held that even if the firearm was no longer a pistol, it would still not qualify as an “any other weapon” because “§§ 5845(a) and (e) expressly exclude[] weapons with a rifled bore.”¹⁸⁹

The Sixth Circuit reached the opposite conclusion in *United States v. Black*,¹⁹⁰ holding that a vertical fore-grip, when attached to a pistol, creates an “any other weapon” under the NFA.¹⁹¹ The case concerned a convicted felon who was arrested for driving without a license.¹⁹² In his car, police found a variety of firearms including a pistol with a vertical fore-grip.¹⁹³ The Court held that the ATF had ample authority to define a “pistol,” and that the “ATF’s [subsequent] interpretation of [its definition] is controlling unless ‘plainly erroneous or inconsistent with the regulation.’”¹⁹⁴ Even so, the Court called the interpretation a “close call.”¹⁹⁵

184. 4 F. App’x 324, 326 (9th Cir. 2001).

185. *See id.* at 326 (Weapon “was originally designed and made to be fired with one hand, and still could be, despite the addition of a foregrip.”).

186. *Id.*

187. 27 C.F.R. § 479.11 (2016) (emphasis added).

188. *Fix*, 4 F. App’x at 326.

189. *Id.*

190. 739 F.3d 931 (9th Cir. 2014).

191. *See id.* at 935.

192. *See id.* at 932.

193. *Id.* at 934.

194. *Id.* at 935 (citing *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

195. *Id.* (“While this may be a close call, we defer to the ATF’s interpretation of its own regulation if only because it is plainly consistent with the language of 26 U.S.C. § 5845(e).”). This Note disagrees with the court’s assertion that the ATF’s interpretation is plainly consistent because the Gun Control Act’s definition of “handgun” overrides the ATF’s authority to create its own, more restrictive definition of “pistol.”

Despite the holding of *Black*, the ATF's interpretation is not entitled to *Auer* deference. As held in *Fix*, the term "originally" in the ATF's definition of "pistol" modifies the words that follow it: "designed, made, and intended."¹⁹⁶ Additionally, the ATF's definition requires that pistols have "a short stock designed to be gripped with one hand."¹⁹⁷ The addition of a vertical foregrip does not conflict with this definition because a AR-15 pistol still has the necessary "pistol grip" and was *originally* designed and intended to be fired with one hand. As such, the ATF's regulation that prohibits vertical fore-grips on pistols should not receive *Auer* deference.

B. *Chevron Deference and the ATF's Regulation of Vertical Fore-Grips*

Perhaps more interestingly, the decision in *Black* did not address the argument that the ATF lacked the authority to promulgate a new definition that contradicts the Gun Control Act and therefore contravenes the will of Congress. Separate from *Auer* deference, the Court should have addressed whether the ATF was entitled to *Chevron* deference in promulgating a definition for "pistol" in light of the Gun Control Act's definition of "handgun." The Court instead focused only on the ATF's promulgated definition, ignoring Congress's definition of "handgun" in the Gun Control Act.

The ATF interpretation of the NFA in creating its definition of "pistol" is evaluated under *Chevron*. *Chevron* deference provides wide discretion to agencies by courts. First, the evaluating court asks "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."¹⁹⁸ However, even where Congress's intent is ambiguous, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."¹⁹⁹ Because the ATF undoubtedly has authority from Congress to

196. United States v. Fix, 4 F. App'x 324, 326 (9th Cir. 2001).

197. 27 C.F.R. § 479.11 (2016).

198. *Chevron, U.S.A., Inc., v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

199. *Id.*

make rules carrying the force of law and the ATF exercised that authority in promulgating its definition, *Chevron* is triggered.²⁰⁰

Even though *Chevron* grants great deference to the ATF, the Bureau's interpretation of the NFA, which purports to override the Gun Control Act's definition of "handgun" is a clear contravention of statutory language. The Gun Control Act's definition of "handgun" focuses entirely on the design of the firearm in question.²⁰¹ While the ATF creates a two-prong test for "pistols" that focuses on the physical characteristics of the firearm, it goes further to include within the NFA's regulatory reach all firearms "intended to fire a projectile (bullet) from one or more barrels when held in one hand."²⁰² This expanded definition allows the ATF to regulate firearms based on the use of the arm, which varies from person to person, rather than the immutable characteristics that the NFA and Gun Control Act seek to regulate. Such a focus on intent grants the Bureau carte blanche to pursue the individual misuse of firearms based on a vague and arguably subjective standard. This is a vast delegation of power that, at the very least, should not be inferred from a mere definitional provision.

If a court were to nevertheless find that the plain "handgun" language to be ambiguous, the ATF should still be denied *Chevron* deference because the Bureau's interpretation is not "a permissible construction of the statute."²⁰³ To determine what constitutes "a permissible construction," the legislative history of the category of "any other weapons" in the NFA is instructive. While not dispositive, the limited record regarding the NFA's "any other weapon" category shows two things: (1) pistols and rifles are excluded, and (2) the focus of the category is concealable weapons.²⁰⁴ The category of "any other weapon" was analyzed in a discussion between Congressmen Vinson and Treadway during a hearing of the House Committee on Ways and Means. Representative Vinson wanted to ensure that pistols or revolvers would not be included within the defini-

200. See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

201. See 18 U.S.C. § 921(a)(29) (2012) (A handgun is "a firearm which has a short stock and is designed to be held and fired by the use of a single hand.").

202. 27 C.F.R. § 479.11 (emphasis added).

203. *Chevron*, 467 U.S. at 842–43.

204. *NFA Hearing*, *supra* note 15, at 88 (statements of Mr. Woodruff and Mr. Keenan); *id.* at 116 (statements of Mr. Vinson, Mr. Treadway, and Gen. Reckord).

tion, even though they can be concealed.²⁰⁵ The only other time the phrase of “any other firearm” or “any other weapon” arose during in the hearings was in passing, as part of the phrase “any other firearm capable of being concealed on the person.”²⁰⁶ Based on the legislative history, Congress only contemplated including those firearms that were not originally made as pistols which could actually be concealed.²⁰⁷

Even if we concede that an AR-15 pistol with a vertical fore-grip is no longer a pistol,²⁰⁸ these firearms are by no means concealable “on the person.” Although the barrel of an AR-15 pistol can range from 14 inches to 7.5 inches, the firearm is bulky and wider than concealable pistols. The AR-15 pistol, like other firearms with both pistol and rifle variants, was never designed to be concealed on the body. The Glock 26, on the other hand, is a common firearm selected by those who wish to conceal carry.²⁰⁹ By comparison, it has an overall length of 6.49 inches and a width of only 1.18 inches.²¹⁰ Additionally, an AR-15 must accommodate an external magazine, optics, and the added vertical fore-grip. The firearm simply is not capable of being “concealed on the person” unless the person goes to extraordinary lengths to do so.

C. *Further Complications from the ATF’s Fore-Grip Regulation Regime*

Unfortunately, the confusion regarding fore-grips does not end with vertical grips. The ATF has decided that although vertical fore-grips create an “any other weapon” as defined by the NFA, an angled fore-grip, such as that designed by Magpul Industries, does not. Magpul filed a patent on November 6,

205. *Id.*

206. *Id.* at 6 (statement of Homer S. Cummings, Att’y Gen. of the United States).

207. See H.R. REP. NO. 73-1780, at 2 (1934) (“The term ‘firearm’ is defined to mean a shotgun or rifle having a barrel of less than 18 inches in length, any other gun (except a pistol or revolver) if the gun may be concealed on the person.”).

208. Even without a forward grip, “assault weapon” pistols essentially require the shooter to place one hand in front of the magazine well, near or on the front handguard, to stabilize the pistol’s weight and manage recoil.

209. See Brandon Curtis, *The 10 Best Concealed Carry Guns*, CONCEALED NATION (July 12, 2014), <http://concealednation.org/2014/07/the-10-best-concealed-carry-guns/> [<https://perma.cc/6BJ4-RM6M>].

210. See *Glock 26*, GLOCK, INC., (last visited Mar. 22, 2017), <https://us.glock.com/products/model/g26> [<https://perma.cc/8RNA-XNFX>].

2009 for a forward grip that was angled, forming a triangle with the base of the triangle then attached to the bottom rail of a rifle's handguard.²¹¹ Unlike other vertical fore-grips, the angled fore-grip "position[s] the shooter's hand high on the centerline of the bore," which "helps [the shooter] mitigate recoil and control the weapon to facilitate faster, more accurate follow-up shots."²¹² It would make more sense to regulate the angled fore-grip than the vertical fore-grip because the angled grip is both more concealable and more effective than traditional vertical fore-grips.

On August 30, 2010, the ATF answered a series of questions in a letter regarding non-restricted AR-15 pistols. Without any further elaboration, the Chief of the Firearms Technology Branch, John R. Spencer, answered "yes" to the question: "Can I lawfully install a Magpul [Angled Fore-Grip] on the bottom accessory rail of the subject AR-15 type pistol?"²¹³ Although this grip still requires the shooter wishing to benefit from the angled fore-grip to use both hands when shooting (as would be required of a vertical fore-grip), only the vertical fore-grip can change a "pistol" into an "any other weapon." This interpretation has persisted for the seven years since the letter's release.

Angled fore-grips make a firearm *more* concealable than a vertical fore-grip does (although the firearm is still not reasonably concealable) simply due to the fact that the angled grip does not protrude from the firearm as much as the vertical one. If the legislative intent of Congress was to include AR-15 pistols with attached vertical fore-grips, it must certainly have also intended to include those with angled fore-grips. Regardless of the concealability argument, however, a fore-grip (vertical or angled) does not change the mechanical function of the firearm. To draw a distinction between the two fore-grips that prohibits using the less effective and concealable attachment defies logic entirely. The erroneous and inconsistent ATF interpretation of the NFA must be rejected as an impermissible construction of the NFA and the Gun Control Act's definition of "handgun."

211. See U.S. Patent No. 643497 (filed Nov. 6, 2009).

212. *AFG-Angled Fore Grip*, MAGPUL INDUS., INC. (last visited Mar. 22, 2017), <https://www.magpul.com/products/afg?productVariantID=VO346> [<https://perma.cc/LU59-AYGK>].

213. Spencer Letter, *supra* note 166, at 3.

When Congress failed to define “handgun” or “pistol” in the original provisions of the NFA, it may have determined that such definitions were unnecessary. It did not intend to delegate any authority on the matter to the ATF, as Congress subsequently defined “handgun” in the Gun Control Act.²¹⁴ Although the NFA did contain a catchall provision labeled “any other weapon,” Congress surely did not intend for the ATF to be permitted to hold that non-NFA-regulated rifles and pistols can easily be transformed into NFA-restricted arms by simply adding an attachment that does not alter the mechanical function of the gun. To hold otherwise would encourage administrative agencies to abuse the authority Congress has granted to them.

D. *The Sig Sauer Brace Controversy*

Although the ATF has been reluctant to pursue charges regarding vertical fore-grips, it has continued to criminalize other pistol attachments. Specifically, over just the last few years, the ATF set its sights on the “Sig Sauer” stabilizing arm brace. The brace was designed by Alex Bosco and quietly launched in 2013 by a company called SB-Tactical through the popular firearm website, Midway USA.²¹⁵ The brace’s purpose was noble: to aid wounded veterans in firing the AR-15 pistol. The “shooter would insert his or her forearm into the device while gripping the pistol’s handgrip, then tighten the Velcro straps for additional support and retention.”²¹⁶ As a result, a veteran who had lost one of his hands could still use his disabled arm to stabilize his AR-15 pistol during use.

The design was submitted to the ATF with the stated intent of “facilitat[ing] one handed firing of the AR-15 pistol for those with limited strength or mobility due to handicap.”²¹⁷ By installing this device as one would a buttstock, “it [becomes] no longer necessary to dangerously ‘muscle’ this large pistol during the one handed aiming process, and recoil is dispersed significantly, resulting in more accurate shooting without compromis-

214. 18 U.S.C. § 921(a)(29) (2012).

215. See Christian Lowe, *The Rise and Fall of the SB-15 ‘Sig-Brace’*, GRAND VIEW OUTDOORS (Mar. 24, 2015), <http://www.grandviewoutdoors.com/grand-view-outdoors/the-rise-and-fall-of-the-sb-15-sig-brace/> [https://perma.cc/7VAN-AQDX].

216. Current Letter, *supra* note 166, at 1.

217. *Id.*

ing safety or comfort.”²¹⁸ However, because the stabilizing brace is attached in the same manner as a traditional buttstock, shooters found that the brace, if placed against the shoulder, could be effectively used as a buttstock. Sergeant Joe Bradley of the Greenwood, Colorado Police Department submitted a letter to the ATF inquiring as to the legality of this practice. On March 5, 2014, the ATF responded in an individual letter (the “Revoked Letter”) that was later uploaded to the Internet. The Revoked Letter stated that “certain firearm accessories such as the Sig Stability Brace have not been classified . . . as shoulder stocks and, therefore, using the brace improperly does not constitute a design change” that would be necessary to “change the classification of the weapon per [f]ederal law.”²¹⁹

The Revoked Letter caused great excitement in the firearm community, causing a surge in the purchase and use of stabilizing braces. The Revoked Letter “determined that firing a pistol from the shoulder would *not* cause the pistol to be reclassified as [a short-barrel rifle].”²²⁰ Furthermore, the ATF insisted that “[g]enerally speaking, we *do not* classify weapons based on how an individual uses a weapon.”²²¹

Just months later, however, the ATF reversed course.²²² In a new letter (the “Current Letter”), the Acting Chief of the Firearms Technology Criminal Branch of the ATF disavowed the Revoked Letter as “contrary to the plain language of the NFA” and a misapplication of federal law.²²³ When used properly, according to the Current Letter, the Sig Brace “is not considered a shoulder stock.”²²⁴ However, when the same firearm is placed against the shoulder, the pistol is transformed into a NFA-restricted rifle and the shooter may be fined \$10,000 and imprisoned for ten years.²²⁵

218. *Id.*

219. Letter from Earl Griffith, Chief, Firearms Technology Branch, ATF, to Sgt. Joe Bradley, Greenwood, Colorado, Police Dep’t 1 (Mar. 5, 2014) [hereinafter Revoked Letter], https://www.scribd.com/fullscreen/216207869?access_key=key-%2026ke01u6fwjyzpgmfm06&allow_share=true&escape=false&view_mode=scroll [https://perma.cc/Z5CH-WRME].

220. *Id.*

221. *Id.*

222. See Current Letter, *supra* note 166.

223. *Id.* at 2. For the purposes of this note, it will be assumed that an open letter such as the Current Letter is applicable to every citizen and corporation.

224. *Id.*

225. See 26 U.S.C. §§ 5871, 5872(a) (2012).

The ATF's Current Letter portrays a troubling trend. A pistol cannot be transformed into a rifle merely because of where it is placed on the body. Furthermore, simply because something is designed for one purpose, does not make all other uses illegitimate.²²⁶ Firearms are machines that function in the same manner despite the positioning of the shooter. The size, firing mechanism, safety buttons or levers, and sights remain the same whether a pistol is placed against the shoulder or held in one hand. Put simply, nothing changes. Reasoning otherwise is contrary to the purpose and text of the NFA.

Agencies are generally granted deference when promulgating regulations due to their superior knowledge of the subject matter.²²⁷ However, to avoid abuse and to calm accountability concerns, the amount of deference an agency receives when it interprets a statute differs according to the facts.²²⁸ In this context, there are two types of deference: *Chevron* deference and *Skidmore* deference. *Chevron* deference requires the reviewing court to not disturb an agency's interpretation if it was issued pursuant to an agency's delegated authority and the regulation represents a "permissible construction of the statute."²²⁹ If Congress did not intend for the agency to issue binding interpretations of the statutory provision at issue, the agency action may nonetheless be afforded *Skidmore* deference.²³⁰ This second level of deference is a function of how well-reasoned an agency action is. Accordingly, *Skidmore* deference is based on four factors: "the thoroughness [of the agency's] consideration, the validity of its reasoning, the regulation's consistency with earlier and later pronouncements, and all those factors which give the regulation power to persuade, if lacking power to control."²³¹

The ATF's determination that a pistol with a stabilizing brace can be classified as a short-barrel firearm if shouldered should be evaluated under the *Skidmore* test. When choosing between *Chevron* and *Skidmore*, courts use a standard announced in *Unit-*

226. One such instance is the use of Listerine, which was originally in 1860 invented as a surgical antiseptic. See *From Surgery Antiseptic to Modern Mouthwash*, LISTERINE, <https://www.listerine.com/about> [<https://perma.cc/5ZCX-323J>].

227. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 865 (1984).

228. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

229. *Chevron*, 467 U.S. at 842–43.

230. *Mead Corp.*, 533 U.S. at 227.

231. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

*ed States v. Mead Corp.*²³² Similar to the letters distributed by the ATF,²³³ the Court in *Mead* was tasked with determining whether a “classification ruling by the United States Customs Service deserves judicial deference.”²³⁴ The Court held that an agency receives *Chevron* deference “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of such authority.”²³⁵ Delegation can be proven “by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of comparable congressional intent.”²³⁶ If no such delegation occurred, the promulgated interpretation is evaluated under *Skidmore*.²³⁷

Although the NFA does grant the Director of the ATF and the Attorney General of the United States authority to “prescribe such rules and regulations as may be necessary for carrying the provisions of this Act into effect,”²³⁸ the finding that the use of a stabilizing brace turns a pistol into an unregistered short-barrel rifle was not promulgated under such authority. For that reason alone, *Chevron* deference should not apply. Additionally, and more fundamentally, Congress’s definitions of various types of firearms in the NFA and the Gun Control Act of 1968 show that it did not delegate to the ATF any authority to reclassify firearms due to how they are used on the shooter’s person. The text of the NFA is clear in that it seeks to regulate firearms based on physical characteristics, such as a shotgun “having a barrel or barrels of less than 18 inches” or “a rifle having a barrel or barrels of less than 16 inches.”²³⁹ Sections 5845 (a)–(f), the NFA’s definition provisions, do not contemplate individual use, but rather lay out measurements and other mechanical and aesthetic characteristics of the arms it seeks to regulate.²⁴⁰ Both the NFA and the Gun Control Act regulate firearms based solely on their functionality and ap-

232. 533 U.S. 218 (2001).

233. See Revoked Letter, *supra* note 219; Current Letter, *supra* note 166.

234. *Mead Corp.*, 533 U.S. at 221.

235. *Id.* at 218.

236. *Id.*

237. See *id.* at 226–27.

238. National Firearms Act of 1934, § 12, Pub. L. No. 73-474, 48 Stat. 1236, 1240; 26 U.S.C. § 599A (2012) (vesting this authority in the Attorney General).

239. 26 U.S.C. § 5845(a) (2012).

240. See *id.* § 5845(a)–(f).

pearance, and thus the ATF has no basis under either Act to regulate individual behavior. Congress's clear preemption of the ATF's ability to alter NFA definitions, coupled with the limited nature of its ruling letters, preclude the ATF's determination regarding the stabilizing brace from receiving *Chevron* deference.²⁴¹

Without *Chevron* deference, the ATF's criminalization of shouldering a stabilizing brace is evaluated under *Skidmore*. Under that standard, the ATF's ruling receives no deference and is plainly unlawful. Courts evaluate the *Skidmore* factors in varying ways, but appellate courts most commonly utilize the factors as a sliding scale test.²⁴² Still, the ATF determination on stabilizing braces fails the weight of the factors. The first factor, evaluating the "thoroughness evident in [the ATF's] consideration," weighs at least moderately against deference. Between its two ruling letters, the ATF completely reversed its reasoning over a matter of months. The Revoked Letter cited a determination made by the Firearms Technology Branch of the ATF not released to the public. This determination supposedly concluded "that the firing of a weapon from a particular position, such as placing the receiver extension of an AR-15 type pistol on the user's shoulder, does not change the [firearm's] classification."²⁴³ The ATF's Current Letter cites NFA definitions and other situations in which a particular use of a firearm or other device would change the classification of the item,²⁴⁴ but it never explains why the reasoning from its Revoked Letter was so perfunctorily set aside. The Current Letter's at-best cursory treatment of the contrary position raised in its own Revoked Letter reasonably suggests that the ATF did not thoroughly consider its final determination.

241. Indeed, irrespective of how the issue of *Chevron* deference is resolved, a reviewing court should be obligated to interpret any statutory ambiguities in favor of the gun owner. See HALBROOK, *supra* note 25, § 6.2 ("[T]he rule of lenity applies to all NFA definitions should any ambiguity arise."); see also *United States v. Thompson Center Arms Co.*, 504 U.S. 505, 517–18 (1992) (holding that the rule of lenity applies to the NFA).

242. See Kristin E. Hickman and Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1271 (2007) ("In 79 of 106, or 74%, of *Skidmore* applications, the reviewing court assessed at least one *Skidmore* factor in evaluating the administrative interpretation. By contrast, only 20 of 106, or 18.9%, of *Skidmore* applications reflected independent judgment.").

243. Revoked Letter, *supra* note 219, at 1.

244. See Current Letter, *supra* note 166, at 1; see also 26 U.S.C. § 5845 (2012).

Nevertheless, even if the ATF's Current Letter were to be facially convincing, it still must fail the *Skidmore* standard. The second *Skidmore* factor, analyzing the "validity of [the ATF's] reasoning,"²⁴⁵ likely provides the decisive blow to the ATF stabilizing brace determination. The Bureau's reasoning depends on the definitions set forth by the NFA. First, the ATF points to the definition of "firearm" as being a shotgun with a barrel of less than eighteen inches or a rifle with a barrel less than sixteen inches.²⁴⁶ Furthermore, both "rifle" and "shotgun" are defined as "a weapon designed or *redesigned*, made or remade, and intended to be fired from the shoulder."²⁴⁷ Finally, *Webster's II New College Dictionary*, which the ATF itself cited, defines "re-design" as "alter[ing] the appearance or function of" an item.²⁴⁸ So, taking all this together, the ATF concluded that using the stabilizing brace as a buttstock constitutes the "redesign" of a pistol into a NFA-regulated rifle. The addition of a stabilizing brace supposedly alters a firearm's appearance, and the misuse of that brace presumably alters a firearm's function.²⁴⁹

Beyond the literal reading of the NFA's text, the ATF provides two examples in its Current Letter to show that its interpretation is not novel. First, the ATF has regulated behavior before by determining that a person who "misuses" an unregulated flare launcher as a grenade launcher has "made" an NFA weapon.²⁵⁰ Far from the single-shot flare guns commonly found on ships, many flare launchers today resemble grenade launchers commonly used by armed forces around the world.²⁵¹ When used to launch flares, these items are not regulated by the NFA.²⁵² However, if one loads anti-personnel ammunition, an

245. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

246. See Current Letter, *supra* note 166, at 1; see also 26 U.S.C. § 5845.

247. 26 U.S.C. § 5845

248. *Redesign*, WEBSTER'S II NEW COLLEGE DICTIONARY (3rd ed. 2005).

249. Current Letter, *supra* note 166, at 2.

250. *Id.*

251. See, e.g., *Spikes Tactical 37mm Flare Launcher*, BROWNELLS (last visited Feb. 4, 2017), <http://www.brownells.com/shooting-accessories/flashlights-accessories/accessory-mounts/37mm-flare-launchers-kaos-stock-systems-12-havoc-launcher-sku100-007-034-43848-91011.aspx> [<https://perma.cc/67YV-JHFX>].

252. See 26 U.S.C. §5845(f)(3) ("The term 'destructive device' shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device.").

NFA-regulated destructive device has been created.²⁵³ Second, the ATF cites a previous Bureau determination, Revenue Ruling 61-45, that designates Luger and Mauser pistols with buttstocks as short-barrel rifles.²⁵⁴

Ultimately, the ATF's conclusions here must fail. Accepting the definition of "redesign" forwarded by the ATF, the "misuse" of the stabilizing brace, to which the ATF originally objected, *still* does not meet the definition's requirements. First, the appearance of a pistol with an attached stabilizing brace is objectively the same whether fired from the shoulder or the arm. Nothing is added or taken away from the pistol when pressed to the shoulder. When placed on the ground after being fired from either the shoulder or the arm, what remains is *still* a pistol with a stabilizing brace, nothing more.

Second, the function of the firearm has also not changed. When, as the ATF argues, a flare gun is "misused" as a grenade launcher, the flare gun's very function changes. Rather than firing flares, it is now firing grenades. This is true whether or not a particular flare guns can seamlessly load and fire flares, anti-personnel rounds, or 37mm or 40mm grenades. Moreover, the shooter must aim and take precautions with a grenade launcher differently than he would a flare, and the specialized 37mm grenade itself is an addition to the flare gun. Conversely, in the context of the stabilizing brace, the AR-15 pistol fires the same ammunition it always did, without any change in form or function. The stabilizing brace is not manipulated, the fire rate of the firearm remains the same, the gas port is untouched, the trigger bears the same weight, and the shells feed and eject in the same manner as when the brace is "properly" utilized. There is, admittedly, an increase in accuracy and recoil management when using the brace as a buttstock, but these factors have nothing to do with the firearm's position. They instead relate to the shooter's position on the firearm. Therefore, alt-

253. See ATF Rul. 95-3 (1995), <https://www.atf.gov/firearms/docs/ruling/1995-3-3738mm-gasflare-guns-anti-personnel-ammunition-are-defined-nfa-weapons/download> [<https://perma.cc/NZB9-VMZC>].

254. Current Letter, *supra* note 166, at 1. The Luger "Long 08" or more commonly, the "Artillery Model" pistol was adopted by the German Army on August 22, 1908, though stock attachments appeared in later years. The C96 Mauser pistol saw use in both World Wars and a variety of colonial insurrections. See JOHN WALTER, *THE LUGER BOOK* 32 (1986); see also IAN V. HOGG, *MILITARY PISTOLS & REVOLVERS* 91 (1987); GEORGE MARKHAM, *GUNS OF THE REICH* 58 (1989).

though the definition of “redesign” requires the alteration of “appearance or function,” the “misuse” of the stabilizing brace, without more, cannot meet this definition.

The next of the *Skidmore* factors, “consistency with earlier and later pronouncements,”²⁵⁵ also strikes against the ATF. As mentioned, both letters were released within a matter of months, completely conflicting with each other. The ATF’s citation to earlier precedent, its determination that P.08 Luger and C96 Mauser pistols with a buttstock were short-barrel rifles,²⁵⁶ cannot dent the legal effect of this inconsistency. The analogy is disingenuous, at best. These firearms, commonly used during the First and Second World Wars, *were* “re-designed” or “remade” as prohibited by the NFA.²⁵⁷ These pistols were designed to be “pistols,” but they were turned into rifles through the addition of a buttstock.²⁵⁸ Here, the stabilizing brace was neither designed nor approved as a buttstock. When attached to a “pistol,” the ATF concedes that the firearm’s classification does not change because the stabilizing brace is not itself a buttstock.²⁵⁹ As such, there can be no “re-design” of the firearm. Nothing is added or taken away from the pistol, whether placed on the ground, fired attached to the forearm, or fired from the shoulder. Finally, even if this argument is not convincing, the ATF has since removed Mauser and Luger pistols with attached buttstocks from the purview of the NFA as collector’s items.²⁶⁰

255. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

256. See Current Letter, *supra* note 166, at 1.

257. The Luger “Long 08” or more commonly, the “Artillery Model” pistol was adopted by the German Army in 1908, though stock attachments appeared in later years. See WALTER, *supra* note 254, at 32.

258. Some variants of the C96 included a buttstock that doubled as a holster. This is of no consequence here as stock is not attached to the pistol and the pistol cannot be used when it is in the holster. Meanwhile nothing needs to be adjusted or altered to shoulder a stabilizing brace. See *C96 Mauser Features*, FIREARMS GUIDE (last visited Feb. 4, 2017), http://www.firearmsguide.com/index.php?option=com_firearms&view=firearms&Itemid=106 [https://perma.cc/L5TF-YZCT].

259. See Current Letter, *supra* note 166, at 1.

260. See BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, CURIOS AND RELICS LIST § III, <https://www.atf.gov/firearms/docs/curios-or-relics-list-update-january-2008-through-june-2014pdf/download> [https://perma.cc/3M3R-GENY].

The reasoning of the ATF in its usage-based determination of stabilizing braces leaves much to be desired. As demonstrated above, the Bureau's thoroughness is demonstrably lacking, its reasoning has many fatal flaws, and its determination is not consistent with previous interpretations of the NFA. Had the Agency done an honest evaluation of the Act and its own determinations, it would have determined that a pistol with a brace is still just a "pistol." For a court to allow such inconsistency would create a type of Schrödinger's firearm problem. In such a regime, a firearm would both violate and not violate the NFA at any given time. Such inconsistency and invalid reasoning should not be tolerated by courts, negating any persuasive effect the Bureau's decision could have had.

IV. CONCLUSION

There are more people filing applications for NFA firearm transfers now than at any time since the Act's enactment in 1934.²⁶¹ Although the NFA has been presumed constitutional for nearly eighty-two years, Congress surely did not intend for various pieces of plastic, which do not alter the mechanical function of a firearm, to land a person in prison for ten years with a \$10,000 fine. Similarly, there is no indication that Congress considered the intent of a person using a firearm in applying these penalties. As such, the ATF regulations determining that a pistol with a vertical fore-grip is an "any other weapon," and that a pistol with a stabilizing brace is a short-barrel rifle when shouldered, should not receive deference under *Chevron* or *Skidmore*. The regulations are poorly reasoned and exceed the plain language of the NFA.

Unfortunately, these ATF regulations are simply emblematic of a larger issue. It is not simply the ATF, but rather the National Firearms Act itself, that has enabled these short-barrel firearm regulations to come to life. Despite the Court's holding in *United States v. Miller*, subjecting these firearms to the NFA's regulatory apparatus is unconstitutional. The simple truth is that short-barrel firearms are no different than non-restricted firearms. The continued restriction of short-barrel firearms serves no purpose except to arbitrarily condemn citizens to

261. See *supra* note 84–85 and accompanying text.

grave penalties for what usually amounts to an honest mistake. Although the debate regarding firearm rights will continue to rage indefinitely, courts have a duty to “protect constitutional rights from extinction by means both direct and indirect.”²⁶² This duty also must also apply to encroachments of the NFA, rendering some of its provisions unconstitutional.

*James A. D’Cruz**

262. *Murphy v. Guerrero*, 2016 U.S. Dist. LEXIS 135684, at *78–79 (D.N. Mar. I. Sept. 28, 2016); *see also Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1156–63 (9th Cir. 2014) (discussing the history of judicial review of state legislation restricting or banning the carry of arms during the Antebellum Period).

* J.D. Candidate, Harvard Law School, 2017; B.A., Florida International University, 2014; National Security Certificate, Florida International University, 2014; National Rifle Association Certified Instructor, 2015. Thank you to my wonderful parents, Alex and Cheryl D’Cruz, for encouraging me to pursue my passions of marksmanship and firearm collecting. Additional gratitude to my grandfather, James Ushinski, who taught me proper firearm etiquette and safety. Finally, I would like to thank my classmates: Josh Craddock, Christopher Goodnow, Andrew Hanson, and Paul Vanderslice for their support and guidance.

PROTECTING PRENATAL PERSONS: DOES THE FOURTEENTH AMENDMENT PROHIBIT ABORTION?

What should the legal status of human beings *in utero* be under an originalist interpretation of the Constitution? Other legal thinkers have explored whether a national “right to abortion” can be justified on originalist grounds.¹ Assuming that it cannot, and that *Roe v. Wade*² and *Planned Parenthood of Southeastern Pennsylvania v. Casey*³ were wrongly decided, only two other options are available. Should preborn human beings be considered legal “persons” within the meaning of the Fourteenth Amendment, or do states retain authority to make abortion policy?

INTRODUCTION

During initial arguments for *Roe v. Wade*, the state of Texas argued that “the fetus is a ‘person’ within the language and meaning of the Fourteenth Amendment.”⁴ The Supreme Court rejected that conclusion. Nevertheless, it conceded that if prenatal “personhood is established,” the case for a constitutional right to abortion “collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.”⁵

Justice Harry Blackmun, writing for the majority, observed that Texas could cite “no case . . . that holds that a fetus is a person within the meaning of the Fourteenth Amendment.”⁶

1. See Antonin Scalia, *God’s Justice and Ours*, 156 L. & JUST. - CHRISTIAN L. REV. 3, 4 (2006) (asserting that it cannot); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007) (arguing that it can).

2. 410 U.S. 113 (1973).

3. 505 U.S. 833 (1992).

4. *Roe*, 410 U.S. at 156. Strangely, the state of Texas later balked from the implications of this position by suggesting that abortion can “be best decided by a [state] legislature.” John D. Gorby, *The “Right” to an Abortion, the Scope of Fourteenth Amendment Personhood, and the Supreme Court’s Birth Requirement*, 4 S. ILL. U. L.J. 1, 9 (1979) (quoting ORAL ARGUMENTS IN THE SUPREME COURT: ABORTION DECISIONS 59 (1976)). It is possible that, in this respect, the state acted in its own interest rather than in the interest of the fetus.

5. *Roe*, 410 U.S. at 156–57.

6. *Id.* at 157. Of course, the counsel’s inability to cite such a case does not preclude the existence of such a case or legal principle. Blackmun engages in a falla-

Relying on other uses of the word “person” in the Constitution, including the qualifications for congressional representatives and the President, the Court concluded that “the use of the word is such that it has application only post-natally.”⁷ Thus, there could be no “assurance[] that it has any possible pre-natal application.”⁸ Relying on the notion that “throughout the major portion of the nineteenth century, prevailing legal abortion practices were far freer than they are today,” the Court concluded “that the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”⁹

Even scholars who agree in principle with the outcome of *Roe* have criticized the Court’s blanket approach to creating a federally protected right to abortion.¹⁰ Justice Blackmun’s assumption that “the lack of consensus” about when life begins

cious argument from ignorance, since absence of evidence is not evidence of absence. Because the Court framed the case in terms of a right to privacy from the outset, it shifted the burden of proof to the state of Texas to prove that preborn human beings are indeed legal persons, whereas the presumption should have been in the state’s favor. See Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 *FORDHAM L. REV.* 807, 849 (1973).

7. *Roe*, 410 U.S. at 157.

8. *Id.*

9. *Id.* at 158. The Court assumed its own conclusion that the unborn are not persons when it denied review to the Illinois abortion case *Doe v. Scott*, 321 F. Supp. 1385 (N.D. Ill. 1971), *vacated sub nom. Hanrahan v. Doe*, 410 U.S. 950 (1973). In that case, a guardian *ad litem* had been appointed to represent the interests of the fetus in court. The Court never addressed the preborn individual’s standing since it assumed that he or she was not a “person.” See Gorby, *supra* note 4, at 8–9. The United States District Court for the Northern District of Georgia, in *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970), *judgment modified sub nom. Roe v. Wade*, 410 U.S. 113 (1973), similarly denied the appointment of a guardian *ad litem* in the case that was brought to the Supreme Court, saying that “the court does not postulate the existence of a new being with federal constitutional rights at any time during gestation.” 319 F. Supp. at 1055 n.3.

These denials of representation rights are reminiscent of the arguments brought forth in *Bailey v. Poindexter’s Ex’r*, 55 Va. (14 Gratt.) 132 (1858), which determined that a slave could not choose freedom or sale after his master’s death since “in the eye of the law, so far certainly as civil rights and relations are concerned, the slave is not a person, but a thing The attribution of legal personality to a chattel slave . . . implies a palpable contradiction in terms.” 55 Va. (14 Gratt.) at 142–43. Recall also *Dred Scott v. Sandford*, 60 U.S. 393 (1857), which determined that a slave lacked standing to sue because his African descent excluded him from the “political community created by the Constitution of the United States.” 60 U.S. at 406, *superseded by* U.S. CONST. amend. XIV (1868).

10. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 922 (1973).

means that “abortion must be permitted,” rather than left to state legislatures, has been criticized as “arbitrary” and unwarranted.¹¹ When *Roe* determined that states could not protect preborn humans as persons, “the Court effectively decided that the Constitution requires their exclusion.”¹²

Other commentators have contested the central holding of *Roe* but do not believe the Constitution justifies a blanket policy prohibiting abortion either. Some in this camp have argued that a Human Life Amendment to the Constitution is the best or only way to respond to *Roe*'s inadequacies.¹³ Some have advocated returning abortion policy to the states. The late Justice Antonin Scalia frequently noted his opposition to *Roe* and his belief that individual states should determine their abortion policy through democratic processes.¹⁴ In either case, if *Roe*'s critics are correct, constitutional scholars must revisit whether the Fourteenth Amendment protects prenatal life or whether each state may choose to permit abortion.

This Note rejects arguments for returning abortion policy to the states—including those offered by Justice Scalia upon originalist grounds¹⁵—before investigating evidence that the

11. Dennis J. Horan & Thomas J. Balch, *Roe v. Wade: No Justification in History, Law, or Logic*, in *ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS* 57, 76 (Dennis J. Horan et al. eds., 1987) (surveying criticisms of *Roe* by other legal scholars).

12. Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250, 1278 n.130 (1975)

13. See, e.g., *id.* at 1339–40.

14. See, e.g., Scalia, *supra* note 1, at 4.

15. Originalism refers to the “family of related theories” in constitutional interpretation that emphasize “four core ideas”: (1) That “the meaning of each provision of the Constitution becomes *fixed* when that provision is framed and ratified;” (2) That “sound interpretation of the Constitution requires the recovery of its *original public meaning*;” (3) That “original public meaning has the *force of law*;” and (4) That “*constitutional construction*” (which ascertains the text’s legal effect) should be distinguished from “*constitutional interpretation*” (which discerns the linguistic meaning of the text) and supplement interpretation only where the textual provisions are “abstract and vague.” Lawrence B. Solum, *We Are All Originalists Now*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* 1, 2–4 (2011) (emphasis in original). Originalist methodology discovers the original public meaning by looking at a term’s usage, its context within the Anglo-American common law tradition, and its historical interpretation in cases with precedential value. Justice Scalia associated himself with originalism. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

Fourteenth Amendment extends to prenatal human beings. These findings contest the reasoning of *Roe* and answer Justice Blackmun's objections to extending Fourteenth Amendment protections to the preborn. Based on the historical evidence, this Note presents an originalist argument that all prenatal life is included within the Fourteenth Amendment's existing guarantees of Due Process and Equal Protection.

I. JUSTICE SCALIA'S STATES' RIGHTS VIEW

What does the Constitution say about abortion? According to the famed originalist and late Associate Justice Antonin Scalia, "the Constitution says absolutely nothing about it."¹⁶ In Justice Scalia's judgment, the meaning of the term "person" at the time of the Fourteenth Amendment's adoption in 1868 did not include prenatal life:

There are anti-abortion people who think that the constitution requires a state to prohibit abortion. They say that the Equal Protection Clause requires that you treat a helpless human being that's still in the womb the way you treat other human beings. I think that's wrong. I think when the Constitution says that persons are entitled to equal protection of the laws, I think it clearly means walking-around persons.¹⁷

On this view, preborn human beings possess no constitutionally guaranteed rights to Equal Protection or Due Process. Replying to anti-abortion campaigners who "say that the Constitution requires the banning of abortion," Justice Scalia pointed to the varying degrees of protection extended to prenatal life in various state jurisdictions during the 1800s.¹⁸ He observed that "some states prohibited [abortion], some states

16. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in judgment in part and dissenting in part).

17. Interview by Lesley Stahl with Antonin Scalia (Apr. 24, 2008), in CBS NEWS, *Justice Scalia On The Record* (Apr. 24, 2008), <http://www.cbsnews.com/news/justice-scalia-on-the-record/2/> [<https://perma.cc/B2JN-WKRC>]. Of course, it is contradictory to say that the Constitution says nothing about the meaning of "persons," and then claim that the Fourteenth Amendment "clearly" refers to "walking-around persons." By implication, the Constitution would then have something to say about the meaning of personhood.

18. Interview by Piers Morgan with Antonin Scalia (July 19, 2012), in CNN, *Scalia: Roe v. Wade Theory Not Sound* (July 19, 2012), <http://www.cnn.com/videos/crime/2012/07/19/piers-scalia-roe-vs-wade.cnn> [<https://perma.cc/SAB3-9LQR>].

didn't . . . It was one of those many things—most things in the world—left to democratic choice.”¹⁹

If the Constitution remains mute on abortion, it cannot grant the Federal Government power to decide the issue one way or the other. Justice Scalia wrote that “if a state were to permit abortion on demand, I would . . . vote against an attempt to invalidate that law . . . because the Constitution gives the federal government . . . no power over the matter.”²⁰ In Justice Scalia’s view, neither side should attempt to use the courts to enforce a national policy on abortion:

I will strike down *Roe v. Wade*, but I will also strike down a law that is the opposite of *Roe v. Wade*. You know, both sides in that debate want the Supreme Court to decide the matter for them. One wants no state to be able to prohibit abortion and the other one wants every state to have to prohibit abortion, and they’re both wrong . . . that’s how I read the Constitution.²¹

Justice Scalia is not alone in finding the Fourteenth Amendment irrelevant to prenatal life. Paul Linton, legal counsel for Americans United for Life, has written that of the seventeen Justices who have sat on the Supreme Court since *Roe*, “not one has ever stated that the unborn child is a constitutional person.”²² Neither then-Justice Rehnquist nor Justice White, both dissenters in *Roe*, disputed the Court’s claim that unborn life is not encompassed in the term “person” as used in the Fourteenth Amendment.²³ Indeed, both Justices believed that states should retain authority to legislate on abortion. Justice Rehnquist wrote in his *Roe* dissent, “[T]he drafters did not intend to have the Fourteenth Amendment withdraw from the states the power to legis-

19. *Id.*

20. Scalia, *supra* note 1, at 4.

21. Antonin Scalia, Remarks at the Pew Research Center Forum, A Call for Reckoning: Religion and the Death Penalty, Session Three (Jan. 25, 2002), <http://www.pewforum.org/2002/01/25/session-three-religion-politics-and-the-death-penalty/> [<https://perma.cc/S57Z-M7WS>].

22. Paul B. Linton, *How Not To Overturn Roe v. Wade*, FIRST THINGS (Nov. 2002), <https://www.firstthings.com/article/2002/11/how-not-to-overturn-roe-v-wade> [<https://perma.cc/D6TB-C4N2>]. Of course, even if Linton is correct, that fact is not dispositive for determining the meaning of the Constitutional text under an originalist framework.

23. *Id.*

late with respect to this matter."²⁴ Likewise, Justice White wrote in his *Doe v. Bolton* dissent, "This issue, for the most part, should be left with the people and the political processes the people have devised to govern their affairs."²⁵

According to Justice Scalia, attempting to resolve the matter through judicial decree merely perpetuates social unrest "by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum . . . [and] by continuing the imposition of a rigid national rule instead of allowing for regional differences."²⁶ Instead, "the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let *them* decide, State by State, whether this practice should be allowed."²⁷

In Justice Scalia's view, apart from clear constitutional provisions granting protection, legal rights for a particular minority group exist only insofar as the majority determines that the minority group deserves protection.²⁸ Although rights explicit-

24. *Roe v. Wade*, 410 U.S. 113, 177 (1973) (Rehnquist, J., dissenting).

25. *Id.* at 222 (White, J., dissenting).

26. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., concurring in part and dissenting in part).

27. *Stenberg v. Carhart*, 530 U.S. 914, 956 (Scalia, J., dissenting).

28. See Antonin Scalia, Address at the Gregorian University, Symposium: Left, Right, and the Common Good: The Common Christian Good (May 2, 1996), *quoted in* HARRY V. JAFFA, *STORM OVER THE CONSTITUTION* 115 (1999). The majoritarianism expressed in this speech is striking:

It just seems to me incompatible with democratic theory that it's good and right for the state to do something that the majority of the people do not want done. Once you adopt democratic theory, it seems to me, you accept that proposition. If the people, for example, want abortion the state should permit abortion. If the people do not want it, the state should be able to prohibit it. . . . You protect minorities only because the majority determines, that there are certain minority positions that deserve protection. . . . The minority loses, except to the extent that the majority, in its document of government, has agreed to accord the minority rights.

Id. In his judicial opinions, Justice Scalia expressed his views in a more circumspect manner. He seemed open to the existence of unenumerated rights, but foreclosed the possibility that judges could identify or enforce them, leaving them instead to the legislative process. See *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) ("[T]he [Ninth Amendment's] refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people."); *City of Chi. v. Morales*, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting) ("The entire practice of using the Due Process Clause to add judicially favored rights to the limitations upon democracy set

ly enumerated in the Constitution are exempt from democratic purview, all others must be wrestled out in the majoritarian system. Because no constitutional guarantees explicitly apply to preborn human beings, “[t]he States may, if they wish, permit abortion on demand . . . The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.”²⁹ Justice Scalia’s view that abortion should simply be put to a democratic vote is worrisomely reminiscent of Senator Stephen Douglas’s advocacy of “popular sovereignty” to determine whether states could permit racial slavery in the antebellum period.³⁰

Linton observed that Justice Scalia not only believed majorities ought to decide whether a fetus is a person, but also that “the determination of *when human life begins* is a question not capable of judicial resolution and instead must be left to the political process where compromise and accommodation of divergent views is possible.”³¹ That position, however, “forecloses the possibility that any scientific proof or rational demonstration can establish that an unborn child is a human being.”³² Indeed, that position also “forecloses the possibility that there can be any rational discussion of the matter at all,

forth in the Bill of Rights (usually under the rubric of so-called ‘substantive due process’) is in my view judicial usurpation.”).

29. *Casey*, 505 U.S. at 979 (Scalia, J., concurring in part and dissenting in part).

30. Douglas proclaimed:

I look forward to a time when each state shall be allowed to do as it pleases. If it chooses to keep slavery forever, it is not my business, but its own. If it chooses to abolish slavery, it is its own business, not mine. I care more for the great principle of self-government, the right of the people to rule, than I do for all the [Negroes] in Christendom . . . let us maintain this government on the principles that our fathers made it, recognizing the right of each state to keep slavery as long as its people determine, or to abolish it when they please.

Stephen Douglas, Seventh Lincoln-Douglas Debate (Oct. 15, 1858), in *THE LINCOLN-DOUGLAS DEBATES* 251, 291–92 (Rodney O. Davis & Douglas L. Wilson eds., 2008).

31. Linton, *supra* note 22 (citing *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 520 (1990)) (emphasis added).

32. Nathan Schlueter & Robert H. Bork, *Constitutional Persons: An Exchange on Abortion*, *FIRST THINGS* (Jan. 2003), <https://www.firstthings.com/article/2003/01/002-constitutional-persons-an-exchange-on-abortion> [<https://perma.cc/B9K5-VM36>] (statements of Nathan Schlueter).

insofar as values by their very nature are subjectively determined.”³³ In this respect, Justice Scalia’s epistemic agnosticism in the courtroom resembled the relativism of Justice Kennedy’s “sweet-mystery-of-life passage,” which Justice Scalia so mercilessly mocked.³⁴

Nevertheless, the case for state-by-state regulation of abortion appears at least plausible. Natural rights were not exhaustively enshrined in the federal Constitution.³⁵ Since the federal government is one of enumerated powers, “[i]t is the states, not the federal government, which have the primary duty to protect those unalienable rights.”³⁶ This position comports with the historical reality that states have traditionally decided the question of personhood.³⁷ States could adopt or modify the common law to suit the valid purposes of their respective localities, but “in so doing [they] cannot contravene the rights of persons under [the] common law in an arbitrary or unreasonable manner.”³⁸ The states have historically exercised their police powers to promote public health, safety, and morals—all of which could be valid justifications to regulate abortion. The states did exercise police powers over abortion policy, and the Constitution never explicitly mentions the issue. For Justice Scalia, the case was closed.

II. INTERPRETING “PERSONS” IN THE FOURTEENTH AMENDMENT

A constitutional scholar seeking to establish an originalist interpretation of the Fourteenth Amendment must ascertain the meaning of the words at the time the Amendment was written and ratified.³⁹ One might look to dictionaries of legal

33. *Id.*

34. *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (citing *Casey*, 505 U.S. at 851).

35. As Chief Justice Marshall remarked, “a constitution, from its nature, deals in generals, not in detail.” *Bank of the U.S. v. Deveaux*, 9 U.S. 61, 87 (1809).

36. Gregory J. Roden, *Unborn Children as Constitutional Persons*, 25 *ISSUES L. & MED.* 185, 193 (2010).

37. *Id.* at 195. For an argument that states should continue to exercise this power to protect prenatal life, see T.J. Scott, *Why State Personhood Amendments Should Be Part of the Pro-life Agenda*, 6 *U. ST. THOMAS J.L. & PUB. POL’Y* 222 (2012).

38. Roden, *supra* note 36, at 234.

39. See Solum, *supra* note 15, at 2–4.

and common usage, the context of the English common law tradition, and cases that attempted to construe the meaning of the text in a manner consistent with original meaning. Using this methodology, it is reasonable to construe the Fourteenth Amendment to include prenatal life.⁴⁰

The structure of the argument is simple: The Fourteenth Amendment's use of the word "person" guarantees due process and equal protection to all members of the human species. The preborn are members of the human species from the moment of fertilization.⁴¹ Therefore, the Fourteenth Amendment protects the preborn. If one concedes the minor premise (that preborn humans are members of the human species), all that must be demonstrated is that the term

40. Justice Scalia argued, "A text should not be construed strictly, and it should not be construed leniently; it should be construed *reasonably*, to contain all that it fairly means." ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (1997) (emphasis added).

41. The scientific and medical answer as to whether a prenatal life qualifies as a distinct human being had been available for over a century at the time of *Roe*. See *infra* notes 77–81 and accompanying text. Dr. Patten of Michigan Medical School writes in his 1964 *Foundations of Embryology*, "The union of two such sex cells to form a zygote constitutes the process of fertilization and initiates the life of a new individual." BRADLEY M. PATTEN, FOUNDATIONS OF EMBRYOLOGY 3 (1964). Drs. Greenhill and Friedman write in their 1974 obstetrical textbook, "The term *conception* refers to the union of the male and female pronuclear elements of procreation from which a new living being develops . . . [T]he zygote thus formed represents the beginning of a new life." J.P. GREENHILL & EMANUEL A. FRIEDMAN, BIOLOGICAL PRINCIPLES AND MODERN PRACTICE OF OBSTETRICS 17, 23 (1974). As Dr. Mathews-Roth of Harvard University Medical School later said, "[I]t is incorrect to say that biological data cannot be decisive . . . it is scientifically correct to say that an individual human life begins at conception . . . and that this developing human always is a member of our species in all stages of its life." *The Human Life Bill: Hearing on S. 158 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 97th Cong. 17 (1981) (testimony of Dr. Micheline Mathews-Roth).

Both the *Roe* Court and the late Justice Scalia confused the scientifically and medically answerable question about when a new human organism's life begins with the ethical and legal question of whether that life possesses intrinsic value and demands protection. See Horan & Balch, *supra* note 11, at 75; Schlueter & Bork, *supra* note 32 (statements of Nathan Schlueter). But since the scientific discoveries of the nineteenth century, disagreement has existed only over the latter question. Judges need not inject their own values into that question, because, as will be shown, "[t]hat value judgment was made over one hundred years ago, on a constitutional level and as a matter of binding law, by the framers of the fourteenth amendment," who drafted it to cover every living human being. Byrn, *supra* note 6, at 840. Thus it may be said with confidence that "[o]ne's right to life . . . depend[s] on the outcome of no elections." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

“person,” in its original public meaning at the time of the Fourteenth Amendment’s adoption, applied to all members of the human species.

The minor premise need not be lingered upon here. Nevertheless, we should observe that whether states historically believed that the preborn specifically were members of the human species is not dispositive, so long as they believed all human beings were entitled to protection under the Fourteenth Amendment. Just as “freedom of speech” protects movies and internet communication under an originalist interpretation⁴² even though those technologies did not exist at the time of the First Amendment’s adoption, “person” protects every member of the human species, regardless of whether individuals were *recognized* as members of the human family at the time of the Fourteenth Amendment’s adoption.⁴³

I will defend the major premise using four tools. First, I will employ textualist analysis, such as dictionary definitions from the period; second, common law precedent; third, inferences from state practice; and fourth, the anticipated legal application of the Amendment, to the extent that expected application is indicative of the public meaning.

A. *Text and Dictionary Usage*

First, let us recall the relevant text itself:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

42. See SCALIA, *supra* note 38, at 140 (“I take many things to be embraced within ‘the freedom of speech,’ for example, that were not in fact protected, because they did not exist, in 1791—movies, radio, television, and computers, to mention only a few. The originalist must often seek to apply that earlier age’s understanding of the various freedoms to new laws, and to new phenomena, that did not exist at the time.”). In Justice Scalia’s view, the meaning of the relevant text does not evolve, it is simply applied to a new set of circumstances or new information. He applied the same principle in *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008), writing, “Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way.”

43. See Schlueter & Bork, *supra* note 32 (statements of Nathan Schlueter).

*process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*⁴⁴

According to dictionaries of common and legal usage at the time of the Fourteenth Amendment's adoption, the term "person" was largely interchangeable with "human being" or "man."⁴⁵ The 1864 edition of Noah Webster's *American Dictionary of the English Language* defined the term "person" as relating "especially [to] a living human being; a man, woman, or child; an individual of the human race."⁴⁶ The entry for "human" included all those belonging to "the race of man."⁴⁷ No dictionary of the era referenced birth or the status of being born in its definition of "person," "man," or "human being."⁴⁸ Although dictionaries did not address the preborn by name, the term "person" included all human beings, which necessarily included prenatal human beings.

In legal usage, the term person had expansive scope. In his discourse on "The Rights of Persons," Blackstone wrote that "[n]atural persons are such as the God of nature formed us."⁴⁹

44. U.S. CONST. amend. XIV, § 1 (emphasis added).

45. See e.g., 2 ALEXANDER M. BURRILL, A NEW LAW DICTIONARY AND GLOSSARY 794 (1851) ("A human being, considered as the subject of rights, as distinguished from a *thing*."); 3 THOMAS EDLYNE TOMLINS & THOMAS COLPITTS GRANGER, THE LAW-DICTIONARY 104 (1st Am. ed. 1836) ("A man or woman."); *Person*, 2 NOAH WEBSTER ET AL., AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("An individual human being . . . [i]t is applied alike to a man, woman or child.").

46. 1 NOAH WEBSTER ET AL., AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 974 (1864).

47. *Id.* at 643. "Man" is in turn defined as, "An individual of the human race; a human being; a person." *Id.* at 806.

48. See Gorby, *supra* note 4, at 23.

49. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *119. Blackstone's choice of phrase evokes the words of the Psalmist: "you formed my inward parts; you knitted me together in my mother's womb." *Psalm* 139:13 (ESV); see also Michael S. Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 24 (2013).

Blackstone goes on to distinguish "natural persons"—that is, human beings—from "artificial" persons, which "are created and devised by human laws for the purposes of society and government; which are called corporations or bodies politic." 1 BLACKSTONE, *supra*, at *119. In accordance with this distinction, the Supreme Court has determined that the constitutional usage of "person" includes corporations, which exist as artificial persons. See *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886). If, relying on Blackstone's distinction between kinds of persons to determine the term's scope of meaning, the term "person" includes corporations as "artificial persons," then it should *a fortiori* include prenatal members of the human family as "natural persons."

Thus, for Blackstone, there was “no distinction . . . between *biological* human life and *legal* personhood.”⁵⁰ He considered all members of the human species to be legal persons. Blackstone declared that “[l]ife is . . . a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother’s womb.”⁵¹ Mention of the preborn child’s stirring was intended to protect prenatal life as soon as it could be discerned, not to exclude human life from protection prior to that point. The principle of Blackstone’s rule was that “where life can be shown to exist, legal personhood exists.”⁵²

Roe reached the wrong conclusion in light of these definitions. Justice Blackmun used an intratextual methodology to explicate the meaning of “person” instead of exploring the term’s original meaning as understood in 1868.⁵³ It is difficult to prove what a term *cannot* mean through negative inferences alone,⁵⁴ but Justice Blackmun did just that when he concluded that “person” cannot include the preborn.⁵⁵ The constitutional clauses Justice Blackmun analyzed limited the broader and more indeterminate category of “persons” to narrower and specific categories of persons eligible for particular purposes. For instance, the clause specifying that only persons thirty-five years of age or older are eligible for the Presidency indicates that other individuals exist who do not meet the qualifications, but who are still persons.⁵⁶ That clause gives no indication about *when* one becomes a person, and it certainly does not

50. Paulsen, *supra* note 49, at 26.

51. 1 BLACKSTONE, *supra* note 49, at *125.

52. Paulsen, *supra* note 49, at 28 (summarizing Blackstone’s rule).

53. Intratextualism compares the uses of a term within a document to infer that term’s meaning. See generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (defending this mode of interpretation).

54. See *id.* at 792 (“[I]f we try to prove that a word *cannot* mean Y, examples drawn from the Constitution are *weaker*” than “when we seek to prove that a word *could* mean X.”).

55. See *Roe v. Wade*, 410 U.S. 113, 157 (1973); see also Amar, *supra* note 53, at 792 (“[I]f Blackmun is seeking to prove that ‘person’ *must* mean post-natal humans . . . even a slew of examples from the Constitution may prove unavailing.”). Notably, the Supreme Court did not use *Roe*’s intratextual reasoning that “person” has “application only post-natally” to arrive at its conclusion that corporations are persons. See Destro, *supra* note 12, at 1284.

56. See Gorby, *supra* note 4, at 12.

suggest that one becomes a person “at birth or at any other particular stage of one’s development.”⁵⁷

The other clauses Justice Blackmun relied on also fail to support his conclusion. The phrase “persons born or naturalized in the United States and subject to the jurisdiction thereof” does not *define* the scope of the class “persons.”⁵⁸ Rather, “born or naturalized” and “subject to the jurisdiction thereof” serve to narrow the broader class of persons to which the term refers.⁵⁹ Likewise, the Apportionment Clause cannot be construed to exclude prenatal life from the term person, since it also excludes “Indians not taxed” and persons outside the “several states,” such as residents of Puerto Rico or the District of Columbia, who are surely persons protected by the Fourteenth Amendment.⁶⁰

Justice Blackmun’s observation that the usage of “person” has “application only post-natally” therefore draws an unsupported conclusion from the text.⁶¹ An opposite and perhaps equally tentative conclusion can be drawn from the text through the use of the phrase “persons born or naturalized” in Section 1 of the Fourteenth Amendment. The adjective “naturalized” indicates that there are persons who are not naturalized. If “born” functions the same way and also limits the category of persons eligible for citizenship, it indicates that there are persons who are not born.⁶²

57. *Id.*

58. Foreign nationals, Indian tribesmen, and even African slaves were considered persons, even though in most cases they were not citizens. See Paulsen, *supra* note 49, at 20. The term “person” has always been larger than its subset, “citizen,” and the Supreme Court’s longstanding interpretation of the Fourteenth Amendment reflects that traditional understanding. See *Plyler v. Doe*, 457 U.S. 202, 212 (1982) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

59. See Paulsen, *supra* note 49, at 36.

60. See Roden, *supra* note 36, at 191. In the *Insular Cases*, the Supreme Court curtailed aspects of the Bill of Rights in unincorporated territories for reasons unrelated to the meaning of the term person. See, e.g., *Balzac v. Porto Rico*, 258 U.S. 298, 311 (1922). Even after the *Insular Cases*, however, guarantees of “fundamental personal rights” remained, including the protection against deprivation of life without due process. *Id.* at 312–13.

61. See Gorby, *supra* note 4, at 12–13. Though Justice Blackmun examined many constitutional passages in his intratextual quest, he conveniently omitted the Preamble’s explicit declaration that the protection of posterity was one of the purposes of adopting the Constitution. See Roden, *supra* note 36, at 191.

62. See Gorby, *supra* note 4, at 13 n.67.

The meaning of “person” in the Fourteenth Amendment cannot be confined by how the term is used in specific applications elsewhere in the Constitution. As Professor Ely scornfully put it, he “might have added that most of [the constitutional provisions] were plainly drafted with *adults* in mind, but I suppose that wouldn’t have helped.”⁶³ Textual analysis and examination of dictionary usage support the conclusion that the Fourteenth Amendment protects preborn humans.

B. Common Law Precedent and State Practice

Historic recognition of the preborn as persons is not necessary to prove that they are included within the meaning of that term in the Fourteenth Amendment.⁶⁴ Nevertheless, the development of the common law and state practices related to abortion leading up to 1868 shed light on the meaning of “person” at that time. After all, many of the same state legislatures that passed criminal codes prohibiting abortion also ratified the Fourteenth Amendment. Since state understanding is often a significant factor when ascertaining original meaning, state understandings of unborn personhood in criminal law help illuminate the original meaning of “person” in the Fourteenth Amendment.

By the time of the Fourteenth Amendment’s adoption, “nearly every state had criminal legislation proscribing abortion,”⁶⁵ and most of these statutes were classified among “offenses against the person.”⁶⁶ The original public meaning of the term “person” thus incontestably included prenatal life. Indeed, “there can be no doubt whatsoever that the word ‘person’ referred to the fetus.”⁶⁷ In twenty-three states and six territories, laws referred to the preborn individual as a “child.”⁶⁸ Is it reasonable to presume that these legislatures would have used this terminology if “they had not considered the fetus to be a ‘person’”?⁶⁹

63. Ely, *supra* note 10, at 925–26.

64. See *supra* notes 42–43 and accompanying text.

65. Gorby, *supra* note 4, at 15.

66. James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY’S L.J. 29, 48 (1985).

67. *Id.* at 49.

68. See *id.* at 48. This terminology is striking compared to that of today’s advocates for legal abortion, who prefer to use the term “fetus” rather than “child.”

69. *Id.*

The adoption of strict anti-abortion measures in the mid-nineteenth century was the natural development of a long common-law history proscribing abortion. Beginning in the mid-thirteenth century, the common law codified abortion as homicide as soon as the child came to life (animation) and appeared recognizably human (formation), which occurred approximately 40 days after fertilization.⁷⁰ Lord Coke later cited the “formed and animated standard,” rearticulating it as “quick with childe.”⁷¹

These standards were difficult to enforce, however, due to the burden of proof necessary to secure conviction for homicide under the common law. It was hard to prove that a woman was actually pregnant at the time of the abortion, that the fetus was alive when the abortion was committed, and that the abortion killed the fetus.⁷² Furthermore, under the common law rule of *corpus delicti*, a corpse was nearly always required to prove homicide, and even then, causation was especially difficult to demonstrate. Without such evidence, convictions were seldom secured.

Lord Coke attempted to ameliorate these evidentiary difficulties in the late seventeenth century. He identified abortion as a “great misprision”—that is, a serious misdemeanor—subject to a lower burden of proof if the child died before birth, but murder if the child died from the abortion attempt after being born alive.⁷³ Coke’s “innovations” at common law were “not substantive, but evidentiary.”⁷⁴ Thus, the common law consistently prohibited abortion of human beings *in utero* according to the best medical knowledge of the day, and viewed abortion as the wrongful killing of a human being.⁷⁵

70. See Byrn, *supra* note 6, at 816.

71. See *id.* at 819–20 (quoting EDWARD COKE, 3 INSTITUTES 50 (1644)).

72. See Witherspoon, *supra* note 66, at 31.

73. See Byrn, *supra* note 6, at 819–20 (quoting COKE, *supra* note 71, at 50–51).

74. *Id.* at 821.

75. The *Roe* Court relied extensively on a brief submitted by NARAL attorney Cyril Means regarding the state of common law protections for prenatal life. See JUSTIN B. DYER, *SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING* 107, 110–11 (2013). Subsequent scholarship has since exposed that the historiography contained therein, particularly as it related to *The Twinslayer’s Case*, 1 Edw. 3 (1327), and *The Abortionist’s Case*, 22 Edw. 3 (1348), was deeply flawed, inaccurate, and misleading. See Byrn, *supra* note 6, at 817–23; Destro, *supra* note 12,

In the eighteenth century, Coke's description "quick with child" (the point at which the child is first *able* to move, then considered to be the beginning of existence) was equated with "quickening" (the point at which the mother first *feels* fetal movement).⁷⁶ This distinction was intended to protect prenatal life as soon as it could be discerned, not to exclude human life from protection prior to that point. Once again, "quickening was a flexible standard of proof—not a substantive judgment on the value of unborn human life."⁷⁷ The *Roe* Court made much of the quickening rule in its rush to dismiss the personhood of the preborn,⁷⁸ but failed to see that the rule was merely a tool of criminal law, not a statement about the value of life prior to perceptible movement in the womb.

The "quickening" distinction survived in common law until emergent medical science discovered "that human life began at fertilization,"⁷⁹ allowing medical examiners to prove prenatal life and cause of death due to abortion with greater certainty. After this discovery in the early nineteenth century, British courts instructed jurors that "quick with child," which had earlier meant "formed and animated," now meant "from the moment of conception."⁸⁰ When determining whether to grant temporary reprieve from execution for a pregnant woman, for example, the court in *Regina v. Wycherley*⁸¹ reinterpreted common law to reflect that new scientific fact in 1838.⁸²

at 1267–78; DYER, *supra*, at 105–132. See generally JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* (2006).

Another brief, which essentially recapitulated the same arguments and suffered from the same defects, was filed in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). Laurence Tribe and Ronald Dworkin both relied on the same modified historiography in their arguments against extending legal personhood to preborn human beings. See John Keown, *Back to the Future of Abortion Law: Roe's Rejection of America's History and Traditions*, 22 ISSUES L. & MED. 3, 4 (2006).

76. See Byrn, *supra* note 6, at 824.

77. *Id.* at 825.

78. See *Roe v. Wade*, 410 U.S. 113, 132–39 (1973).

79. See Keown, *supra* note 75, at 6.

80. See Byrn, *supra* note 6, at 825.

81. 173 Eng. Rep. 486 (1838).

82. See *id.* at 486–87. Temporary reprieve from execution arising from a plea of pregnancy is a common law tradition of ancient origin. See Byrn, *supra* note 6, at 825–27 n.125.

This revision of the common law to conform to this basic principle—that human life, where it exists, must be protected— informed the meaning of the term “person” in the United States at the time of the Fourteenth Amendment’s adoption. Thomas Percival’s influential and widely circulated nineteenth century work *Medical Ethics* declared, “[T]o extinguish the first spark of life is a crime of the same nature, both against our maker and society, as to destroy an infant, a child, or a man.”⁸³ The American Medical Association’s 1859 report on abortion considered the human being *in utero* a person, and it called for protection of the “independent and actual existence of the child before birth, as a living being.”⁸⁴ They decried the “unnecessary and unjustifiable destruction of human life” both before and after quickening, and they urged state legislatures to reform their abortion statutes.⁸⁵ The Medical Society of New York in 1867 “condemned abortion at every stage of gestation as ‘murder.’”⁸⁶

In the mid-nineteenth century, American courts began to discard the obsolete “quickening” rule in order to “protect the unborn from [the point of] fertilization.”⁸⁷ The Pennsylvania Supreme Court’s ruling in 1850 that “the moment the womb is instinct with embryo life, and gestation has begun, the crime [of abortion] may be perpetrated . . . [There] was therefore a crime at common law,”⁸⁸ is indicative of the national mood regarding abortion in that era.⁸⁹ The Supreme Judicial Court of Maine similarly upheld a statute repudiating the quickening standard in *Smith v. State*.⁹⁰

Meanwhile, state legislatures also took action to prohibit abortion from the point of fertilization. At the end of 1849, “no fewer than 18 of the 30 states had enacted anti-abortion statutes; by the end of 1864, 27 of the 36; by the end of 1868, 30 out of 37,”⁹¹ in addition to six territories.⁹² Of those thirty states,

83. THOMAS PERCIVAL, *MEDICAL ETHICS* 135–36 (Chauncey D. Leake ed., 1975) (1827).

84. 12 *TRANSACTIONS OF THE AMERICAN MEDICAL ASSOCIATION* 76 (1859).

85. *Id.*

86. Byrn, *supra* note 6, at 836.

87. Keown, *supra* note 75, at 6.

88. *Mills v. Commonwealth*, 13 Pa. 631, 632–33 (1850).

89. *See Gorbey*, *supra* note 4, at 15.

90. 33 Me. 48 (1851).

91. Keown, *supra* note 75, at 27.

“twenty-seven punished abortion before and after quickening” and twenty applied the same punishment “irrespective of quickening.”⁹³ In other words, although minor policy-driven differences existed among states in the treatment of abortion at common law, a general consensus treated preborn human beings as “persons.”⁹⁴ These statutes indicate that the preborn were included within the public meaning of the term “person” at the time the Fourteenth Amendment was adopted.

When the Amendment was adopted in 1868, the states widely recognized children *in utero* as persons. Twenty-three states and six territories referred to the fetus as a “child” in their statutes proscribing abortion.⁹⁵ At least twenty-eight jurisdictions labeled abortion as an “offense[] against the person” or an equivalent criminal classification.⁹⁶ Nine of the ratifying states explicitly valued the lives of the preborn and their pregnant mothers equally by providing the same range of punishment for killing either during the commission of an abortion.⁹⁷ The “only plausible explanation” for this phenomenon is that “the legislatures considered the mother and child to be equal in their personhood.”⁹⁸ Furthermore, ten states (nine of which had ratified the Fourteenth Amendment) considered abortion to be either manslaughter, assault with intent to murder, or murder.⁹⁹ New York joined them in 1869, and the number grew to seventeen jurisdictions in the period shortly after the adoption of the Fourteenth Amendment.¹⁰⁰ A significant number of states also considered actions that, while

92. See Witherspoon, *supra* note 66, at 33.

93. Keown, *supra* note 75, at 27.

94. Moreover, since abortion was never a common law liberty, “it cannot be considered to be a ninth amendment right retained by the people.” Destro, *supra* note 12, at 1282.

95. Witherspoon, *supra* note 66, at 48.

96. *Id.* at 48 n.59.

97. *Id.* at 40.

98. *Id.* at 42.

99. See *id.* at 44. That some states treated abortion as manslaughter rather than murder does not indicate that the unborn child had less value or lacked personhood. Rather, it suggests the perpetrator was less culpable in some way, or that policy reasons dictated a lesser punishment. See *infra* Part III–B.

100. See Witherspoon, *supra* note 66, at 42, 44.

not intended to cause abortion, caused the death of a child *in utero* to be manslaughter as well.¹⁰¹

Some scholars have suggested that this trend was motivated by concern for women's health or distrust of women's reproductive choices rather than by recognition of fetal humanity.¹⁰² But most anti-abortion statutes "increased the penalty for abortion if it were proved to have caused the unborn child's death and a majority did so irrespective of the age of gestation."¹⁰³ The statute at issue in *Smith v. State* specifically evinced concern for the child *in utero* by deeming prosecution for abortion "fatally defective for not charging the essential element of the crime" if it "did not allege the destruction of the child."¹⁰⁴ This strongly suggests that state legislatures intentionally designed the statutes to protect the life of the child *in utero* and not merely to protect the mother's health. Thus, contra the historiography presented by Cyril Means and adopted by the *Roe* Court, "it is beyond reasonable doubt" that the primary purpose—perhaps the only purpose—of this late nineteenth century wave of anti-abortion legislation was to protect the preborn.¹⁰⁵ Quite simply, these statutes were enacted in recognition of unborn human beings' full and equal membership in the human family.

Several states also left clear documentary evidence about their legislative purposes, which shed light on how lawmakers viewed the relationship between these statutes and the Fourteenth Amendment.¹⁰⁶ For example, after ratifying the Fourteenth Amendment in January 1867, the Ohio legislature took up a bill to amend their 1834 anti-abortion statute.¹⁰⁷ The

101. *See id.* at 43–44.

102. *See, e.g.,* Reva Siegal, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 318 (1992).

103. Keown, *supra* note 75, at 27.

104. Destro, *supra* note 12, at 1278.

105. Keown, *supra* note 75, at 28.

106. This evidence is contrary to the *Roe* Court's erroneous assertion that little legislative history remained of the adoption of mid-nineteenth-century anti-abortion statutes. *See Roe v. Wade*, 410 U.S. 113, 151 (1973).

107. *See Witherspoon, supra* note 66, at 61.

committee that reviewed the bill was composed of several Senators that had voted for ratification of the Amendment.¹⁰⁸

Their Senate report elucidated the purposes of the statute, observing “the alarming and increasing frequency” of abortion by “a class of quacks who make child-murder a trade.”¹⁰⁹ Pointing out that “[p]hysicians have now arrived at the unanimous opinion that the foetus in utero is alive from the very moment of conception,” the committee repudiated the “ridiculous distinction in the punishment of abortion before and after quickening.”¹¹⁰ They asserted that “no opinion could be more erroneous” than to think “that to destroy the embryo before that period [of quickening] is not child-murder.”¹¹¹ They concluded their report: “Let it be proclaimed to the world, and let it be impressed upon the conscience of every woman in the land ‘that the willful killing of a human being, at any stage of its existence, is murder.’”¹¹² The bill passed both houses of the Ohio legislature by April 1867.¹¹³

The Ohio legislature that ratified the Fourteenth Amendment obviously thought preborn human beings were “persons in the full sense.” Otherwise it would not have declared abortion to be “child-murder” or reiterated Thomas Percival’s declaration that abortion was a crime commensurate to the murder of an infant, child, or adult. Other state legislatures that both enacted anti-abortion laws and approved of the Fourteenth Amendment must also have “shared the views of the Ohio legislature on the personhood of unborn children,” given their use of statutory language comparable to that of Ohio, the success of the various state medical societies’ lobbying in favor of such laws in order to protect the unborn, and the absence of any serious doubt within the legislatures regarding the constitutionality of the statutes.¹¹⁴

At the time of the Fourteenth Amendment’s adoption, nearly every state understood “person” to include prenatal life. The

108. *See id.* at 62.

109. 1867 OHIO SENATE J. APP’X 233.

110. *Id.*

111. *Id.*

112. *Id.*

113. *See Witherspoon, supra* note 66, at 63.

114. *Id.* at 65–69.

inclusive meaning of “person” in 1860s state law should thus shape an originalist understanding of the Amendment.¹¹⁵

C. *Anticipated Legal Application*

The legislatures that in short sequence adopted anti-abortion statutes and ratified the Fourteenth Amendment saw no conflict between their actions to defend prenatal life and their Fourteenth Amendment obligations.¹¹⁶ Indeed, they may have even viewed such legislation as required by the Amendment. The Framers of the Amendment certainly thought it required protection of every human being. Although the intentions and statements of the drafters of the Fourteenth Amendment do not govern the meaning of the text, an exploration of what these individuals believed the text meant is relevant to an originalist interpretation because it may shed light on the Amendment’s public meaning at the time of adoption.

The Framers expected the Fourteenth Amendment to protect every member of the human species.¹¹⁷ The Amendment was carefully worded to “bring within the aegis of due process and equal protection clauses every member of the human race, regardless of age, imperfection, or condition of unwantedness.”¹¹⁸ Senator Jacob Howard, who sponsored the

115. One might pursue an even stronger claim. If the power to define personhood belonged to the states prior to its federalization in the Fourteenth Amendment, then the definition of “personhood ‘within the language and meaning of the Fourteenth Amendment’ is to be derived from the municipal law of the states.” Roden, *supra* note 36, at 198 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 913 (1992) (Stevens, J., concurring in part and dissenting in part)); *see also id.* at 195 (observing that “[t]he states had historically decided the question of personhood of unborn children”). Thus, the historical affirmation and recognition of preborn personhood could compel an interpretation of the term “person” under which any permissible view of the scope of the Amendment’s guarantees must include, at a minimum, protections for the unborn.

116. *See Witherspoon, supra* note 66, at 65–69.

117. Once again, it is not necessary to demonstrate whether the authors of the Fourteenth Amendment consciously intended its protection to extend to the unborn specifically; all that must be shown is that the Framers intended the Amendment to protect all members of the human family. *See supra* note 42 and accompanying text.

118. Byrn, *supra* note 6, at 813. The drafters of the Fourteenth Amendment certainly had the issue of race foremost in mind, but it would be erroneous to believe that the guarantees of due process and equal protection were limited exclusively to black Americans. Such an interpretation is “supported by neither the text of the Amendment, the history of its framing, nor its subsequent application.” Schlueter

Amendment in the Senate, declared the Amendment's purpose to "disable a state from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty and property without due process."¹¹⁹ Even the lowest and "most despised of the [human] race" were guaranteed equal protection.¹²⁰ Representative Thaddeus Stevens called the Amendment "a superstructure of perfect equality of every human being before the law; of impartial protection to everyone in whose breast God had placed an immortal soul."¹²¹ Representative James Brown simply put it: "Does the term 'person' carry with it anything further than a simple allusion to the existence of the individual?"¹²²

The primary Framer of the Fourteenth Amendment, Representative John Bingham, intended it to ensure that "no state in the Union should deny to any human being . . . the equal protection of the laws."¹²³ He described the Amendment as a remedy to the denial of basic human rights:

[B]y putting a limitation expressly in the Constitution . . . so that when . . . any other State shall in its madness or its folly refuse to the gentleman, or *his children or to me or to mine*, any of the rights which pertain to American citizenship or to

& Bork, *supra* note 32 (statements of Nathan Schlueter). The Fourteenth Amendment was drafted to create "a constitutional remedy for protecting the rights of persons when the states failed to do so. For this reason, they chose to use the term 'person' rather than 'blacks' as the object of protection in the text of the Constitution." *Id.*

119. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866). Howard went on to say that the Amendment "abolishes all class legislation in the States and does away with the injustice of subjecting one class of persons to a code not applicable to another." *Id.* Extending this reasoning to the matter at hand, legalization of abortion subjects a class of human beings, the preborn, to the life-or-death decision-making power of the mother. Legalized abortion contradicts the expected legal application of the Amendment.

120. *Id.*

121. Thaddeus Stevens, Address at Bedford, Pa. (Sept. 4, 1866), reprinted in SACRAMENTO DAILY UNION, Oct. 3, 1866, at 1.

122. CONG. GLOBE, 38th Cong., 1st Sess. 1753 (1864).

123. John Bingham, Address at Bowerston, Ohio (Aug. 24, 1866), reprinted in *The Constitutional Amendment Discussed by its Author*, CINCINNATI COMM., Sept. 11, 1866, at 19.

common humanity, there will be redress for the wrong through the power and majesty of American law.¹²⁴

Though Bingham never explicitly addressed the issue of abortion, the general consensus in 1868 was that prenatal life was human and therefore included within common humanity.¹²⁵ The Amendment cannot, therefore, be legitimately interpreted “to exclude a group of individuals who were regarded as human beings at the time the fourteenth amendment was written”¹²⁶

Certainly the Framers of the Amendment did not promote an understanding of “legal personhood” separate from biological humanity.¹²⁷ Indeed, they might have relied upon the long-established precedent set in *United States v. Palmer*,¹²⁸ in which Chief Justice Marshall acknowledged that the terms “person or persons” were broad enough to include “every human being” and “the whole human race.”¹²⁹ The authors of the Amendment designed it to protect all biological human beings, regardless of their origin or circumstance. As Justice Hugo Black later put it: “the history of the [Fourteenth] Amendment proves that the

124. CONG. GLOBE, 40th Cong., 2nd Sess. 514–15 (1868) (emphasis added). Just a few years earlier, Bingham expressed his view that the term “person” as used in the Fifth Amendment included all human beings:

[N]atural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guaranteed by the broad and comprehensive word ‘person,’ as contradistinguished from the limited term citizen—as in the fifth article of amendments, guarding those sacred rights which are as universal and indestructible as the human race No State may rightfully, by constitution or statute law, impair any of these guaranteed [sic] rights, either political or natural. They may not rightfully or lawfully declare that the strong citizens may deprive the weak citizens of their rights, natural or political

CONG. GLOBE, 35th Cong., 2nd Sess. 983 (1859). Bingham modeled the language of the Fourteenth Amendment on that of the Fifth, including its usage of the term “person.”

125. See *supra* Part II–B.

126. Destro, *supra* note 12, at 1289. The appellee in *Roe* “assumed that the term ‘human being’ was, in fact, synonymous with ‘person,’” just as the Congressmen who explained the Fourteenth Amendment to the public had a century before. See *id.* at 1334.

127. See Paulsen, *supra* note 49, at 51.

128. 16 U.S. 610 (1818).

129. *Id.* at 631–32 (interpreting a statutory provision).

people were told that its purpose was to protect weak and helpless human beings.”¹³⁰

The original public meaning of the term “person,” the contemporaneous anti-abortion statutes enacted to protect prenatal life, and the public explanations given by the Framers of the Fourteenth Amendment as to the Amendment’s scope of meaning all support extending protections to prenatal life on originalist grounds. To suppose that the Framers meant to exclude the unborn from the Amendment’s protections and instead ensure abortion as a protected liberty “would be to ignore the tenor of the times.”¹³¹ The Fourteenth Amendment was to be a new birth of freedom for *all* human beings.

III. ADDRESSING COUNTER-ARGUMENTS RAISED IN *ROE*

How did the *Roe* Court avoid the strong historical basis for considering prenatal life “persons” protected by the Fourteenth Amendment? Besides relying on the inaccurate Means brief,¹³² Justice Blackmun examined: (1) narrow exceptions to the common law rule against abortion, such as to save the life of the mother;¹³³ (2) varying degrees of punishment for the crime of abortion, including occasional immunity for women who procured abortions;¹³⁴ and (3) the supposed lack of contemporary consensus about the status of preborn humans, to determine that human beings *in utero* were never “recognized in the law as persons in the whole sense.”¹³⁵ These arguments against constitutional personhood for the preborn have been repeated by advocates of a state-by-state approach to abortion.¹³⁶ I will address each in turn.

130. *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 87 (1938) (Black, J., dissenting).

131. *See Destro*, *supra* note 12, at 1290.

132. *See supra* note 75.

133. *See Roe v. Wade*, 410 U.S. 113, 157 n.54 (1973).

134. *See id.*

135. *See id.* at 162.

136. *See, e.g., Schlueter & Bork*, *supra* note 32 (statements of Robert H. Bork).

A. *The “Life of the Mother” Exception*

The *Roe* Court supposed that narrow exceptions in state abortion statutes for the life of the mother indicated that prenatal human beings were considered nonpersons.¹³⁷ But these exceptions were not based “on a legislative preference for the life of the mother over the life of the child, but on the general defense of ‘legal necessity,’” which is connected to self-defense.¹³⁸ Only the impending death of the mother was considered a grave enough reason to consider abortion. The acknowledgement of these rare circumstances “does not demonstrate a lack of legislative recognition of the personhood of the unborn child.”¹³⁹ Even if Justice Blackmun were correct that Texas’s exception for the life of the mother violated equal protection guaranteed by the Fourteenth Amendment, it would not indicate that prenatal life is excluded from the Amendment’s protections. It would only show that Texas inconsistently applied the protections of the Amendment.¹⁴⁰

B. *Variance Among Criminal Punishments for Abortion*

The *Roe* Court pointed to the varying severity of charges and punishments among state laws proscribing abortion prior to and after the adoption of the Fourteenth Amendment as evidence that states did not believe in preborn personhood.¹⁴¹ In some jurisdictions, the maximum sentence for abortion was less severe than for murder.¹⁴² The Court believed this suggested that the law did not include fetuses as persons

137. See *Roe*, 410 U.S. at 138–39, 157 n.54.

138. Witherspoon, *supra* note 66, at 47.

139. *Id.* Today, experts in obstetrics and gynecology believe that “direct abortion,” the purposeful destruction of the unborn child, is not medically necessary to save the life of a woman,” and affirm “a fundamental difference between abortion, and necessary medical treatments that are carried out to save the life of the mother, even if such treatment results in the loss of life of her unborn child.” See COMM. ON EXCELLENCE IN MATERNAL HEALTHCARE, DUBLIN DECLARATION ON MATERNAL HEALTHCARE (2012), <http://www.dublindeclaration.com/> [<https://perma.cc/X75K-MRLJ>].

140. See Francis J. Beckwith, *The Supreme Court, Roe v. Wade, and Abortion Law*, 1 LIBERTY U. L. REV. 37, 51 n.46 (2006).

141. See *Roe*, 410 U.S. at 151–52, 157 n.54.

142. *Id.* at 158 n.54.

during this period.¹⁴³ But the principle permitting legislatures to determine how to classify and punish different types of unlawful killing is one of historical provenance. It says nothing about the personhood status of the victim. In his *Lectures on Law*, the early American legal scholar and founding father James Wilson recognized that policy-driven ranges of punishment for crimes of killing were permissible.¹⁴⁴ He wrote that “grades of solicitude, discovered, by the law, on the subject of life” exist, and he acknowledged that the law may consider “different degrees of aggression” against life.¹⁴⁵ How these various “degrees may be justified, excused, alleviated, aggravated, redressed, or punished,” he said, “will appear both in the criminal and in the civil code of our municipal law.”¹⁴⁶

Indeed, many examples may be drawn from analogous instances in criminal law. In some states, for example, a young minor who intentionally kills another human being cannot be convicted of homicide.¹⁴⁷ By establishing infancy as an absolute defense, lawmakers have accounted for the special circumstances of such cases, including the minor’s immaturity and incapacity to reason through the consequences of his actions.¹⁴⁸ Such provisions do not suggest that the victim of a minor’s deadly attack is not a constitutionally protected person. Even if infancy were not permitted as a defense, prosecutions against minors would likely be rare based on the same considerations. Likewise, lawmakers and prosecutors in some jurisdictions took into account the pregnant woman’s stress and other extenuating circumstances of “unwanted pregnancy” which favored reduced punishment for abortion.¹⁴⁹

143. *Id.*

144. James Wilson, *Lectures on Law*, in 2 COLLECTED WORKS OF JAMES WILSON 747, 1068 (Kermit L. Hall & Mark D. Hall eds., 2007).

145. *Id.*

146. *Id.*

147. See, e.g., Infancy, 720 ILCS 5/6-1 (1962) (“No person shall be convicted of any offense unless he had attained his 13th birthday at the time the offense was committed.”); see also 4 BLACKSTONE, *supra* note 49, at *23 (“By the antient Saxon law, . . . under twelve it was held that he could not be guilty . . . of any capital crime which he in fact committed. But by the law, as it now stands . . . [u]nder seven years of age, indeed, an infant cannot be guilty of a felony . . .”).

148. See Gorby, *supra* note 4, at 20.

149. See *id.*

Much like infancy, the woman who had an abortion was historically “not deemed able to assent to an unlawful act against herself” and “incapable of consenting to the murder of an unborn infant.”¹⁵⁰ Thus, the woman was often treated as “a victim rather than a perpetrator of the act.”¹⁵¹

Factoring in the actor’s degree of culpability does not indicate “unconstitutional discrimination against the victim or the negation of his personhood.”¹⁵² Killing a police officer or killing under provocation, for example, may be evaluated with greater or lesser degrees of culpability and warrant different sentences without implying anything about the intrinsic personhood of the victim. Both contemplation of social cost and awareness of juries’ reluctance to pass harsh sentences upon aggrieved women influenced legislative decisions regarding the range of punishment for abortion.¹⁵³

Justice Blackmun thought it significant that some states in the mid-nineteenth century did not prosecute women who procured abortion, and found this policy incompatible with prenatal life being included within the scope of the Fourteenth Amendment.¹⁵⁴ As already mentioned, however, this immunity likely stemmed from the notion that women were victims of abortion rather than perpetrators.¹⁵⁵ On a practical level, the most likely witness against a criminal abortionist was a woman upon whom an abortion had been performed. Therefore, the legislature may have granted immunity to women in the interest of convicting criminal abortionists. Lending credence to this position is that nearly all states that *did* impose criminal penalties on abortive women offered immunity to those women who testified against an accused abortion provider.¹⁵⁶ Despite all these considerations, at least seventeen states imposed criminal sanctions upon women who underwent surgical or chemical abortion.¹⁵⁷

150. *State v. Farnam*, 161 P. 417, 419 (Ore. 1916). This is not to imply that lawmakers historically believed the pregnant woman was the *only* victim of abortion. Both mother and child were treated as victims of abortion.

151. Witherspoon, *supra* note 66, at 59.

152. *Id.* at 51.

153. *See id.* at 51–52.

154. *See Roe v. Wade*, 410 U.S. 113, 151 (1973).

155. *See supra* notes 150–51 and accompanying text.

156. *See Witherspoon*, *supra* note 66, at 59.

157. *See id.*

C. *Purported Disagreement About When Life Begins*

Pointing to a lack of contemporary consensus about preborn personhood, the *Roe* Court asserted that they “need not resolve the difficult question of when life begins,”¹⁵⁸ thereby failing to resolve the crucial question at the crux of the case. Much like the hunter who shoots into a quivering bush without identifying his target, the Court decided, in effect, that the human being *in utero* “is a non-person without stopping to consider whether or not he is a human being.”¹⁵⁹ Admitting its ignorance on this important question, the Court’s only legally sound response would have been to “err on the side of life, and therefore to legally prohibit virtually all abortions.”¹⁶⁰ After all, the Constitution expressly prohibits deprivations of life without due process of law, while notions of a right to privacy or a liberty interest protecting so-called reproductive rights are at best implied and unenumerated. As explained in Part II, originalist methodology establishes that the Fourteenth Amendment protects every biological member of the human family. Thus, authorizing the killing of a living organism “without knowing whether that being is a human being with a full right to life” would constitute willful judicial recklessness, “even if one later discovered that the being was not fully human.”¹⁶¹

The *Roe* Court could have turned to its own precedent instead of punting the question. The Supreme Court had previously extended equal protection guarantees to illegitimate children in *Levy v. Louisiana*.¹⁶² There, the Court reasoned that equal protection extends to all who “are humans, live, and have their being.”¹⁶³ If Justice Blackmun had applied the *Levy*

158. *Roe*, 410 U.S. at 159.

159. Charles E. Rice, *Overruling Roe v. Wade: An Analysis of the Proposed Constitutional Amendments*, 15 B.C. INDUS. & COM. L. REV. 307, 311 (1973).

160. Beckwith, *supra* note 140, at 56.

161. *Id.* Recall that knowledge of the preborn child’s biological status as a living member of the human family was widespread at the time *Roe* was decided. See PATTEN, *supra* note 41, at 3 (presenting this as a medical fact in 1964).

162. 391 U.S. 68 (1968) (determining that the Equal Protection Clause prohibits invidious discrimination against illegitimate children and rejecting the premise that such children are “nonpersons” for Fourteenth Amendment purposes).

163. *Id.* at 70.

standard in *Roe*, “the Court could not have avoided passing on the factual ‘biological’ question of whether unborn children are live human beings.”¹⁶⁴ But the *Roe* Court ignored *Levy*.

Rather than weighing the interests of the preborn human being, the Court half-heartedly advocated for the interests of viable fetuses capable of “meaningful life outside the mother’s womb.”¹⁶⁵ The arbiter of whether life is meaningful or not goes unnamed, but in practice the Court acts as the final decision-maker. The wisdom of the Framers of the Fourteenth Amendment is evident: protecting *all* human beings through use of the term “person” avoids troubling inquiries about what constitutes a “meaningful life” worth protecting, and who has the authority to answer such existential questions.¹⁶⁶

In fact, the *Roe* Court’s determination in this respect was inconsistent with the direction of past precedent. Just a few years after the adoption of the Fourteenth Amendment, the Supreme Court held that the child *in utero* is entitled to secure inheritance and property rights in *McArthur v. Scott*.¹⁶⁷ There, the Court determined that an Ohio probate court had violated the rights of the decedent’s grandchildren (then *in utero*) by failing to afford them adequate representation as parties in interest.¹⁶⁸ The Court enforced the common law principle of “treating a child in its mother’s womb as in being” for purposes of the rule against perpetuities, and found that the grandchildren’s rights had vested *in utero* at the time of their grandfather’s death.¹⁶⁹ If the Due Process Clause protects unborn children’s representational rights in a probate hearing, should not a preborn child be even more entitled to due process to secure her life? As Judge John T.

164. Byrn, *supra* note 6, at 842.

165. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

166. Rice, *supra* note 159, at 319 (“What about the retarded, the sick, and the senile?”). Recall that the Nazi party initiated euthanasia for Jews deprived of their political rights so as to achieve “the destruction of life devoid of value.” KARL BINDING & ALFRED HOCHÉ, *THE RELEASE OF THE DESTRUCTION OF LIFE DEVOID OF VALUE* (Robert L. Sassone trans., 1975) (1920). Rice draws the parallel that “abortion inflicts the same inequality that the Nazis inflicted on the Jews” and predicts the trend of prenatal testing and systematic abortion of “undesirables” discovered to possess a disability. Rice, *supra* note 159, at 319.

167. 113 U.S. 340, 382 (1885); *see also* Roden, *supra* note 36, at 224–35.

168. *See McArthur*, 113 U.S. at 404.

169. *Id.* at 382.

Noonan puts it: "it would be odd if the fetus had property rights which must be respected but could himself be extinguished."¹⁷⁰

Roe's legal judgment about the meaning of the term "person" was far from inevitable. A pre-*Roe* federal district court decision determined that the rationale of *Griswold v. Connecticut*¹⁷¹ did not extend to abortion and distinguished between contraception, which prevents the creation of human life, and abortion, which destroys existing human life.¹⁷² Rejecting the privacy argument, the three-judge panel ruled:

[T]he legal conclusions in *Griswold* as to the rights of individuals to determine without governmental interference whether or not to enter into the process of procreation cannot be extended to cover those situations wherein, voluntarily or involuntarily, the preliminaries have ended, and a new life has begun. Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it.¹⁷³

The facts cannot be honestly evaded: either the *Roe* Court "arbitrarily denied the unborn the constitutional protections due it or . . . the fourteenth amendment is inadequate as a legal device to protect the fundamental rights of all members of the human family, the avowed purpose of the drafters of the fourteenth amendment."¹⁷⁴

IV. CONCLUSION

The *Roe* decision by Justice Blackmun, as well as the dissents by then-Justice Rehnquist and Justice White, with which Justice Scalia agreed, "are constitutionally unsound."¹⁷⁵ All permit

170. David W. Louisell & John T. Noonan, Jr., *Constitutional Balance*, in *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES* 220, 246 (John T. Noonan, Jr., ed., 1970).

171. 381 U.S. 479 (1965).

172. *Steinberg v. Brown*, 321 F.Supp. 741, 746 (N.D. Ohio 1970) ("The difference between this case and *Griswold* is clearly apparent, for here there is an embryo or fetus incapable of protecting itself. There, the only lives were those of two competent adults.").

173. *Id.* at 746–47. Ironically, this case—decided only three years prior to *Roe*—was cited by Justice Blackmun. See *Roe v. Wade*, 410 U.S. 113, 155 (1973). He left the federal district court's reasoning unmentioned and unrefuted.

174. Gorbey, *supra* note 4, at 35.

175. *Id.* at 4.

“violation of the fetus’s constitutionally protected right to life without due process of law.”¹⁷⁶ Returning abortion policy to the states would “leave considerable doubt as to the extent to which human life would receive affirmative protection under the laws of the several states.”¹⁷⁷ The extent to which prenatal life would be protected or not would be dictated by “political pressure and popular sentiment,”¹⁷⁸ potentially “constitutionaliz[ing] the mass murder of millions” of human beings in the womb.¹⁷⁹

What would happen if a state permitted abortion? Based on the historical evidence, “such action would be a violation of the Constitution.”¹⁸⁰ If prenatal life is to be protected under the Fourteenth Amendment, Congress or the courts must intervene in states that do not guarantee equal protection and due process to preborn human beings. After all, “the [Fourteenth] amendment was designed to limit state power and authorize Congress to enforce such limitations.”¹⁸¹ Should a state refuse to protect prenatal life, it would be a violation of equal protection as understood in the *Civil Rights Cases*¹⁸² and later reiterated in Justice Goldberg’s concurring opinion in *Bell v. Maryland*:

“Denying includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.” These views are fully consonant with this Court’s recognition that state conduct which might be described as “inaction” can nevertheless constitute responsible “state action” within the meaning of the Fourteenth Amendment.¹⁸³

176. *Id.*

177. Destro, *supra* note 12, at 1320.

178. *Id.* at 1321.

179. Rice, *supra* note 159, at 322. Natural law scholars critical of Justice Scalia’s position argue that it is “indefensible to condition” the right to life “on the concurrence of the legislature in each state.” *Id.* From this perspective, returning abortion to the states would be like “contending that each locality in Germany during World War II should have been allowed to decide whether or not to have a death camp to exterminate undesirables.” *Id.*

180. Louisell & Noonan, *supra* note 170, at 244.

181. Paulsen, *supra* note 49, at 59.

182. 109 U.S. 3 (1883).

183. 378 U.S. 226, 309–11 (1964) (Goldberg, J., concurring) (quoting *United States v. Hall*, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (citing *Marsh v. Alabama*, 326 U.S.

If a state chose not to prosecute the “intentional [and] unjustified . . . killing of unborn persons while prosecuting for the killing of all other classes of persons” then “such official inaction denies the child in the womb equal protection of the laws.”¹⁸⁴ *Reitman v. Mulkey*¹⁸⁵ determined that statutes permissive of individual discriminatory actions can constitute state action violating the Equal Protection Clause.¹⁸⁶ This reasoning has been relied upon by inferior court decisions requiring life-saving blood transfusions for fetuses, even against their parents’ religious objections.¹⁸⁷ In one such case, the justices were unanimously “satisfied that the unborn child is entitled to the law’s protection” from inaction that would deprive her of life.¹⁸⁸ Applying the same principle, a state’s consistent and systematic failure to act, “depriving some persons within their jurisdiction of the equal *protection* of the laws,”¹⁸⁹ warrants federal intervention. Given the broad agreement among the states which held that unborn children are “persons under criminal, tort, and property law, the text of the Equal Protection

501 (1946); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Terry v. Adams*, 345 U.S. 461 (1953); *Barrows v. Jackson*, 346 U.S. 249 (1953)).

184. Rice, *supra* note 159, at 336.

185. 387 U.S. 369 (1967).

186. *See id.* at 373; *see also* John E. Archibold, *Re-examine State Abortion Law, Opponent Urges*, DENVER POST, July 7, 1968, at 5G (applying *Reitman* to the abortion context). Typically, “a State’s failure to protect an individual against private violence [does] not constitute a violation of the Due Process Clause.” Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119, 291 (2006) (citing *DeShaney v. Winnebago Cnty. Dep’t of Soc. Serv.*, 489 U.S. 189, 197 (1989)). Nevertheless, the *DeShaney* Court qualified its holding by recognizing that “the State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.” 489 U.S. at 197 n.3 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). The Court’s reference to *Yick Wo* is telling. In that case, which extended Fourteenth Amendment guarantees to noncitizens, the Court condemned the “unjust and . . . discriminat[ory]” exercise of “purely personal and arbitrary power” over weak and disfavored groups. 118 U.S. at 369–70; *see also* Lugosi, *supra*, at 291. These precedents establish that if states were to systematically deny human beings *in utero* the protection of generally applicable laws against homicide it would violate equal protection.

187. *See, e.g.,* *Raleigh Fitkin-Paul Mem’l Hosp. v. Anderson*, 201 A.2d 537 (N.J. 1964).

188. *Id.* at 538.

189. Brief of Amici Curiae Professor Hadley Arkes and The Claremont Institute Center for Constitutional Jurisprudence, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (No. 05-1382), 2006 WL 2252506, *11.

Clause of the Fourteenth Amendment compels federal protection of unborn persons.”¹⁹⁰

Tragically, *Roe v. Wade* allowed the judiciary to regulate which classes are worthy of receiving the “protection of fundamental liberties.”¹⁹¹ Bound only by its own sense of self-restraint, the Court asserted its absolute authority to define “‘person’ narrowly to fit its perceptions of acceptable public policy” and to “control[] the applicability of the due process clause to specific classes.”¹⁹² The Supreme Court’s abortion jurisprudence demonstrates the need to reexamine the Court’s role as “sole arbiter of the existence of fundamental rights” based on “its own perception of the relative worth of the parties whose rights are asserted.”¹⁹³

That institutional introspection seems unlikely. The Supreme Court’s defense of the central holding in *Roe* indicates its unwillingness to reverse course and enforce equal protection for prenatal life.¹⁹⁴ Likewise, legislative attempts to ban abortion are unlikely to withstand judicial scrutiny,¹⁹⁵ unless invalidating such legislation would threaten the Court’s credibility. In the absence of departmental enforcement of the Fourteenth Amendment’s guarantees, a new constitutional amendment explicitly protecting prenatal life is likely necessary.¹⁹⁶

Until the Court, the people, or their elected representatives dismantle the “discriminatory legal system of separate and unequal” treatment for unborn human beings, there can be no true equal protection under the law.¹⁹⁷ The legal regime that discriminates against preborn human beings should be abolished on originalist grounds. Until all human beings are recognized as legal persons, bringing science and law into

190. Roden, *supra* note 36, at 186 (footnotes omitted).

191. Destro, *supra* note 12, at 1260.

192. *Id.*

193. *Id.* at 1260–61.

194. See, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

195. See Rice, *supra* note 159, at 320.

196. See *id.* at 321.

197. Lugosi, *supra* note 186, at 120.

consonance, “the dissonance between truth and fiction will increase, rather than diminish.”¹⁹⁸

*Joshua J. Craddock**

198. *Id.* at 152.

* J.D. expected May 2018, Harvard Law School; B.A., Politics, Philosophy, and Economics, 2013, The King’s College. I would like to acknowledge my indebtedness to my academic advisor, Dr. David Tubbs, Professor of Law at The King’s College, for his direction and guidance. I would also like to thank Notes Editor Christopher Goodnow for his keen editorial comments.