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THE FEDERALIST SOCIETY'S ARTICLE I INITIATIVE

The Federalist Papers clearly establish that the drafters of the Constitution intended the legislature to be the most powerful branch of government. In its present state, as the government operates on a day to day basis, it is not. We are left to wonder how this came to be. Were the Founders simply wrong about the inherent powers of the legislative branch? Has the institution of Congress developed practices that are not compatible with the text of the Constitution? Why are current Congressional leaders unable or unwilling to act as an effective check on the presidency? Why is Congress unable to pass a budget? Why has Congress ceded much of its authority to the executive branch and to administrative agencies? What does it mean to serve productively as a member of the House or Senate?

The Federalist Society's Article I Initiative seeks to address these questions, and many more. The guiding principle of this project is the development of a theory of the role and practical goals of Congress that stems directly from core Constitutional principles including separation of powers, bicameralism, a federal system extended over a diverse Republic, limited and enumerated domains of legislation, and the Bill of Rights.

The Federalist Society is instituting new Article I programmatic strategies through a variety of outlets: white papers, a writing contest, a podcast, a blog, and a mixture of events at our Student Chapters, Lawyers Chapters, and on Capitol Hill. The live events are intended to help foster a nationwide conversation and engage a non-expert audience while our high-level academic colloquia jump-start dialogue among policy makers and academics. All of these efforts are designed to carry forward a sound, explanatory theory of Congress that will better inform our popular understanding and the day-to-day work of congressional practitioners.

With this Initiative, the Federalist Society has once more set a course to fill a void in our public discourse and we hope you will join us in this important work. To learn more about the Article I Initiative, please visit www.fedsoc.org/articlei.

Eugene B. Meyer
President, The Federalist Society

THE PLACE OF CONGRESS IN THE CONSTITUTIONAL ORDER

KEITH E. WHITTINGTON*

It is no accident that the Constitution begins with Congress. The Founders understood that the legislature would be central to the new constitutional project. Congress would be the foundation stone upon which the rest of the governmental edifice would be constructed, and so it necessarily came first in the constitutional document and absorbed the bulk of the delegates' attention at the Philadelphia Convention in the summer of 1787. Getting the national legislature right, they believed, was their most important task if the government they were constructing was to be successful.

Beginning with Congress was the natural choice for those designing a new government for the American republic. The first American constitution, the Fundamental Orders of the Connecticut colony, began by establishing two general assemblies.¹ Even the royal charters granted to the colonists settling the North American wilderness tended to begin by setting out a council for the "ruling, ordering, and governing" of the inhabitants, as the Charter of Massachusetts Bay put it.² When the revolutionaries announced, as in Virginia, that "the government of the country, as formerly exercised under the crown of Great Britain, is TOTALLY DISSOLVED," their plans for new state governments began with the legislative branch.³ The Articles of Confederation government consisted of nothing but a legislature.⁴

In Britain, the power of Parliament had to be wrested from the king. The growth of parliamentary authority gradually transformed the British kingdom and secured new liberties for Englishmen. Britain was not a republic, but the English colonists who

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1. FUNDAMENTAL ORDERS OF CONN. of 1639, art. I.

2. CHARTER OF MASSACHUSETTS-BAY of 1629.

3. VA. CONST. of 1776.

4. ARTICLES OF CONFEDERATION of 1781, art. V.

crossed the Atlantic Ocean were nurtured on republican ideas. And at the heart of any republic would be an assembly of the people. It was that body that made it the people's government.⁵

There was little question that when the Federalists gathered in Philadelphia to reconstitute the federal government and put it on stronger footing, the design of Congress would be the first priority. They knew that Congress could not be the whole of the government, but they expected Congress to be the driving force of any government they created, with all the promise and danger that that entailed. It would be the repository of national powers, and the channel of popular energy.⁶

The Founders were clear-eyed about the national legislature. They recognized both its potential virtues and its potential vices. Finding a place for Congress within the constitutional order meant appreciating both those virtues and those vices, and finding ways to help realize and take advantage of the benefits that a legislature can bring and of finding ways to curtail the damage that it might do.

I. CONGRESSIONAL VIRTUES

Congress serves a particular role within the constitutional system. That role exploits the particular virtues of a representative assembly. Congress is constituted so as try to build up those virtues, and it is empowered to perform duties that exploit those advantages.

There are four interrelated political virtues associated with Congress. Congress is the primary vehicle by which the citizenry is *represented* in government. Congress is the government institution most directly *accountable* to the people. Congress embodies *deliberation* in the making of government policy. The work of Congress is relatively *transparent* to the public. This is not to say that the other branches of the federal government are completely lacking in these virtues, but simply that Congress has a comparative advantage when it comes to these features of the political system. The design of Congress is meant to bring

5. See EDMUND S. MORGAN, *INVENTING THE PEOPLE* 246–260 (1988).

6. See, e.g., 2 JAMES MADISON, *THE WRITINGS OF JAMES MADISON* 157 (Gaillard Hunt ed., 1901).

these virtues to the fore, and the powers and responsibilities assigned to Congress attempt to take advantage of them.

A. *Congressional Representation*

Congress is entrusted with the legislative power because it is a representative assembly. Popular representation and policymaking power were understood by the Framers to go together,⁷ and as a consequence the delegates at the Philadelphia Convention spent most of the summer wrestling with the twin problems of what powers were to be entrusted to the national government and who would control those powers.⁸ As a practical matter, that meant determining what powers Congress was going to possess and how Congress was going to be constituted. Those were the thorniest issues to be resolved in drafting a new Constitution, and Article I of the U.S. Constitution is the most detailed of all of its parts to memorialize those carefully negotiated arrangements.

In the late eighteenth and early nineteenth centuries, statesmen recognized that political representation in a republic could reflect three distinct things: property, people, and political communities.⁹ The architecture of Article I embodies and reconciles all three forms of representation.

Notably, this idea of republican government meant rejecting another possible basis of representation: social orders.¹⁰ The governments of Europe were forced to compromise republican principles and take into account inherited social orders. The landed aristocracy and the hereditary nobility were understood to be a distinct social interest that required their own representation.¹¹ The “people” were only represented in a single component of the British government, the House of Commons, and that chamber alone was to represent their interests.¹² By contrast, the United States consisted only of the people. No other interest could be recognized as legitimate. They were not to be confined to a single

7. See JACK N. RAKOVE, *ORIGINAL MEANINGS* 209–219 (1996).

8. See MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 68–123 (1913).

9. See JOHN PHILLIP REID, *THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION* 31–62 (1989).

10. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLICAN, 1776–1787*, at 197–256 (1969).

11. *Id.* at 197–202.

12. *Id.* at 596.

portion of the government; their spirit was to move all of its parts. There would be no American House of Lords.

It was a long-standing principle of the evolving British constitutional system that property-holders should have a voice in the decision to collect taxes. The need to represent property was essential to the emergence of parliamentary government.¹³ This was a critically democratizing reform. British property-holders insisted that the king should not be able to unilaterally extract resources from society and dispose of those resources at his own discretion. The people who were being asked to bear the costs of government activities should have a role in authorizing and directing those activities. The king must go to the legislature to open the purse strings.¹⁴ That fundamental principle was carried to the American colonies and embodied in colonial legislative assemblies. The revolutionary cry of “no taxation without representation” appealed to that same ancient principle, while denying that the Parliament in London could adequately represent the interests of the taxpayers in Boston.¹⁵ There is no more basic principle in the American constitutional system than the requirement that elected representatives must choose whether to extract revenue from the people.

The Framers of the Constitution reconciled the representation of property and people in a single republican principle. It was understood that the governmental treasury would not be filled by a small set of plutocrats. The financial health of the republic stood on much broader foundations. The people as a whole are the source of financial support for the government.¹⁶ Taxes would not be raised from the few but rather from the many, and as a result the many should be involved in making the decisions on how taxes should be imposed and how much revenue should be raised. If the fiscal burden of government was not to be widely shared and taxpayers were to be a small subset of the population, then requiring that the government

13. See J.R. POLE, *POLITICAL REPRESENTATION IN ENGLAND THE ORIGINS OF THE AMERICAN REPUBLIC* 388–95 (1966).

14. See MARGARET LEVI, *OF RULE AND REVENUE* 95–122 (1988); DOUGLASS C. NORTH, *STRUCTURE AND CHANGE IN ECONOMIC HISTORY* 143–70 (1982).

15. See CHARLES HOWARD MCILWAIN, *THE AMERICAN REVOLUTION* 164–180 (1923); 1 JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 238–241 (1987).

16. RAKOVE, *supra* note 7, at 70–75.

consult with those wealthy enough to contribute to the public fisc would not move a country very far toward becoming a democracy. But if there is no meaningful gap between taxpayers and citizens, then the principle of “no taxation without representation” becomes a fully republican principle.

The Origination Clause in Article I, Section 7 expresses that commitment: “All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”¹⁷ Although the Origination Clause might seem like a bit of technical detail, it appears at the head of the list of congressional powers for a reason. Before the Constitution even explains the process by which legislation can be made, it specifies that only the House of Representatives can launch a proposal to raise revenue. It does so because within Congress itself the House of Representatives is the people’s chamber.¹⁸ If the people, through their representatives, must authorize a tax, then it is the House alone that can give that authorization. Both symbolically and functionally, the most popular body in the government controls the purse strings.

The Origination Clause might not have been needed but for the different forms of representation embodied in the House and the Senate. As James Madison later explained, “the House of Representatives will derive its power from the people of America.”¹⁹ The people are represented directly in the House and in proportion to their numbers.²⁰ The Senate, by contrast, was constructed on the basis of the third form of representation, political communities. As Madison observed, the states “as political and coequal societies” are “represented on the principle of equality in the Senate.”²¹ Although the Seventeenth Amendment shifted the mode of selection of senators so that they are chosen directly by the people, it did not alter the principle of representation.²² Madison was skeptical of the indirect election of legislatures, fearing that the “people would be lost

17. U.S. CONST. art. I, § 7.

18. Priscilla H.M. Zotti & Nicholas M. Schmitz, *The Origination Clause: Meaning, Precedent, and Theory from the 12th to 21st Century*, 3 BRIT. J. AM. LEGAL STUD. 71, 90–93 (2014).

19. THE FEDERALIST NO. 39, at 244 (James Madison) (Clinton Rossiter ed., 1961).

20. U.S. CONST. art. I, § 2, cl. 3.

21. THE FEDERALIST NO. 39, at 244 (James Madison) (Clinton Rossiter ed., 1961).

22. U.S. CONST. amend. XVII.

sight of altogether, and the necessary sympathy between them and their rulers and officers, too little felt," and as a result he thought it was imperative that at least one chamber of Congress not be "removed from the people by an intervening body of electors."²³ Eliminating that intervening body of electors certainly changed the nature of the Senate, but it did not render the Senate wholly popular and "national" in the Madisonian sense. It is still the House that represents the people in their national ratio, and as a consequence the House that must originate revenue bills.

Together, these two forms of representation, the people directly and the states as equal political communities, form the twin pillars of congressional authority. It was on that foundation of national representation that Congress could be entrusted with its legislative powers. Only a national council representing the diverse interests of the country could be properly situated to make policy on the problems that spilled across state boundaries and implicated the collective interest of the nation as a whole. The regulation of interstate commerce, the establishment of uniform rules of bankruptcy and naturalization, and the coining of money all needed resolution by the representatives of the people as a whole to prevent conflict among the separate state communities. The raising of armies, the making of war and peace, and the managing of territories all affected a distinctly national interest that could not be left to the partial decision-making of individual states. The authority to make policy decisions followed the adequate representation of those who would be affected by those decisions. The Confederation period had taught the Federalists that states should not be able to impose barriers on trade across their borders or burden out-of-state creditors or admit new citizens into the United States without consulting the other states.²⁴

The people of the individual states should be able to manage their own affairs, but they should not be able to manage the affairs of their neighboring states. The people had the right to have their voices heard in a legislature that was, in effect, setting poli-

23. JAMES MADISON, NOTES OF THE DEBATE IN THE FEDERAL CONVENTION OF 1787, at 40 (1987).

24. On the problems of the Confederation period, see Brandon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37 (2005).

cy for them. In some cases, that meant leaving policymaking authority in hands of localities, but in other cases that meant lifting policymaking authority up and placing it in the hands of national representatives who could give voice to all the relevant interests. It was this basic logic of representation that Chief Justice John Marshall leveraged to explain why state legislatures could not constitutionally tax the Bank of the United States. The people of the state of Maryland could not be allowed to exercise a veto power over the policy decisions of the people of the country at large as represented in the U.S. Congress. It was “in general, a sufficient security against erroneous and oppressive taxation” for legislatures to be allowed only to tax their own constituents.²⁵ If the voters were unhappy with their taxes, they could correct the situation at the polls. But that logic only worked when the people, through their representatives, were “taxing themselves and their property.”²⁶ Legislators could be trusted with the power to tax only so long as they were taxing their own voters, but the people of the other states would have no reason to trust a legislature in which they were not represented: “In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.”²⁷

For the Founders, the federal nature of the Union made the relationship between representation and policymaking authority most relevant. The major constitutional question to be decided in the years after the Revolution was who ought to have the authority to act on different policy issues, national officials, or state officials. A properly designed constitutional system would match representation and policymaking authority. As Virginia’s George Mason emphasized in the Philadelphia Convention, what was needed was an assembly that “ought to know & sympathise with every part of the community” and that could adequately represent its “different interests and views arising from difference of produce, of habits, &c &c.”²⁸

25. *McCulloch v. Maryland*, 17 U.S. 316, 428 (1819).

26. *Id.*

27. *Id.* at 431.

28. MADISON, *supra* note 23, at 39.

There was no similar debate in the context of the separation of powers because it went without saying that only a legislature could be sufficiently representative to be entrusted with policymaking authority. In Britain, the constitutional struggle was over how to wrest policymaking from the monarch and deposit it in a representative assembly. That was not the struggle in the United States. The primary question here was *which* legislature should make policy decisions, not *whether* a legislature should make policy. That decisions about the basic policies to be pursued by the government had to be decided by a representative legislative assembly was taken as a given.

B. Congressional Accountability

Accountability is a necessary correlate of representation. Elections not only elevate a representative to a position of authority, but they also preserve the link between the people and their rulers. Structuring a legislature to be representative is futile if legislators are not responsive to the constituents that they represent. When Parliament imposed taxes on the American colonists, the British government justified its actions by claiming that the Americans were “virtually” represented in London.²⁹ Parliament represented all British subjects and had a moral obligation to take their well-being into account, and thus could make policy for them and impose taxes on them. The revolutionaries responded by deepening the theory of legislative representation. There must be an “intimate and inseparable relation” between the electors and the elected, if representation is to be meaningful.³⁰ The colonists “might be oppressed in a thousand shapes, without any Sympathy, or exciting any alarm” among those who actually elected the Parliament.³¹ The members of Parliament could impose ruinous taxes on the American colonies without any repercussions precisely because they were not accountable to an American electorate. An American legislature could only be entrusted to make

29. 1 REID, *supra* note 15, at 239–41.

30. DANIEL DULANY, CONSIDERATIONS OF THE PROPRIETY OF IMPOSING TAXES IN THE BRITISH COLONIES 10 (Annapolis, Jonas Green 2d ed. 1765).

31. *Id.*

policy “for the people” if it was a “government of the people [and] by the people.”³²

There have long been two models of representative government.³³ One model emphasizes the ability of the representative to mirror the public will and to make policy as the people themselves would make it, if only it were convenient for them to do so. An alternative model emphasizes the authority of the representative to make policy decisions on behalf of the public and to then be held accountable for their actions. As the twentieth-century political economist Joseph Schumpeter argued, the “will of the people” has a tendency to “vanish[] into thin air.”³⁴ The crucial function of the people in a democracy is not to make policy but to determine to whom “the reins of government should be handed.” The voters install a government, but they also “evict[]” it.³⁵ The capacity of the people to remove the legislators, to hold them accountable for their actions, underwrites the authority of Congress to make policy for the nation. A government in which legislators could make policy without repercussion would be little different than a monarchical government.

Congress is designed to sustain this type of accountability. The Framers did not neglect the need for an “intimate” relationship between the representative and the represented. Senators and representatives are required to be inhabitants of their states, to reside among their constituents, and to be affected by the same policies and issues that are of concern to them.³⁶ The constitutional text does not specify that federal officials would be subject to the same rules as the average citizen, but the norm is deeply rooted that the legislative power must be used to make general laws and not set up special privileges.³⁷ To emphasize that norm, the Constitution explicitly prohibits grants

32. Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), reprinted in *ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS* 734, 734 (Roy P. Basler ed., 1946).

33. See, e.g., HANNA PITKIN, *THE CONCEPT OF REPRESENTATION* 130–135 (1967); Heinz Eulau et al., *The Role of the Representative: Some Empirical Observations on the Theory of Edmund Burke*, 53 *AM. POL. SCI. REV.* 742 (1959).

34. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 252 (Routledge 2003) (1943).

35. *Id.* at 272.

36. U.S. CONST. art. I, § 2, cl. 3.

37. See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* 22–33 (1993).

of nobility that might be understood to elevate a class of individuals above the law.³⁸

More importantly, the members of Congress must stand for frequent election. The design of an electoral mechanism is always a delicate balance. Officials must be independent enough to make policy judgments but responsive enough to react to the felt interests of the people. The bicameral structure of Congress allows for a mix of perspectives. The longer-termed senators benefit from greater independence and stability. The shorter-termed representatives benefit from their closer attachment to the people. Both must be held responsible for their actions to the electorate and, as a consequence, can claim to represent the people's interest and claim the authority to act on their behalf.

C. Congressional Deliberation

The representative quality of Congress walks hand-in-hand with its deliberative quality. Legislatures represent the people by bringing them "indoors." Rather than encouraging the people to take direct action through mobs and riots, the institutionalization of popular politics in the form of legislatures encouraged the people to choose agents who could represent their interests and sit down together to negotiate and deliberate.³⁹ But they come indoors in their multitude. A legislative assembly is a distinct governmental body in its collective nature. Congress represents the people in their diversity. Congress is a "they, not an it."⁴⁰ Congressional decision-making necessitates discussion, compromise, and agreement. At its best, Congress deliberates.⁴¹

Congress is a deliberative institution in at least two senses. First, as a collective body, Congress must deliberate to make decisions and take action. It is possible to imagine members of Congress simply casting their votes based on preconceived ideas and interests and laws emerging from tallying those votes. But Congress does not operate that way. Members in-

38. U.S. CONST. art. I, § 9, cl. 8.

39. On the people "out-of-doors" and "outside of the legal representative institutions," see WOOD, *supra* note 10, at 320–21.

40. Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

41. See JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON* 150–82 (1994).

stead come together to argue, learn, persuade, and justify.⁴² From its inception, Congress brought together a diverse collection of individuals hailing from the far-flung reaches of the country. They brought with them the particular and idiosyncratic concerns, interests, and perspectives of their local constituency. Congress was the place where those representatives could find common ground, identify a common legislative agenda, and develop agreed-upon policy.

Congress is also deliberative in a second sense, in that it investigates social problems and deliberates on possible solutions. If floor debates exemplify Congress being deliberative in the first sense as members spar with each other over the issues of the day, congressional committees exemplify Congress being deliberative in the second sense as members and their staffs develop expertise in specialized policy domains.⁴³ It is in committees, and various comparable institutions ranging from caucuses and working groups like the Republican Study Committee to institutionalized support agencies like the Congressional Budget Office, that Congress gets down to the business of policymaking. James Madison thought that the natural virtue of legislators would allow them to “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations.”⁴⁴ Whatever we think of that notion, we might more credibly think that “the public voice, pronounced by the representatives of the people, will be consonant to the public good, than if pronounced by the people themselves,”⁴⁵ because legislators have more incentive and opportunity to gain an adequate understanding of matters of state.

While there are some formal constitutional features of Congress that reinforce this deliberative capacity, informal features are at least as important. The Constitution explicitly recognizes

42. See Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 818–27 (2002).

43. See ROGER H. DAVIDSON ET AL., *CONGRESS AND ITS MEMBERS* 163–205 (14th ed. 2014); KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* 71–74 (1992);

44. THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

45. *Id.*

and encourages robust debate by guaranteeing in the Speech and Debate Clause that members will have legal immunity for their legislative actions.⁴⁶ Implicitly, the Constitution creates the conditions for a deliberative institution by constructing a legislature from districts spread across the country. The history of political debate in the national legislature would have been very different if, for example, the Founders had not chosen to allocate House seats by states. Constituting a Congress that would eventually include members from Montana and Maine, Nebraska and New York, set the conditions for legislators to arrive in the nation's capital with different backgrounds, perspectives, and concerns. One need only compare the educational, regional, and professional background of the members of the Supreme Court, the Cabinet, and the Senate to see that Congress still performs a distinctive function of drawing together the talents and sentiments of the nation as a whole.⁴⁷ It is no accident that it was the Speaker of the House of Representatives, Tip O'Neill, who was fond of saying that "all politics is local."⁴⁸ But the supports for deliberation in Congress include many informal institutions, practices, and norms. The system of standing committees on which Congress has relied since early in its history was not anticipated in the constitutional text. Political parties, interest groups, consultants, and staff are unknown to the Constitution but play critical roles in informing congressional decision-making.

D. Congressional Transparency

Congressional deliberation is on display in a way that makes the legislature a particularly important institution for insuring transparency in government. The constitutional drafters encouraged transparency by requiring that Congress keep a journal of its proceedings and record the votes of its members.⁴⁹ More important, however, is that the members of Congress quickly discovered that it was in their political interest to be visible. The Senate thought at first to do most of its work in ex-

46. U.S. CONST. art. I, § 6.

47. See, e.g., JOEL ABERBACH ET AL., *BUREAUCRATS AND POLITICIANS IN WESTERN DEMOCRACIES* 47–67 (1981); JEFFREY E. COHEN, *THE POLITICS OF THE U.S. CABINET* 44–80 (1988).

48. TIP O'NEILL, *MAN OF THE HOUSE* 6 (1988).

49. U.S. CONST. art. I, § 5, cl. 3.

ecutive session, and soon found itself eclipsed by the more open lower chamber. The senators realized that they were better off doing their business in public.⁵⁰ As often as not, members of Congress want to be visible. In a base sense, of course, members of Congress as politicians understand the value of publicity, and the institution has found it necessary to try to develop countervailing norms that reward “workhorses” as well as “show horses.”⁵¹ But in a more elevated sense, part of what members of Congress do is construct and engage in the public sphere.⁵² Part of the job of an ambitious member of Congress is to perform in public, to be noticed by the public, and to engage with the public. Congress shapes national politics not only by legislating but also by taking “action,” even when such action might simply be giving a speech or holding a hearing.

Congress represents the people in government and represents the government *to* the people. Congress gains little by acting in secret. The instinct of the legislator is to seek the spotlight, not to hide in the shadows. Congress wishes to be seen engaging in the public’s business. As Madison emphasized, the constitutional drafter hoped to harness political ambition to serve the public good.⁵³ In this case, self-interest incentivizes members of Congress to shine a spotlight on the workings of the federal government. In a republic, governmental transparency is essential. If the people are going to be able to hold their rulers accountable and contribute to the formation of public policy by selecting effective representatives, then they must be exposed to what those rulers do. Interest groups and the press have cultivated a good image by portraying themselves as watchdogs over the government, but members of Congress themselves race to perform that role as well. No branch of government makes its home in the public sphere to the extent that Congress does, and that contribution to government transparency is one of the distinctive virtues of Congress within the constitutional order. While investigative hearings may become tiresome and degenerate into partisan sparring, they serve an essential function of exposing

50. See ELAINE K. SWIFT, *THE MAKING OF AN AMERICAN SENATE* 117–26, 149–70 (1996).

51. Donald R. Matthews, *The Folkways of the United States Senate: Conformity to Group Norms and Legislative Effectiveness*, 53 *AM. POL. SCI. REV.* 1064, 1067 (1959).

52. See DAVID R. MAYHEW, *AMERICA’S CONGRESS* 1–28 (2000).

53. See *THE FEDERALIST NO. 51* (James Madison).

the workings of the federal government to public scrutiny. If legislators might sometimes grandstand at the expense of administrative efficiency, their incentive to shine a light on the executive branch serves both to encourage government officials to anticipate that their actions might eventually have to be defended in public and to punish and reform actors and institutions that are shown to be functioning badly.

II. CONGRESSIONAL VICES

If Congress embodies certain political virtues that the constitutional drafters hoped to encourage and exploit, it also threatens some vices that they hoped to discourage and contain. Congress might have been the first branch of the new federal government, but the experience with the Articles of Confederation, which did not establish a distinct federal executive or judiciary, persuaded the Federalists that the legislature could not be the only branch of the government.

There are five congressional vices worth noting. In many ways, they are enmeshed in the very features of the legislature that give rise to its virtues. First, Congress can *overreach*. Second, Congress can be *too responsive* to public sentiment. Third, the members of Congress can be *too parochial* in their interests. Fourth, Congressional policymaking can be *cumbersome*. Fifth and finally, Congress can be *cacophonous*.

A. Congressional Overreach

The Founders anticipated that in a republican form of government, the legislature would always be the most powerful political institution. The legislature could speak with the authority of the people, and its members could be expected to be pressured to respond the people's immediate wants and desires. The few short years of American independence had already suggested that elected legislators could claim extravagant mandates. James Madison thought that the "legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."⁵⁴ As elected representatives, legislators were prone to take on the mantle of the people themselves. When acting on behalf of the people, legislators tended to view constitu-

54. THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

tional constraints as mere “parchment barriers,” hardly worthy of respect or deference.⁵⁵ Legislators would be tempted to consolidate excessive power into their own hands, which would be dangerous in its own right.

Legislators have incentives to overreach as well. A hereditary aristocracy might extend its power for its own benefit at the expense of the people. Legislators might well do the same. Unsurprisingly, the intellectual and political traditions that informed the Founders at the end of the eighteenth century were more attuned to the dangers posed by unaccountable government agents than by elected representatives.⁵⁶ Republicanism was the solution to the problem of monarchy and aristocracy. The electoral mechanism was expected to ensure that government officials in a republic would look out for the interests of the people. Elections work because legislators are self-interested; they pay attention to their constituents because they hope to be returned to office.⁵⁷ But self-interest can also lead legislators to seek ways to avoid accountability when they can. If legislators can create a cushion between themselves and the voters, then they can begin to look out for their own interests, independent of the interests of the people.⁵⁸ Given the opportunity, legislators can be expected to try to create that cushion by means both fair and foul. As political scientists have detailed, low-profile constituent service can build up political goodwill for an incumbent legislator, potentially freeing them from having to be as diligent in catering to constituent interests in the more consequential realm of policymaking.⁵⁹ More troubling, legislators might seek to manipulate electoral rules, ballot access, and campaign finance to suppress their opponents and insulate themselves from electoral accountability.⁶⁰ The

55. *Id.* at 308.

56. See FORREST McDONALD, *NOVUS ORDO SECLORUM* 66–70 (1985).

57. For a classic account, see DAVID MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974).

58. See, e.g., R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* (1990); Keith T. Poole and Thomas Romer, *Ideology, “Shirking,” and Representation*, 77 *PUB. CHOICE* 185 (1993).

59. See, e.g., MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (2d ed. 1989).

60. See Yasmin Dawood, *Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review*, 62 *U. TOR. L.J.* 499, 500 (2012); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic*

Founders understood that politicians might try to manipulate the public to enhance their own power and to the ultimate detriment of the public interest, but they surely did not appreciate the creativity with which modern politicians work to cartelize political power. Nonetheless, the Constitution they designed has proven remarkably useful, if hardly perfect, for reinforcing the bulwarks of representative democracy and pushing back against the self-aggrandizement of incumbent politicians.

But even when acting on behalf of the perceived interests of their constituents, legislators can overreach. Legislators have an incentive to act, and the pressure for action inevitably poses a risk that the government will overrun constitutional barriers. Constitutional fetters are designed to impede action. Legislators, however, are not likely to win reelection and fulfill their political ambitions by sitting on their hands. When their constituents bring problems to their attention, legislators are expected to do something to ameliorate those problems. It is rarely a winning political strategy to plead impotence and turn constituents away. Constituents expect their representatives to exercise power on their behalf, not explain that what the voters want is beyond the power of the representatives to provide. Legislators generally win friends by finding ways to say “yes,” rather than having to say “no.” While legislators may not be specifically motivated to engage in unconstitutional conduct, they are regularly motivated to find ways around constitutional obstacles as they pursue their policy objectives. The constant pressure to push constitutional boundaries will tend to stretch those boundaries outward.

B. *Congressional Hyper-responsiveness*

The tendency of an elected legislature to overreach its constitutional limits is closely related to the tendency to be too responsive to public opinion. Some degree of responsiveness is a necessary precondition for the kind of representative accountability that the Founders thought essential to a thriving republic. Meaningful elections were the mechanism that was to ensure that the political elite listened to and looked out for the people at large. Legislators without the necessary sympathy for the needs of the people could

Process, 50 STAN. L. REV. 643, 644 (1998); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 86 GEO. L.J. 491, 503–04 (1997).

not be effective representatives, and requirements that members of Congress stand for regular election, live among their constituents, and be citizens of a mature age were to help ensure that representatives would have that necessary sympathy.⁶¹

Effectively conjoining the interests of the legislator and the people was the first challenge of a well-designed republican constitution, but it was not the only challenge. In the immediate aftermath of declaring independence from Britain, the American revolutionaries' first priority in drafting their constitutions was to place the new American governments on a popular foundation. Government officials would answer to their own people, not to distant kings. Frequent elections and "rotation" in office (that is, term limits) were generally viewed as the primary constitutional tools for attaching the government to the people.⁶² Across the Confederation period, however, many Federalists came to worry about a different problem. They feared that the revolutionary governments had tilted too far toward popular responsiveness.⁶³ With no breakwater between the people and the government, turbulent and transitory passions could be transmitted directly through the people's representatives into government action. The more immediate the connection between legislators and their constituents, the more representative government was likely to partake of the vices of direct democracy.

The classically-trained founding generation had drawn one fundamental lesson from the democratic experiments of the ancient Greek city-states: that democracy could easily give way to mob rule and from there to anarchy and tyranny. The people in mass were subject to emotional and irrational furors, and governments should be able to resist those outbursts rather than exaggerate them. If the people ruled personally and directly by gathering together to be swayed by demagogues, then liberty and the common weal would never be secure.⁶⁴ If the people could not

61. U.S. CONST. art. I, § 2. On James Madison's nuanced views on the relationship between public opinion and republican representation, see Alan Gibson, *Veneration and Vigilance: James Madison and Public Opinion, 1785–1800*, 67 REV. POL. 5 (2005); Colleen A. Sheehan, *Madison v. Hamilton: The Battle over Republicanism and the Role of Public Opinion*, 98 AM. POL. SCI. REV. 405 (2004).

62. WOOD, *supra* note 10, at 140–41, 166–67.

63. *Id.* at 474–75.

64. See JAMES W. CEASER, *PRESIDENTIAL SELECTION 47–71* (1979); THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM 46–48* (1990).

make isolated government officials attend to their concerns, then liberty and the common good were likewise insecure. Government officials needed to be able to simultaneously stand apart from the people and yet share public concerns.

Democratic governments could be impetuous. They must be made to be reflective. The Federalists hoped that representative government would suffer from fewer of the problems that had historically bedeviled direct democracies. James Madison spoke for many in concluding that "pure" democracies "have ever been spectacles of turbulence and contention" and "incompatible with personal security or the rights of property."⁶⁵ For some, that experience suggested that popular government would be impossible to sustain. For the Americans of the revolutionary generation, abandoning popular government was not an option. They would need a "republican remedy for the diseases most incident to republican government."⁶⁶ More idiosyncratically, Madison argued that republics differed from democracies in that they delegated government power "to a small number of citizens elected by the rest."⁶⁷ Others might have simply called this representative democracy.⁶⁸ But crucially, Madison hoped that creating a bit of separation between the people and government power would render popular government more stable and more just. A properly designed "scheme of representation," he thought, "promises the cure for which we are seeking."⁶⁹ Congress could "refine and enlarge the public views" so as to better "discern the true interest of [the] country."⁷⁰ In the best case, legislators will be able to resist the "temporary or partial considerations" that might otherwise rile popular politics.⁷¹ So long as the representatives "derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it," and hold power "for a limited period," a republican government could be expected to care for

65. THE FEDERALIST NO. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961).

66. *Id.* at 84.

67. *Id.* at 82.

68. See KEITH E. WHITTINGTON, THE IDEA OF DEMOCRACY IN AMERICA (forthcoming).

69. THE FEDERALIST NO. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961).

70. *Id.* at 82.

71. *Id.*

the public interest.⁷² For many in the revolutionary generation, “a limited period” usually required annual elections. The Federalists generally thought that term of office was too short,⁷³ and over time the length of the legislative term of office in state constitutions converged toward the federal model.⁷⁴ All agreed that accountability and responsiveness needed to be balanced against independence and responsibility.

Legislatures could pose a danger to liberty if their members were either too far removed from the people or too tightly bound to them. “Frequent elections” were necessary to ensure that government officials would “have a common interest with the people.”⁷⁵ But competent legislators not only needed to know the interests and will of their own constituents, but also needed to develop “a certain degree of knowledge of the subjects on which [they are] to legislate.”⁷⁶ A government needed not only a commitment to the happiness of the people, but also a capacity to adopt and implement good policies that would advance that objective. A government that was too focused on creating responsiveness risked making “blunders” and succumbing to inconstancy.⁷⁷ A legislature needed “firmness” as well as sympathy.⁷⁸ Madison and his fellow Federalists tried to convince the American public that a bit of insulation between the people and their representatives did not pose a threat to their liberties. In part, Americans should feel confident that the term of office of federal representatives would not be so long as to call into question their fidelity to the interests of the voters. But equally importantly, the Federalists emphasized that constitutional checks and balances would keep the new federal legislature in line in ways that would be even more beneficial to American liberty than the frequent elections that had been embraced by constitutional drafters during the American Revolution.⁷⁹ Bicameralism, the presidential veto, an independent judiciary, and limited congressional powers

72. THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

73. *Id.* at 241–42.

74. JAMES QUAYLE DEALEY, GROWTH OF AMERICAN STATE CONSTITUTIONS 186 (1915).

75. THE FEDERALIST NO. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961).

76. THE FEDERALIST NO. 53, at 332 (James Madison) (Clinton Rossiter ed., 1961).

77. THE FEDERALIST NO. 62, at 379 (James Madison) (Clinton Rossiter ed., 1961).

78. *Id.*

79. WOOD, *supra* note 10, at 438–63.

would all work alongside elections to prevent the abuse of government power by legislators.

If Anti-Federalists in the 1780s worried that the Constitution created representatives who would be too distant from the people, subsequent developments have proven such fears to be misplaced. Far from being isolated and insulated, members of Congress have proven to be finely attuned to the opinions and preferences of their constituents. Developments in communication, transportation, political professionalization, and social and political organization all have tended to tighten rather than loosen the connections between the voters and their elected representatives. Eager-to-please modern representatives are more likely to be hyper-responsive than unresponsive to the voters who control their future political careers. Such extreme responsiveness can lead to its own dysfunctions, which the Founders might have anticipated in substance if not in form. As the British political scientist Anthony King has concluded, "America's politicians campaign too much and govern too little."⁸⁰ Posturing for public support might help stave off electoral vulnerability, but it does not necessarily "refine and enlarge the public views" as Madison hoped.⁸¹ When the potential electoral implications of policy decisions are ever-present, deliberation on the substantive merit of a given policy is likely to be shorted.

C. *Congressional Parochialism*

A somewhat different pitfall of how Congress represents the people is that legislative representation is likely to be too parochial. The Founders emphasized that all parts of the American system of government would rest on popular foundations. There would be no effort to try to replicate the British monarchy or House of Lords and create a political body separate from and superior to the people. The different parts of a republican government would not reflect different interests, but they can be made to represent the people in diverse ways. The personnel of the different branches of government would serve different terms, and at least originally they varied in how directly or indirectly they were chosen by the people.

80. See generally ANTHONY KING, *RUNNING SCARED* (1997).

81. THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

Legislatures had always been the most natural representative institution. Only a multi-member body can adequately represent the people in all their diversity. Indeed, for many of the Anti-Federalists, Congress was too small to adequately represent the people.⁸² A relatively small number of legislators seemed unlikely to be able to fully appreciate the concerns and interests of their many constituents or be able to respond to their individual complaints. The Federalists were more optimistic that a large constituency could be effectively represented, while also hoping that the diversity within a large legislative district would allow the representative to exercise some independent judgment on what might be in the public interest.⁸³

The smaller and more homogeneous the constituency the more it might be possible for an elected representative to simply mirror the preferences of the voters, but such representation might not be ideal if the goal is good government. In particular, legislative representation can risk being too parochial. Presidents have long highlighted the difference between their own representative credentials and those of the members of Congress.⁸⁴ While Congress as a whole represents the people of the nation, each individual member of Congress is only accountable to a small subset of the people. As a consequence, Congress is systematically pressured to respond to the concerns of geographically concentrated interests to the detriment of more diffuse interests. The local bias of congressional representation reinforces a general tendency of democratic politics to underrepresent diffuse interests. Concentrated interests find it naturally easier to organize and mobilize political support for their concerns.⁸⁵ For example, automakers can more easily identify their shared interests and organize to advance those interests than can drivers; credit card issuers can more readily coordinate their political activities than credit card users. That problem is magnified by the existence of geographical legislative districts. Dairy farmers

82. Cecelia M. Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representation*, 12 WILLIAM & MARY Q. 9, 11–13 (1955).

83. Martin Diamond, *The Federalist*, in HISTORY OF POLITICAL PHILOSOPHY 659, 675–76 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987).

84. See GARY L. GREGG II, THE PRESIDENTIAL REPUBLIC 50–73 (1997); Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1224–30 (2006).

85. See, e.g., MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 165–66 (1965).

in Vermont and coal miners in Kentucky can count on getting a sympathetic hearing from their local members of Congress, but mothers who buy milk or environmentalists who worry about air pollution have a more difficult time mobilizing political allies. As a consequence, across its history Congress has notoriously sacrificed the national interest to local interests on issues ranging from trade protection to deficit spending to military basing.⁸⁶ Presidents have regularly complained that Congress has failed to adopt the same kind of national perspective on political problems that comes more naturally to the White House.⁸⁷ At its best, Congress has found ways to counteract its own instincts in this regard with procedural devices such as fast-track authority on trade deals, hard caps on deficits and mechanisms for automatic spending cuts, and blue-ribbon commissions on base closures.⁸⁸

D. Cumbersome Congress

Congressional decision-making can be cumbersome—more cumbersome than many alternative policymaking options. Congress is at a relative disadvantage in a rapidly changing policy environment or when perceived crises seem to require immediate action. Indeed, Presidents can and have strategically framed social problems as crises to circumvent normal congressional deliberation and enhance the position of the executive branch in making policy.⁸⁹ Alexander Hamilton emphasized that the singular virtue of the executive is “[e]nergy.”⁹⁰ Compared to other political institutions, the executive could act quickly and with decisiveness. Hamilton thought the potential for such energetic action somewhere within the political system was essential to “good government,” and there would frequently be circumstances that would necessitate the executive exerting leadership.⁹¹

86. See, e.g., E.E. SCHATTSCHEIDER, *POLITICS, PRESSURES AND THE TARIFF* 283–94 (1935); Lawrence H. Chamberlain, *The President, Congress, and Legislation*, 61 *POL. SCI. Q.* 42, 60 (1946).

87. MAYHEW, *supra* note 57, at 127–30.

88. See, e.g., R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 99–110 (1990).

89. See, e.g., JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 181 (1987).

90. *THE FEDERALIST NO. 70*, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

91. *Id.*

The very qualities that distinguish Congress within the constitutional order can also hamper its ability to take efficient action. The legislature is too numerous to be representative and deliberative. The Founders worried that a legislature could be too small and thus be “an unsafe depository of the public interests.”⁹² Congress must be large enough to adequately represent the people in their diversity and “to secure the benefits of free consultation and discussion.”⁹³ But a legislature that was too large would be subject to the “confusion and intemperance of a multitude,” sacrificing the benefits that a representative democracy has over a direct democracy.⁹⁴ Finding the proper balance between an assembly too large or too small was at best a matter of pragmatic judgment, but there was no avoiding the reality that Congress would be a collective institution and subject to the challenges necessarily associated with reaching decisions in such a body.

Congress is always subject to collective action problems. Hamilton noted that the chief executive established by the Constitution would benefit from “unity Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceeding of any great number; and in proportion as the number is increased, these qualities will be diminished.”⁹⁵ The President need merely make up his own mind to act; Congress would have to marshal a majority of its members behind any policy proposal. The process of coordinating the will of numerous legislators would unavoidably involve delays. Relatively cumbersome efforts would be needed even to take relatively uncontroversial actions. Merely organizing a legislative majority behind a single policy proposal takes time and effort. The legislature becomes more efficient only to the degree to which it cedes control to its leadership, effectively exchanging its representative qualities for something more closely resembling the unity of the executive.⁹⁶ Across its history, the development of the congressional capacity to act has generally required the in-

92. THE FEDERALIST NO. 55, at 341 (James Madison) (Clinton Rossiter ed., 1961).

93. *Id.* at 342.

94. *Id.*

95. THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

96. See GARY W. COX, *THE EFFICIENT SECRET* 65 (2005).

vention of institutions and procedures that disempower individual members and minority factions within the chamber and empower majorities and a handful of leaders who can act on behalf of those majorities.⁹⁷

The problem of collective action becomes more severe if measures are controversial. To the extent that legislative leaders must overcome disagreement as well as disorganization, their task becomes all the more difficult. The greater the disagreement over what the government should do, the greater the gridlock. The deeper the political differences among representatives, the less likely they are to reach a consensus on how to proceed. Again, the solution has been to reduce the amount of agreement necessary to take action. The Articles of Confederation required that the congressional delegations reach unanimity or near unanimity to take many important actions, and such a level of agreement was difficult to reach.⁹⁸ The Constitution allows more decisions to be made by simple majorities, but, even so, the structure of Congress conspires against hasty action.

E. *Cacophonous Congress*

Finally, Congress can be cacophonous. This is the reverse-side of the congressional virtue of transparency. The legislature is the branch of government that does the most work in public. Presidents are highly visible, of course, and at least since Theodore Roosevelt presidents have fully appreciated the political advantages of occupying the bully pulpit.⁹⁹ But presidential visibility is primarily strategic and rarely involves the actual business of governing. Presidents can demand attention by giving a televised speech from the Oval Office or attending a summit with foreign leaders, but those are carefully managed presentations to the public. Congress, by contrast, conducts important business in front of a public audience. The House and Senate chambers, not the West Wing, have galleries for spectators to observe their representatives in action. While public hearings and floor de-

97. See SARAH A. BINDER, *MINORITY RIGHTS, MAJORITY RULE* 125 (1997); ERIC SCHICKLER, *DISJOINTED PLURALISM* 31 (2001).

98. ARTICLES OF CONFEDERATION of 1781, art. IX.

99. Gerald Gamm & Renee M. Smith, *Presidents, Parties, and the Public: Evolving Patterns of Interaction, 1877–1929*, in *SPEAKING TO THE PEOPLE* 109–10 (Richard J. Ellis ed., 1998).

bates hardly exhaust the business of the legislature, they are visible markers of congressional activity.

That relative transparency comes at a price. At its best, transparency can foster accountability and responsibility in government officials, and can be educative for citizens who can learn about the complexity of public policy. But transparency also puts the messy business of politics on display. It has long been observed that it is unappetizing to watch either laws or sausages get made. The workings of democracy do not become more attractive when observed up close. Legislative business routinely reveals the compromises, limits, and disappointments of politics. Moreover, the collective quality of legislatures exposes political disagreements and contingency. As king and parliament fought in seventeenth century England, the philosopher Thomas Hobbes advocated on behalf of monarchical authority. In part, he thought, a unitary king held an advantage over any multitudinous assembly that by its very nature would display “inconstancy” and disagreement.¹⁰⁰ While few modern Americans would share Hobbes’s enthusiasm for royalty, they are surprisingly unenthusiastic about how democratic politics operate. Witnessing political arguments leaves the average citizen frustrated. The public generally dislikes Congress precisely because Congress makes visible the kind of political disagreement endemic to democratic politics.¹⁰¹ By comparison, executive officials can more easily cloak disagreements and compromises and simply act, presumptively in the public interest.

III. DEVELOPMENTS OF TIME

The founding generation expected the legislature to be the principal branch of government. They understood legislative assemblies and identified them with a republican form of government. They had less of a grasp of what the executive and judicial branch would be within a democratic political system. They understood that those institutions were necessary, and could provide important checks on the democratic excesses

100. THOMAS HOBBS, *LEVIATHAN* 91 (London, Routledge 1894) (1651).

101. See FRED R. HARRIS, *IN DEFENSE OF CONGRESS* 81–82 (1995); JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *CONGRESS AS PUBLIC ENEMY* 147 (1995); JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY* 121–22 (2002).

and institutional foibles of a legislature, but the possibilities implanted in Article II and Article III were obscure.

Subsequent political developments have nurtured the relative growth of executive power. For much of the nineteenth century, Congress largely held its status as the preeminent branch. Policy was primarily made by statute, and the popular will was understood to largely filter through the legislature. Judges and executive officials were, in turn, extensions of the legislative will.¹⁰² By the start of the twentieth century, the situation had changed rather dramatically. Increasing military adventurism abroad lifted the President of the United States onto the world stage and elevated the importance of the presidential role as commander-in-chief and chief diplomat.¹⁰³ The rise of the administrative state necessarily enhanced the power and importance of the executive branch.¹⁰⁴ Social and economic behavior had long been regulated by legislatures with durable statutes and by judges with general common-law rules. As the Gilded Age bled into the Progressive Era, however, the locus of governance shifted away from legislatures and courts and into administrative agencies and regulatory commissions.¹⁰⁵ Congress was content to pass important but broadly-worded statutes that invested substantial discretionary policymaking authority in appointed experts who were charged with developing and implementing the detailed rules that would shape the new economy and with constantly adjusting government policy to a rapidly changing environment.

Despite the rise of the executive within the American constitutional system, Congress still has an important role to play. The administrative state is not going away, and the vices of Congress will continue to make themselves felt. But the traditional virtues of Congress remain foundational to American constitutionalism.

One lesson from the rise of executive power over the course of the twentieth century is that authority and power follows action and energy. To the extent that the executive can claim to get things done, the authority to act has flowed to executive officials. The Founders anticipated that effective power in a re-

102. See STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE 23 (1982).

103. See RICHARD J. ELLIS, THE DEVELOPMENT OF THE AMERICAN PRESIDENCY 217–28 (2012).

104. *Id.* at 272–80.

105. SKOWRONEK, *supra* note 102, at 248–90.

public would ultimately derive from public confidence, regardless of how formal powers are allocated in a constitutional text. They expected, and sometimes feared, that this basic political dynamic would work to the benefit of the legislature, which could credibly claim to speak for the people and that would be constantly motivated to respond to the immediate concerns of the voters. But over time other political institutions have earned the trust of the American people, and Congress has often appeared powerless to address the problems of the day. Playing a more important role in modern politics necessitates demonstrating the capacity to act for the public's benefit.

Most obviously, Congress should act as a policy leader. Electoral representation in the legislature provides both the authority to make policy and the information to identify public needs. While Congress may not be nimble in responding to rapidly changing events, it should be able to identify the common good and determine the level of public commitment to a policy goal. The kind of detailed rulemaking that administrative agencies can do well will necessarily have a place in the political landscape, but congressional decision-making is crucial for setting policy goals and direction. As a formal matter, the Supreme Court has long insisted that executive agencies must take their direction from legislation and cannot simply act autonomously, but in practice the congressional input into the policymaking process has often been rather thin.¹⁰⁶ Congress has often been unwilling or unable to take the necessary action to deliver public policy addressing recognized social problems, and even when legislation is crafted it often simply delegates sweeping authority to executive officials to determine actual policy. In particular, Congress must make the hard choices of setting priorities among competing policy goals. Statutory language that obscures the choices that must be made to implement a given policy abdicates responsibility. The representative structure of Congress is designed to facilitate deliberation, negotiation and compromise among the diverse interests of the country. While that diversity can also make it difficult to make decisions, the constitutional system as a whole functions best and most democratically if the time and effort is taken to work through those difficulties and make the hard decisions. The need for congres-

106. See DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* 101 (2008).

sional deliberation and action is no less necessary in the realm of foreign policy than in domestic policy. Since the United States assumed the status of a global power, Congress has often struggled to lay claim to a meaningful role in deciding questions of war and peace.¹⁰⁷ Congress is as ill-suited to responding to international crises as it is in responding to rapidly developing domestic events, but not all international relations revolves around crises. Nonetheless, taking advantage of opportunities for assessing the American national interest and determining national commitments would give Congress a more meaningful role in an important aspect of American policymaking and would better realize the benefits of legislative representation of the people.

Congress also has a continuing role to play as a watchdog. While legislating was at the core of the Founders' understanding of the role of a legislature, they also appreciated the ways in which a representative assembly can serve as a check on other institutions of government. Congress provides openings for affected interests to complain about mistakes and abuses by government officials. Legislators have incentives to investigate and publicize what might otherwise linger in the shadows. Aggressive monitoring of the executive branch not only effectuates the checks and balances that are necessary to preserve liberties and ensure good government, but also complements the congressional role in making policy. The ability of Congress to establish a policy agenda and priorities requires both the drafting of statutes with sufficient specificity and clarity to guide policymaking and the active monitoring of how those policies are refined and implemented within the executive branch.

The Constitution was designed to empower Congress to accomplish things on behalf of the public, but the Founders were under no illusions as to the dangers that a legislature could pose to the public good. Congress was to have limited powers enumerated in the text of the Constitution, but those were the powers best entrusted to the national legislature. That those powers would not be abused, and that Congress would not go beyond them, Congress was restrained not only by its accountability to the people through frequent elections but also by the

107. See WILLIAM G. HOWELL & JON C. PEVEHOUSE, *WHILE DANGERS GATHER* 73 (2007).

fragmentation and dispersion of power across two legislative chambers and an independent executive and judiciary. Congress has an important role to play within the constitutional system, but it is not the only body empowered by the people to identify and advance the public good.

THE WEALTH OF CONGRESS

JONATHAN KLICK*

INTRODUCTION

“Congress is loaded,” declared Andrew Katz in a post for *Time* magazine’s blog.¹ *Time* was not alone in its assessment. Responding to a report from the Center for Responsive Politics that found, for the first time in 2012, a majority of members of Congress were millionaires,² news outlets from National Public Radio,³ to *Reason* magazine,⁴ to the *Washington Times*,⁵ and everything in between ran headlines announcing the finding that at least 268 members of Congress, a little more than half of the body, exceeded the million-dollar mark based on their 2012 disclosure statements.⁶

For some, the news did not come as a shock. Various sources had previously noted academic work suggesting that members of Congress may have plenty of opportunities to enrich them-

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1. Andrew Katz *Congress Is Now Mostly A Millionaires’ Club*, TIME (Jan. 9, 2014); <http://time.com/373/congress-is-now-mostly-a-millionaires-club> [<https://perma.cc/Y7AP-9NV3>].

2. Russ Choma, *Millionaires’ Club: For First Time, Most Lawmakers are Worth \$1 Million-Plus*, OPEN SECRETS (Jan. 9, 2014), <http://www.opensecrets.org/news/2014/01/millionaires-club-for-first-time-most-lawmakers-are-worth-1-million-plus> [<https://perma.cc/6NND-WUAS>].

3. Carly Cody, *Majority In Congress Are Millionaires*, NPR (Jan. 14, 2014), <http://www.npr.org/sections/itsallpolitics/2014/01/10/261398205/majority-in-congress-are-millionaires> [<https://perma.cc/GKN3-73V8>].

4. Ira Stoll, *Are Members of Congress Too Rich?*, REASON (June 6, 2016), <http://reason.com/archives/2016/06/06/are-congressmen-too-rich> [<https://perma.cc/HNL3-CTEZ>].

5. Cheryl K. Chumley, *Millionaires club: More than half in Congress now have the big bucks*, WASH. TIMES (Jan. 10, 2014), <http://www.washingtontimes.com/news/2014/jan/10/millionaires-making-more-half-congress-now-have-big-bucks> [<https://perma.cc/FNW8-PVUL>].

6. Choma, *supra* note 2.

selves at work.⁷ Hoover Institute Fellow Peter Schweizer published a *New York Times* bestseller in 2011 that catalogued the dozens of ways Congressional members fill their pockets in ways that, while unseemly, are by and large legal and downright common practice.⁸

Others, however, largely attributed the high number of millionaires on Capitol Hill to selection effects. Basically, the claim goes, richer people get elected to Congress because it is so costly to run for election and because those who win elections tend to be especially talented people. "Campaigns have become so taxing we elect millionaires," according to Craig Holman of Public Citizen.⁹ "You can't run for Congress unless you have some money stocked away," explained Stephen Fuller, a public policy professor at George Mason University.¹⁰ The congressional salary is "pretty good money, but . . . actually less than what many members would be making in a position of similar prestige and responsibility in the private sector."¹¹

While it may be true that those in Congress are selected on characteristics that are at least related to wealth or income producing ability, in this Article, I present results that are difficult to square with the growing wealth of members of Congress being an artifact of selection effects alone. I show, using data from the required Congressional disclosures, that even when one conditions on higher levels of baseline wealth for members of the House of Representatives, those members still accrue relatively large rates of return on their wealth while they serve in Congress. Further, while it may be possible that, among their talents, these individuals are simply particularly good at man-

7. See, e.g., John Ransom, *How to Go to Congress and Become a Millionaire*, TOWNHALL (May 26, 2011), http://finance.townhall.com/columnists/johnransom/2011/05/26/how_to_go_to_congress_and_become_a_millionaire [https://perma.cc/V8WM-DEJG]; Stephanie Condon, *Why Is Congress a Millionaires' Club*, CBS NEWS (Mar. 27, 2012), <http://www.cbsnews.com/news/why-is-congress-a-millionaires-club> [https://perma.cc/LTL9-8BEV].

8. PETER SCHWEIZER, *THROW THEM ALL OUT* (2011).

9. Arthur Delaney, *Living Large on Capitol Hill*, HUFFINGTON POST (July 31, 2012), http://www.huffingtonpost.com/2012/07/31/living-large-on-capitol-h_n_1726102.html [https://perma.cc/BR94-R2NA] (quoting Holman).

10. Eric Boehm, *Most in Congress are millionaires, but not because they're getting rich off the system*, WATCHDOG (Jan. 14, 2014), <http://watchdog.org/123522/congress-millionaires-theyre-getting-rich-system> [https://perma.cc/9GRA-WR9Z] (quoting Fuller).

11. *Id.* (paraphrasing Fuller).

aging their financial portfolios or happen to be married to individuals who are particularly adept at amassing wealth, if I compare Representatives' rates of returns to the upper echelon of wealth holders in the United States generally, the Representatives substantially outpace other very wealthy people. Presumably, the non-member wealthy also are quite talented financially and, yet, the average wealth of representatives grew over the 2004–2014 period in real terms at a rate almost 7 times that of the 95th percentile of US wealth holders. Over an average 9-year career for a Representative,¹² this translates to an average Representative having about 25% more wealth than the average U.S. resident who started the 9-year period in the same wealth cohort as the Representative.

While this study cannot determine the specific sources of these extraordinary returns, much less isolate causality, these descriptive findings are quite striking. Further, as discussed below, given the large leeway Representatives have in their financial disclosures, and the presumptive incentive to understate financial gains rather than overstate them, it is possible even these gaudy return numbers might understate the growth of Congressional wealth during the time period studied.

As shown below, the basic finding is largely invariant to party. Republicans start out wealthier on average, but Democrats enjoy slightly better appreciation of their wealth. I also do not find strong differences based on which committees the Representatives serve. Interestingly, I do not find similar growth among the even wealthier members of the Senate.

In the Sections that follow, I first discuss the source of the data including some background and details regarding the Congressional disclosure rules in Section I. In Section II, I analyze the change in wealth in both the House and the Senate during the period 2004–2014. Section III provides a comparison of the congressional results with the evolution of wealth at the top end of the U.S. distribution during the same time period. Section IV offers some concerns about the accuracy of the disclosure data, suggesting that the foregoing results may be understated, and Section V concludes.

12. MATTHEW ERIC GLASSMAN & AMBER HOPE WILHELM, CONG. RESEARCH SERV., RL41545, CONGRESSIONAL CAREERS: SERVICE TENURE AND PATTERNS OF MEMBER SERVICE, 1789-2015, at 3–4, (Jan. 3, 2015) <http://www.fas.org/sgp/crs/misc/RL41545.pdf> [<https://perma.cc/566M-A3A6>].

I. THE DISCLOSURE OF CONGRESSIONAL WEALTH

The disclosure of the financial condition of legislators is viewed as an important check on government corruption and self-dealing, as well as a necessary condition to ensure transparency and good government in general. The World Bank reports that 78% of countries covered in its database require public officials to regularly disclose their assets and liabilities, and 91% of those with disclosure rules cover their legislatures. However, only 43% of the countries make this information available to the general public.¹³

The congressional wealth data in this article come from the Center for Responsive Politics website *Open Secrets*. Annual income and wealth disclosures are required under Title I of the Ethics in Government Act of 1978¹⁴ for members of Congress, as well as various congressional staffers, candidates for elected federal positions, Supreme Court Justices, and various individuals in the executive branch, including cabinet members, as well as the President and Vice President.¹⁵ House members must file their disclosures with the Clerk of the House of Representatives,¹⁶ and Senators must file with the Secretary of the Senate: Office of Public Records.¹⁷ Annual disclosures must be filed by May 15; failure to file on time results in a late filing fee of \$200,¹⁸ although extensions are available on a discretionary basis from the relevant ethics committee.¹⁹

13. Press Release, World Bank, Only 43% of Countries Disclose Public Officials' Financial Assets, Says World Bank (Nov. 8, 2012), <http://www.worldbank.org/en/news/press-release/2012/11/08/only-forty-three-percent-countries-disclose-public-officials-financial-assets-says-world-bank> [<https://perma.cc/7ZG2-VQ73>].

14. 5 U.S.C. app. §§ 101–11 (2012).

15. *Id.* § 101.

16. *Id.* § 103(h)(1)(A)(i)(I). For instructions governing the disclosures in the House, see H. COMM. ON ETHICS, INSTRUCTION GUIDE (2016), <http://ethics.house.gov/sites/ethics.house.gov/files/Instructions.pdf> [<https://perma.cc/D2FG-RUT6>] [hereinafter HOUSE INSTRUCTIONS].

17. 5 U.S.C. app. § 103(h)(1)(A)(i)(II). For instructions governing the disclosures in the Senate, see S. SELECT COMM. ON ETHICS, PUBLIC FINANCIAL DISCLOSURE REPORT FOR THE UNITED STATES SENATE EFD INSTRUCTIONS 15 (Mar. 2017), https://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=D8A43EB3-CF5B-479A-81F6-0C9CE4E2F03F [<https://perma.cc/74LZ-A8P2>] [hereinafter SENATE INSTRUCTIONS].

18. 5 U.S.C. app. § 104(d).

19. *Id.* § 101.

For both the Senate and the House, members must report any source of earned income where the aggregate payment is greater than \$200.²⁰ The source of spousal earned income above \$1000 must be disclosed but the amount is not required.²¹ Members of Congress also need not declare their congressional salaries,²² as well as income from a handful of other sources, such as government retirement benefits or social security proceeds.²³

In terms of assets, members must disclose the value of any asset whose value exceeded \$1,000²⁴ or generated income greater than \$200 in the course of the year.²⁵ For example, reportable assets include real property, non-federal retirement accounts and pensions, various financial assets, collectibles, and intellectual property.²⁶ Valuations are to be based on good faith estimates of the fair market value of the asset at the close of the disclosure period.²⁷ Various assets are excluded from the disclosure requirement, including “real property not held for investment purposes . . . non-interest-bearing [bank] accounts, . . . [and] [p]ersonal property . . .”²⁸ Additionally, in both chambers, assets held in a “qualified blind trust”²⁹ or “excepted trust” need not be disclosed.³⁰ Such trusts must meet various conditions, including that they were not established by the member or his or her spouse, and that the specific holdings of the trust are unknown to the member and the member’s spouse.³¹

In addition to the member’s and member’s spouse’s assets, liabilities owed by the member, the member’s spouse, the member’s dependent children that exceed \$10,000 at any point during the year must be disclosed.³² Both chambers have a number of exclusions. For example, while House members

20. *Id.* § 102(a)(1)(A).

21. *Id.* § 102(e)(1)(A).

22. *Id.* § 102(a)(1)(A).

23. *Id.* § 102(i).

24. *Id.* § 102(a)(1)(A).

25. *Id.* § 102(c).

26. *Id.* § 102(a)(3)–(5), (8).

27. *Id.* § 102(a)(3).

28. HOUSE INSTRUCTIONS, *supra* note 16, at 22.

29. *Id.* § 102(f).

30. SENATE INSTRUCTIONS, *supra* note 17, at 14–15.

31. *Id.*; *see also* 5 U.S.C. app. § 101(f) (describing requirements for a “qualified blind trust”).

32. 5 U.S.C. app. § 101(a)(4).

must disclose mortgages secured by their personal residence if the mortgage exceeds \$10,000, Senators are not required to disclose such mortgages.³³

Although these income and wealth disclosures are meant to create a transparent picture of a members' financial position, clearly the exclusions have the potential to impede any attempt to get an accurate and relevant picture of an elected official's financial position. For example, for the median American, the primary residence makes up a large fraction of total wealth,³⁴ but is omitted from mandated disclosures entirely.

To make matters worse, the disclosures use very broad ranges for the valuations of assets and income. For example, in House member Darrell Issa's 2015 disclosure,³⁵ the first three assets listed in Schedule A are real property where the valuations provided are \$500,001–\$1,000,000, \$5,000,001–\$25,000,000, and \$1,000,001–\$5,000,000.³⁶ Additionally, he lists a number of financial assets as being valued at \$25,000,001–\$50,000,000, and some others valued at \$50,000,000-plus (which is the top category provided in the disclosures).³⁷ The valuation categories for spousal assets top out at \$1,000,000-plus.³⁸ The ranges for the valuation of liabilities are similarly broad³⁹ and, therefore, of limited value.

Such wide valuation ranges make it virtually impossible to know a member's net worth with any real precision, even under the best possible circumstances. However, there is suggestive evidence that there are significant errors in many of the disclosures. For example, an article in *Roll Call* suggests that initial congressional financial disclosures have about a 25% error rate, as indicated by subsequent amendments.⁴⁰ Although

33. SENATE INSTRUCTIONS, *supra* note 17, at 23–24.

34. See, e.g., Jesse Bricker et al., *Changes in U.S. Family Finances from 2010 to 2013: Evidence from the Survey of Consumer Finances*, FED. RESERVE BULL. (Sept. 2014), at 1, <https://www.federalreserve.gov/pubs/bulletin/2014/pdf/scf14.pdf> [<https://perma.cc/AT89-NDGX>].

35. Darrell Issa, Financial Disclosure Report, 2015, http://pfds.opensecrets.org/N00007017_2015.pdf [<https://perma.cc/B6GK-PGRS>] (filed June 24, 2016).

36. *Id.* at 1.

37. *Id.* at 1–4.

38. 5 U.S.C. app. § 102(e)(1)(F) (2012).

39. *Id.*

40. Amanda Becker, *Financial Disclosure Reports Show 25% Error Rate*, ROLL CALL (May 9, 2011), http://rollcall.com/issues/56_119/financial-disclosure-congress-205462-1.html [<https://perma.cc/6WPY-XFQ6>].

the Ethics in Government Act allows for financial penalties (up to \$50,000) and the potential for prison time (up to one year) for falsifying the information in the disclosures⁴¹ and the False Statements Accountability Act of 1996 also provides for fines and up to a five year prison term,⁴² it is not clear that the disclosures are monitored very rigorously, given that primary oversight of the disclosures resides with internal congressional ethics committees, although the independent Office of Congressional Ethics established by the House in 2008⁴³ potentially provides a safeguard against abuse. However, even the Office of Congressional Ethics ultimately just reports its findings and recommendations to the House Committee on Ethics.⁴⁴

Despite these concerns, if the disclosures are reasonably consistent across time or any errors are random over time, it is possible to examine the disclosure data to determine whether there is a systematic tendency for wealth to grow over time as individuals serve in Congress.

II. THE GROWTH OF CONGRESSIONAL WEALTH

As discussed above, the congressional disclosure data are not ideal. In addition to leaving out much of the relevant information regarding a member's household wealth, the categorical nature of the disclosures, wherein members only need to declare values in fairly wide ranges, ensures that any analysis of congressional wealth will be noisy. The coding done by the Center for Responsive Politics provides three different measures of a member's wealth. The minimum value treats all assets as taking the lower value of the category reported and the higher value of the category reported for disclosed liabilities. For very high value assets, those valued above \$50 million dollars for assets held by the member and over \$1 million for assets held by the member's spouse are coded as being worth \$50,000,001 and \$1,000,001, respectively. Otherwise, for the maximum value, assets are valued as the higher number in the

41. 5 U.S.C. app. § 104(d); *see also id.* § 104(b) (directing the ethics committees to refer potential violations to the Attorney General).

42. 18 U.S.C. § 1001(a) (2012).

43. H.R. Res. 895, 110th Cong. (2008).

44. *About*, OFFICE OF CONG. ETHICS, <https://oce.house.gov/about> [<https://perma.cc/W2TB-66GM>] (last accessed May 19, 2017).

categorical range reported, and liabilities are valued as the lower number in the range reported. The so-called average value is determined by the midpoint between the minimum and maximum value measures for the member.⁴⁵

Table 1 provides the average values for the Representatives' minimum, average, and maximum wealth measures by year for the period 2004–2014. These dollar amounts are nominal, that is, they do not include any adjustments for changes in the price level over time.

Table 1: Average Wealth Measures for Members of the House of Representatives

Nominal Dollars			
	Minimum Value	Average Value	Maximum Value
2004	1,882,756	4,244,714	6,606,671
2005	1,833,068	4,502,780	7,172,492
2006	1,892,218	5,079,274	8,266,330
2007	2,078,468	5,675,164	9,271,860
2008	1,600,751	4,739,307	7,877,863
2009	1,794,504	5,034,149	8,273,796
2010	2,350,687	5,927,844	9,505,002
2011	2,298,144	6,525,782	10,800,000
2012	2,375,403	5,948,607	9,521,810
2013	2,882,484	7,189,139	11,500,000
2014	2,951,400	7,612,982	12,300,000
Average Growth Rate	4.60%	6.02%	6.41%

Over the decade from 2004–2014, the average wealth of members of the House (using the average value or midpoint measure applied to each Representative in the given year and then averaged over the entire body for that year) grew from \$4.2 million to more than \$7.6 million. This translates to 6% in terms of annual growth on average over the period. The growth rate was a little

45. See *About the Personal Finances Data & CRP's Methodology*, OPEN SECRETS, <http://www.opensecrets.org/pfds/methodology.php> [https://perma.cc/T5BF-3FS3] (last accessed May 19, 2017).

lower using the minimum wealth measure to calculate the averages (4.6% per year) and a little higher when the maximum value is used to construct the averages (6.4%).

The values in Table 1 may not be very informative, however. Although the period examined is one of relatively low inflation, generally speaking, to purchase a bundle of goods that cost \$1 in 2004 (the beginning of the period examined) would have cost \$1.25 in 2014.⁴⁶ Thus, some fraction of the growth rates presented above is actually just due to generic price inflation in the economy over the period.

To give a better sense of the change in actual value, or purchasing power, over time, Table 2 presents the same information adjusting each year to reflect value in terms of 2013 prices.⁴⁷

Table 2: Average Wealth Measures for Members of the House of Representatives

Real Dollars (2013 Base)			
	Minimum Value	Average Value	Maximum Value
2004	2,321,870	5,234,704	8,147,539
2005	2,186,513	5,370,988	8,555,463
2006	2,186,534	5,869,306	9,552,079
2007	2,335,241	6,376,272	10,400,000
2008	1,732,006	5,127,910	8,523,815
2009	1,948,578	5,466,378	8,984,178
2010	2,511,322	6,332,926	10,200,000
2011	2,380,062	6,758,394	11,100,000
2012	2,410,197	6,035,738	9,661,280
2013	2,882,484	7,189,139	11,500,000
2014	2,904,287	7,491,455	12,100,000
Average Growth Rate	2.26%	3.65%	4.03%

46. See *Consumer Price Index Data from 1913 to 2017: All Urban Consumers – (CPI-U) 1913–2017*, US INFLATION CALCULATOR, www.usinflationcalculator.com/inflation/consumer-price-index-and-annual-percent-changes-from-1913-to-2008 [https://perma.cc/Y62X-ZSVU].

47. 2013 dollars is selected as the benchmark to facilitate comparisons to U.S. wealth data, last collected in 2013. See *infra* Section III.

Once this price effect is removed from the data, we can see that the average Representative's wealth (using the midpoint or average measure) grew from \$5.2 million in 2004 (reflecting 2013 purchasing power) to \$7.5 million in 2014 (again reflecting 2013 purchasing power). This real growth rate, that is, the growth rate in real purchasing power, exceeds an average of 3.6% per year. Once again, if the minimum wealth measure is used, the rate is lower (2.3%) and if the maximum wealth measure is used, the growth rate is higher (4%).

The growth of nominal and real growth for each of the three Congressional wealth measures is shown in Figures 1–3 below. To aid in visualization, the observations are connected using locally weighted regression techniques that allow for the possibility of non-linear trends. As is apparent from each of the three graphs, while all of the measures have grown, the growth has not been entirely uniform over time.

Figure 1: Minimum Wealth Estimates

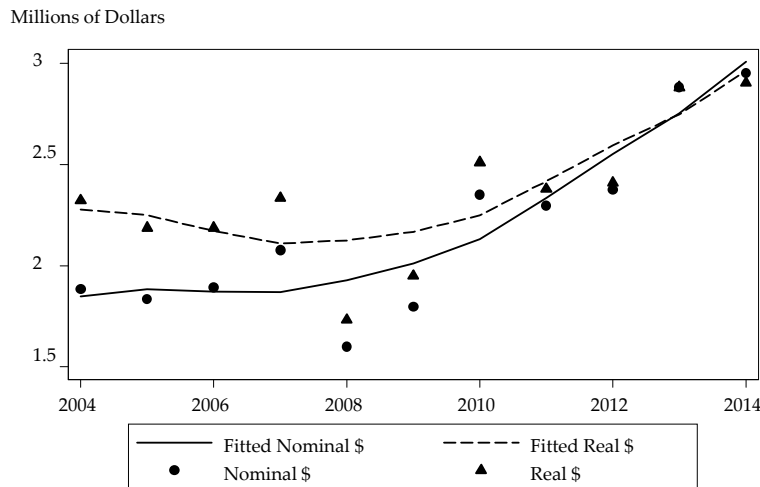


Figure 2: Average Wealth Estimates

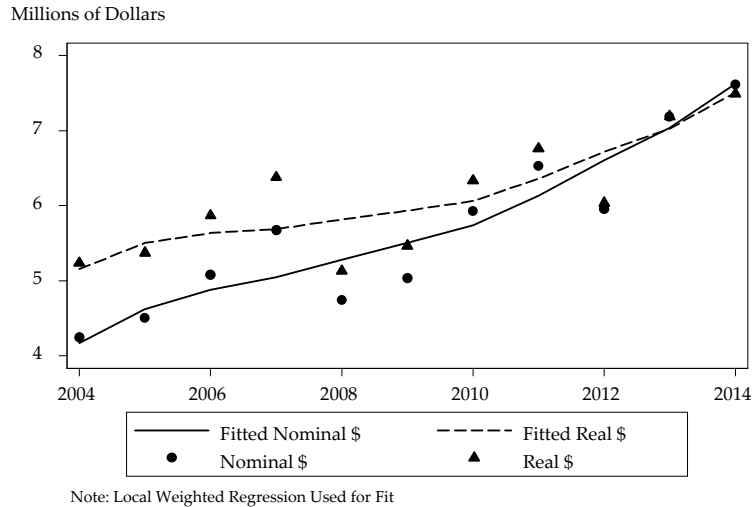
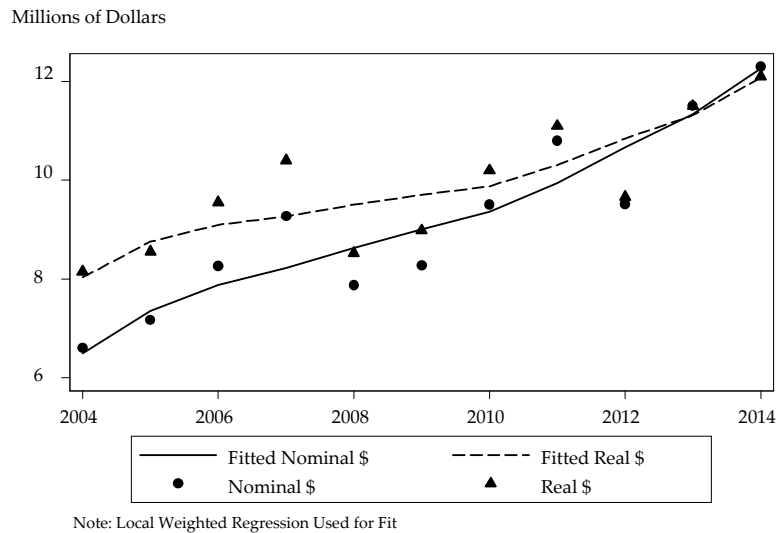


Figure 3: Maximum Wealth Estimates



The average year-to-year comparison, while interesting, potentially conflates two separate issues. As indicated above, some observers conjecture that the appearance of a richer group of members of Congress might be driven by selection

effects.⁴⁸ More specifically, perhaps, the financial demands of running for and securing a seat in Congress increasingly favor individuals who are already rich. On the other hand, some of the appearance may be driven by individuals gaining wealth while they hold or because they hold their seat.

The data do not support the hypothesis that there is a trend of richer individuals entering the House. Table 3 presents the average wealth of House members in 2004 in 2013 dollars and then compares it to the average wealth of freshman House members in each of the subsequent elections, again, all in 2013 dollars. In two elections, the in-coming Representatives actually had a lower average net worth, in one election the net worth was about the same as the 2004 average, and in two elections the average net worth of newcomers was higher. What's more, in three of the elections, the average wealth of the more senior members was higher than the average wealth of the freshman Representatives. This suggests that compositional changes are not driving any growth in House member wealth.

Table 3: Wealth of Newcomers Compared with Baseline House Wealth

Real Dollars (2013 Base)		
2004 Average	5,234,704	
	Freshmen	Non-Freshmen
2005 Average	4,086,041	5,498,843
2007 Average	5,887,154	6,436,028
2009 Average	8,072,867	5,174,364
2011 Average	4,589,959	7,237,407
2013 Average	8,757,428	6,887,545

To separate these two influences more rigorously, I estimated a so-called fixed effects regression wherein a separate intercept parameter (or baseline) is estimated for every House member in the dataset. Effectively, this removes any influence of richer people simply becoming House members over time. I also estimate individual time period effects for each year (ex-

48. See *supra* notes 9–11 and accompanying text.

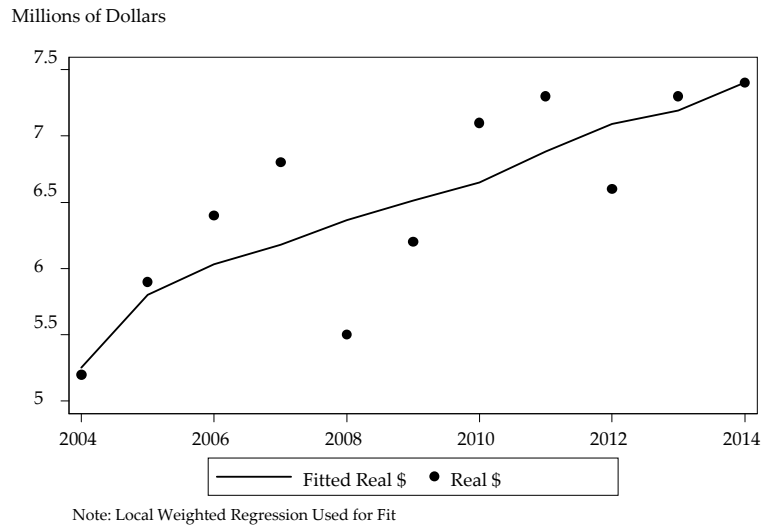
cept for the first year, 2004). The estimates for these individual year effects can be treated as the average increase in wealth (above a member's baseline) for the given year relative to the base year of 2004. For the base year comparison, I simply use the average wealth of House members in 2004. The cumulative average wealth estimates implied by this exercise are provided in Table 4 below.

Table 4: Average Wealth Net of Membership Changes

Real Dollars (2013 Base)	
2004	5,234,704
2005	5,875,250
2006	6,444,549
2007	6,817,500
2008	5,546,110
2009	6,173,796
2010	7,070,276
2011	7,322,380
2012	6,630,425
2013	7,267,662
2014	7,365,050
Average Growth Rate	3.47%

Table 4 indicates that the real purchasing power of House member wealth (as measured by the midpoint metric) grew from \$5.2 million in 2004 to \$7.4 million in 2014, and this growth is net of any influence from a changing composition of House members or increasing price levels. This suggests, relative to the earlier annual average growth estimate of 3.65%,⁴⁹ virtually all of the growth in wealth is attributable to existing members getting richer. Figure 4 below shows these changes graphically, again with an estimated non-linear locally weighted trend line to examine the general year-to-year trajectory of wealth.

49. See *supra* tbl. 2.

Figure 4: Wealth Estimates Net of Membership Changes

Although there are a few downturns in wealth (most notably the large decline in 2008 likely associated with the financial crisis), the trend is strongly upward and fairly steady. In Table 5, I break down the analyses by party.

Table 5: Average Wealth Net of Membership Changes by Party

Real Dollars (2013 Base)		
	Democrats	Republicans
2004	3,202,262	7,082,274
2005	3,387,131	8,139,393
2006	4,359,892	8,305,964
2007	4,269,393	9,212,836
2008	3,114,262	7,790,720
2009	3,640,589	8,652,420
2010	3,904,654	10,192,558
2011	4,086,242	10,436,040
2012	4,037,184	9,228,528
2013	4,745,886	9,689,127

2014	5,469,708	9,291,377
Average Growth Rate	5.50%	2.75%

Table 5 uses the same fixed effects procedure as used above applied separately to all members in the dataset based on whether the individual is a Republican or a Democrat. While members of both parties exhibited healthy average annual growth rates, the rate of growth for Democrats was twice the rate for Republicans. On the other hand, Republican members start from a higher average baseline, so it is not possible to credibly conclude much on the basis of party regarding the general growth of House member wealth. While Democrats may be more successful in leveraging their position to accumulate wealth at a higher rate, it is not possible to rule out that Republican growth rates are lower because the absolute value of the gains to be made from the office are somewhat fixed, and, therefore, generate smaller proportional returns relative to the higher starting base of wealth.

Another possibility is that opportunities to accrue wealth differ based on the committees on which a Representative serves. For example, there has been some speculation and evidence that members of Congress exploit their foreknowledge about the passage of regulations to make well-timed trades that generate above market returns. Ziobrowski et al. examine the patterns with which Senators bought and sold stocks during the period of 1993–1998, finding statistically significant positive abnormal returns upon purchases that, if a portfolio mimicked these purchases, is equivalent to above market returns of 0.85% per month, while a similar portfolio that tracked sales by Senators would generate monthly above market returns of 0.12%.⁵⁰ Similar research using the trading activity of House members found similar results. Specifically, they found that a portfolio that mirrored the trades of House members would generate above market returns of about 6% annually.⁵¹ Interestingly, and perhaps consistent with my findings above regarding rates of

50. Alan J. Ziobrowski et al., *Abnormal Returns from the Common Stock Investments of the U.S. Senate*, 39 J. FIN. & QUANTITATIVE ANALYSIS, 661 (2004).

51. Alan J. Ziobrowski et al., *Abnormal Returns from the Common Stock Investments of Members of the U.S. House of Representatives*, 13 BUS. & POL., no. 1 (2011).

growth by party, they found for both the Senate and the House that the extent to which the members beat the market was larger for Democrats. These results, or at least their generality, has been called into question by Eggers and Hainmueller, who show that for the period 2004–2008, members of Congress would have performed better financially by investing in a passive index fund than trading actively as they did.⁵² Anecdotes, however, do suggest that members of Congress use their non-public information to make opportunistic trades. Schweizer collects quite a few such anecdotes and notes some especially lucky trades made by members of Congress during the financial crisis of 2008, both in terms of selling earlier than most when insiders knew that things were worse than the public thought and then buying the right stocks before bailout decisions had been made public.⁵³

Perhaps one way to investigate the possibility that this kind of insider trading is driving the wealth results presented above is to break the averages down along committee membership lines. Table 6 recreates the foregoing wealth analysis parsing the sample by committee. That is, I re-run the basic fixed effects regression on a sample composed of all the individuals who served on a given committee during the sample period.⁵⁴

52. Andrew C. Eggers & Jens Hainmueller, *Capitol Losses: The Mediocre Performance of Congressional Stock Portfolios*, 75 J. POL. 535 (2013).

53. SCHWEIZER, *supra* note 8.

54. The committee membership data come from Charles Stewart III & Jonathan Woon, *Congressional Committee Assignments, 103rd–114th Congresses, 1993–2017: House*, http://web.mit.edu/17.251/www/data_page.html#2 [<https://perma.cc/9UZX-ZFGA>] (last accessed May 19, 2017).

Table 6: Average Annual Growth in House Member Wealth by Committee Membership (Net of Membership Change Effects)

Real Dollars (2013 Base)			
Committee	2004 Average	2014 Average	Annual Growth Rate
Education & Labor	3,951,156	9,422,950	9.08%
Armed Services	2,785,470	5,716,886	7.45%
Science & Technology	1,637,908	3,197,146	6.92%
Homeland Security	9,743,212	18,672,662	6.72%
Judiciary	2,100,121	3,895,638	6.37%
Budget	3,044,908	4,822,537	4.71%
Oversight & Gov. Reform	5,062,636	7,078,066	3.41%
Foreign Affairs	5,604,912	7,651,303	3.16%
Ways & Means	7,061,198	9,610,125	3.13%
Agriculture	7,573,322	9,968,156	2.79%
Transportation & Infrastructure	5,018,072	6,592,273	2.77%
Natural Resources	3,456,058	4,266,900	2.13%
Energy & Commerce	6,253,352	7,553,026	1.91%
Veterans Affairs	2,036,611	2,440,872	1.83%
Small Bus.	2,905,788	3,118,602	0.71%
Financial Services	5,359,157	5,397,267	0.07%
Appropriations	5,121,276	3,681,891	-3.25%

No clear pattern emerges. If such insider trading were driving the wealth effects, we might predict that such opportunities would be largest in the Financial Services Committee. In fact, there is almost zero growth among that committee's members during the entire sample period. While it is possible that the other committees have just as many or more opportunities to engage in such informed trading behavior, these results are not particularly enlightening.

While the evidence is fairly compelling that House members do add significantly to their wealth while they serve in Congress, the data do not offer any credible insights as to the specific sources of those wealth gains. As of yet, we also have no way to judge whether such gains are particularly large relative the gains that similar rich people experienced during this time period. Perhaps, as hinted at in the introduction, House members are talented folks and, so, we should not be particularly surprised that their net worth grows significantly over time. Before engaging in that calibration in the next section, I present similar analyses (though with noticeably different results) for Senators.

Table 7: Average Wealth Measures for Members of the Senate

Nominal Dollars			
	Minimum Value	Average Value	Maximum Value
2004	9,297,659	14,500,000	19,600,000
2005	8,620,107	14,600,000	20,500,000
2006	8,246,720	14,100,000	20,000,000
2007	9,463,898	17,100,000	24,700,000
2008	7,638,789	13,700,000	19,800,000
2009	7,034,082	13,200,000	19,500,000
2010	6,763,826	13,400,000	20,000,000
2011	5,492,716	11,900,000	18,400,000
2012	7,128,707	12,800,000	18,400,000
2013	5,198,997	10,900,000	16,600,000
2014	4,764,071	10,200,000	15,700,000
Average Growth Rate	-6.49%	-3.46%	-2.19%

Although, as suggested before, nominal amounts provide little information, two things do jump out relative to the amounts for the House in Table 1. First, members of the Senate are substantially wealthier, on average, than the members of the House, regardless of which wealth measure is used. Second, the rates of growth for the wealth of Senators are uniformly negative.

Table 8: Average Wealth Measures for Members of the Senate

Real Dollars (2013 Base)			
	Minimum Value	Average Value	Maximum Value
2004	11,500,000	17,800,000	24,200,000
2005	10,300,000	17,400,000	24,400,000
2006	9,529,418	16,300,000	23,100,000
2007	10,600,000	19,200,000	27,800,000
2008	8,265,138	14,900,000	21,400,000
2009	7,638,023	14,400,000	21,100,000
2010	7,226,035	14,300,000	21,400,000
2011	5,688,504	12,400,000	19,000,000
2012	7,233,124	13,000,000	18,700,000
2013	5,198,997	10,900,000	16,600,000
2014	4,688,022	10,100,000	15,400,000
Average Growth Rate	-8.58%	-5.51%	-4.42%

Once again, we find that in real terms, the average Senator is substantially wealthier than the average Representative, but, on average, Senate wealth declined, which was something not observed in the House. Figures 5–7 below show the extent of this downward trend more clearly.

Figure 5: Minimum Senate Wealth Estimates

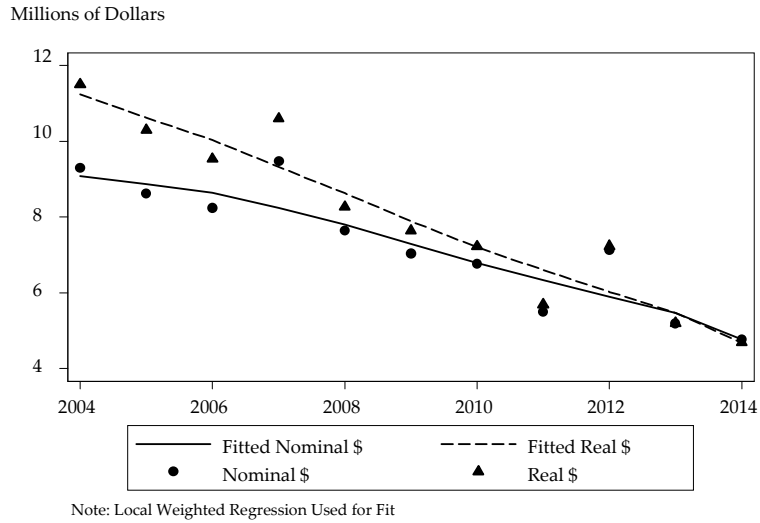


Figure 6: Average Senate Wealth Estimates

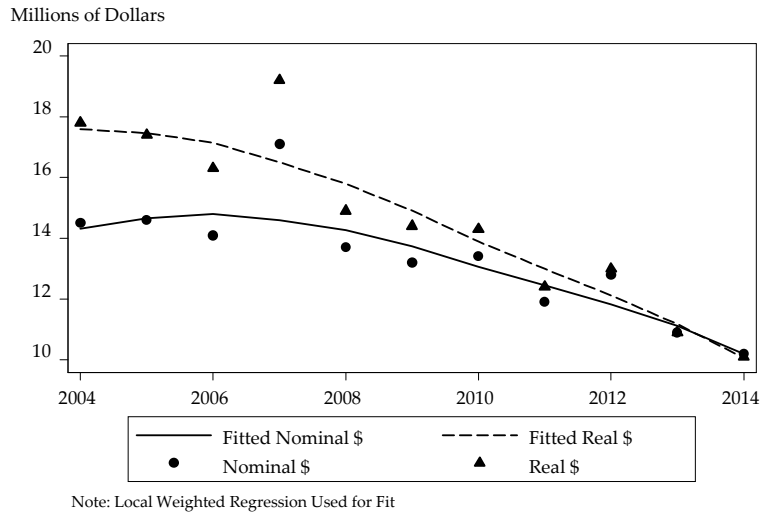
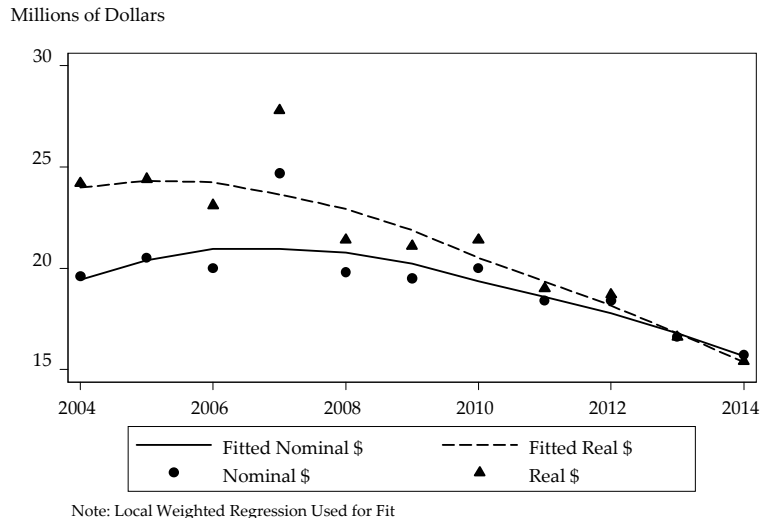


Figure 7: Maximum Senate Wealth Estimates



As was the case with the year-by-year averages for the House, such numbers are a mixture of wealth changes arising because new people are elected to Senate and changes in the wealth of sitting Senators. As was the case with the House, there is no clear pattern with respect to how the wealth of new Senators relates to the wealth of existing Senators. Sometimes, the newcomers are wealthier and sometimes they are not.

Table 9: Wealth of Newcomers Compared with Baseline Senate Wealth

Real Dollars (2013 Base)		
2004 Average	17,800,000	
	Freshmen	Non-Freshmen
2005 Average	3,331,761	18,700,000
2007 Average	11,900,000	19,900,000
2009 Average	29,400,000	13,000,000
2011 Average	14,300,000	12,100,000
2013 Average	2,813,768	11,900,000

As above,⁵⁵ Table 10 attempts to completely account for the effect of a changing Senate composition on average Senate wealth by providing estimates from a model that includes individual baseline controls for each Senator in the database, leaving the individual year variables to pick up the average deviation from the baseline year 2004 calculated across all individuals holding a Senate seat in the given year.

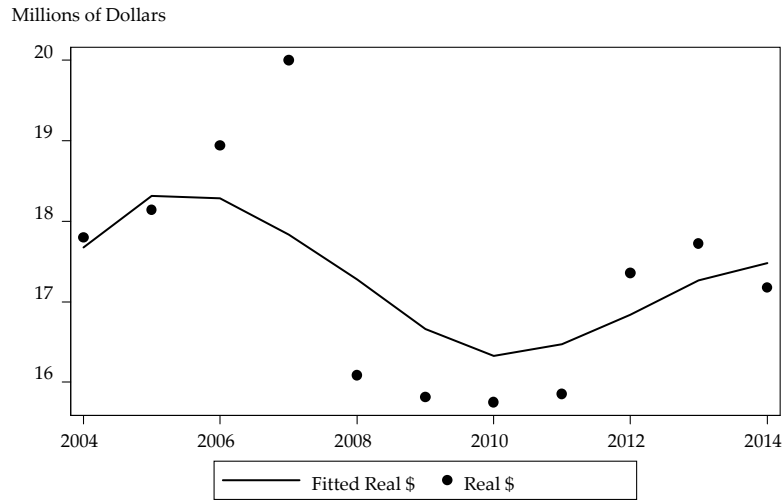
Table 10: Average Senate Wealth Net of Membership Changes

Real Dollars (2013 Base)	
2004	17,800,000
2005	18,137,378
2006	18,938,699
2007	20,000,407
2008	16,087,580
2009	15,813,237
2010	15,748,498
2011	15,855,084
2012	17,355,025
2013	17,722,459
2014	17,174,533
Average Growth Rate	-0.36%

Here, as distinct from the results for the House, we find the during the sample period, much of the change in wealth year-to-year is due to membership changes, as opposed to steady changes in wealth for Senators during their Senate tenure. This is conveyed graphically in Figure 8 below.

55. See *supra* tbl. 4.

Figure 8: Senate Wealth Estimates Net of Membership Changes



Note: Local Weighted Regression Used for Fit

The Senate graph is in striking contrast to the strong sustained upward trend in wealth seen among the Representatives.⁵⁶ Contrary to the party breakdown for the House, in the Senate, Democrats have a much higher initial baseline wealth, but their average growth during the 2004–2014 period is negative, whereas the growth rate for Republicans is slightly positive.

56. See *supra* fig. 4.

Table 11: Average Senate Wealth Net of Membership Changes by Party

Real Dollars (2013 Base)		
	Democrats	Republicans
2004	26,700,000	9,965,386
2005	27,098,935	10,305,459
2006	29,861,392	9,304,129
2007	29,848,883	11,267,721
2008	23,162,903	10,066,592
2009	23,214,089	9,697,323
2010	22,406,394	10,348,286
2011	23,923,704	8,985,260
2012	26,556,775	9,292,328
2013	25,658,624	11,091,261
2014	25,333,316	10,361,723
Average Growth Rate	-0.52%	0.39%

For the Senate, I omit the analysis by committee. Since there does not seem to be much interesting information about Senate wealth that is detectable by even the aggregate data, it is extremely unlikely that anything credible would be revealed by looking at the relatively small Senate committees.

While I have no strong explanation for the basically stable Senate wealth, certainly none that can be tested with the current data, it is possible that the more lenient Senate disclosure rules,⁵⁷ coupled with the significantly higher wealth, make a systematic examination of the Senate disclosure data unlikely to yield any clear picture.

III. CONGRESSIONAL WEALTH IN CONTEXT

The meaning of the foregoing numbers about the growth of wealth among members of Congress is somewhat elusive. The fact that the rich people in the House of Representatives got richer during the 2004–2014 span is hard to understand with-

57. See, e.g., SENATE INSTRUCTIONS, *supra* note 17, at 23–24.

out more context. Hopefully the legislators of the U.S. are talented people who would do a good job husbanding their wealth and adding to it whether they were politicians or not. In this Section, I match the 2004 wealth baseline with its percentile equivalent in data on wealth in U.S. households to judge the House members' performance against other presumptively economically sophisticated investors.

The data on U.S. wealth come from the Federal Reserve's Survey of Consumer Finances.⁵⁸ This is a comprehensive survey regarding the elements of a household's wealth, using fairly large sample sizes and a rigorous survey methodology.⁵⁹ The surveys are performed every three years. The 2004, 2007, 2010, and 2013 surveys cover households in the same period as the congressional disclosure data used above. For the following exercises, I use the Summary Extract Public Data⁶⁰ (though the conclusions would be comparable if the internal data were used or if the full survey were used). All dollar amounts for each year of the survey have been deflated using a 2013 base, so the survey numbers are comparable to the 2013 dollar values used for the congressional wealth estimates presented above. For continuity between the two datasets, I recalculate all average annual growth rates based on a 2013 endpoint. The average House wealth from the fixed effects model that accounts for changing chamber membership⁶¹ and associated growth rates are presented in Table 12 below with only the years corresponding to Federal Reserve survey years in order to focus attention on the comparisons between the two datasets.

58. *Survey of Consumer Finances*, FED. RESERVE, <http://www.federalreserve.gov/econresdata/scf/scfindex.htm> [<https://perma.cc/6GU9-G47R>] (last accessed May 19, 2017).

59. *See id.*

60. *Id.*

61. *See supra* tbl. 4 and accompanying text.

Table 12: Average Wealth Net of Membership Changes

Real Dollars (2013 Base)	
2004	5,234,704
2007	7,051,677
2010	7,350,335
2013	7,195,684
Average Growth Rate	3.60%

One might first attempt to compare the House members with other people who had comparable incomes. In 2004, the salary of a member of Congress was a nominal \$158,100,⁶² which is equivalent to \$194,974 in 2013 prices. This wage income level is equivalent to the wage income of approximately the 96th percentile in the 2004 Survey of Consumer Finances. This wage income level is above the 99th percentile among U.S. households. In 2007, members' salaries were \$165,200⁶³ (\$185,646 in 2013 dollars). In 2010, the salary was \$174,000 (\$185,890 in 2013 dollars) and the 2013 salary was the same.⁶⁴ However, many of the individuals in the House have working spouses and the unit of analysis for wealth in the Survey of Consumer Finances is the household, so I also provide a comparison using households where the wage income was twice the congressional salary of \$316,200 (\$389,948 in 2013 dollars). To provide the comparison, I find the average wealth for households above the wage income level of the congressional household in the given year. I deduct the value of the household's primary residence and add back the balance of any debt secured by that residence since, at least prior to 2013, these items were not required in the House members' disclosures.⁶⁵

62. *About Member of Congress Salaries*, LEGISTORM, https://www.legistorm.com/member_of_congress_salaries.html [<https://perma.cc/JDP5-3JBS>] (last accessed May 9, 2017).

63. *Id.*

64. *Id.*

65. See Stop Trading on Congressional Knowledge (STOCK) Act, § 13, Pub. L. No. 112-105, 126 Stat. 291, 300 (2012) (amending Ethics in Government Act to require disclosure of mortgages on personal residences).

Table 13: Average Net Worth for households at or above the Congressional Salary in the Given Year

Real Dollars (2013 Base)		
Income Used For Comparison	Congressional Salary and Above	Double the congressional Salary and Above
	Average Wealth Excluding Primary Residence and Associated Debt	
2004	3,155,765	8,842,473
2007	3,439,329	7,867,802
2010	3,099,171	6,224,551
2013	2,933,954	6,336,128
Average Annual Growth	-0.81%	-3.64%

The income-defined comparators experienced much less growth in their household wealth than did the House members. In fact, the comparators' wealth declined. This income-based comparison, however, may be inapt since the two comparison income levels are associated with baseline 2004 wealth levels that are either too low or too high relative to the House members' 2004 baseline wealth.

Instead, perhaps, it makes sense to choose the comparators directly on the basis of baseline 2004 wealth. Table 14 does just that, though I provide comparisons based on many definitions of net wealth. As above, one of the definitions excludes the primary residence and its associated debt since these things were not required prior to the 2012 STOCK Act for members of Congress.⁶⁶ However, the Center for Responsive Politics notes that some members included these items even in their pre-2013 disclosures, and, in those cases, the Center included the amounts in their wealth measures.⁶⁷

66. *Id.*

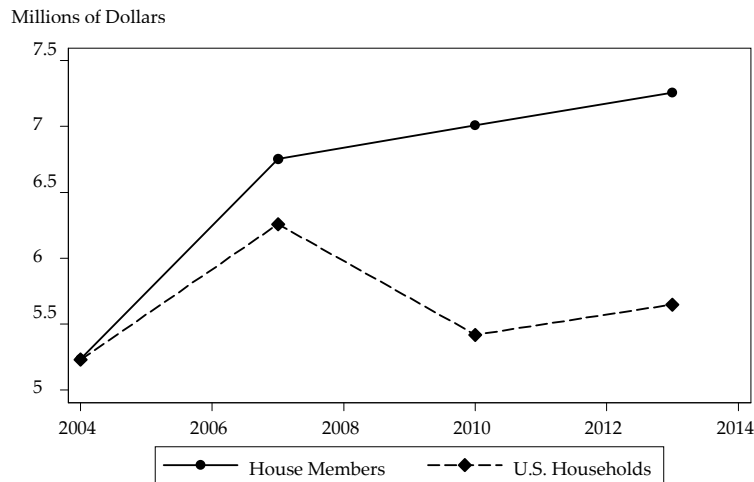
67. *About the Personal Finances Data & CRP's Methodology*, *supra* note 45.

Table 14: Average Wealth of Similarly Situated U.S. Residents: House Comparison

Real Dollars (2013 Base)				
	Average Total Net Wealth	Home Value Excluded	Home Equity Excluded	Home Equity Included in 2013 Only
2004 Percentile	93.5th	94.9th	94.6th	94.6th
2004	5,230,805	5,229,255	5,230,839	5,230,839
2007	6,197,031	6,258,066	6,232,947	6,237,971
2010	5,373,483	5,423,090	5,452,602	5,452,602
2013	5,471,454	5,646,464	5,629,145	5,646,464
Average Annual Growth	0.50%	0.86%	0.82%	0.85%

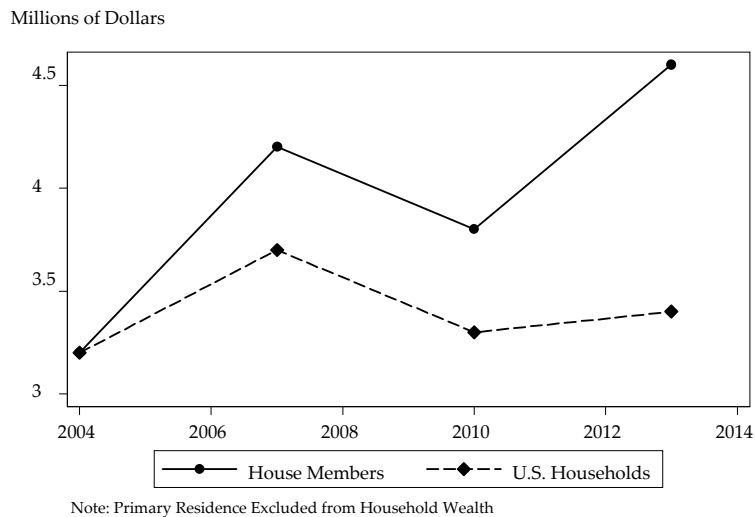
The growth enjoyed by House members was not broadly shared by other wealthy people. This departure post-2004 is quite visible in Figure 9.

Figure 9: House of Representatives Members' Wealth Compared to U.S. 95 Percentile



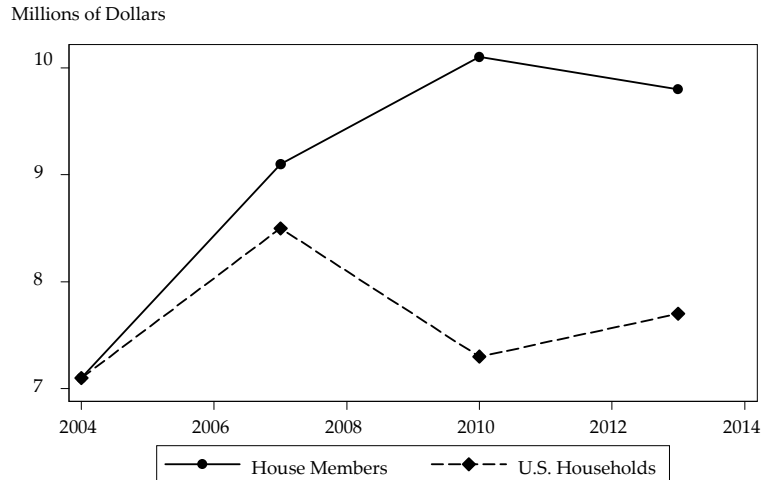
While the 2004 to 2007 growth was comparable between the two groups, House members recovered and even thrived after the financial crisis, whereas the comparison households have yet to really recover. Such a pattern is consistent with the narrative provided by Schweizer regarding the trading activities of political insiders before the markets crashed. Many members of Congress displayed remarkable luck picking the right stocks on the cheap once the government decided on, but had not yet announced, plans to help certain firms, such as Citigroup.⁶⁸ Figures 10–11 break out these data by party affiliation.

Figure 10: House Democrats' Wealth Compared to U.S. 90.2 Percentile



68. SCHWEIZER, *supra* note 8.

Figure 11: House Republicans' Wealth Compared to U.S. 99.6 Percentile



Note: Primary Residence Excluded from Household Wealth

Regardless of the specific source of the gap between the growth rates of House members' wealth and the growth rates enjoyed by similarly situated people who are not members of the House, the gap itself is striking from a descriptive standpoint. Depending on what is included in the net worth measure, House members' wealth grew anywhere from 4 to 7 times as quickly as did their wealth comparators. The difference between an average growth rate of 0.86% and one of 3.7% would generate an average premium in wealth over a Representative's average 9-year tenure of around 25% that would not be experienced by a similarly wealthy person without the advantage of being a member of the House.

Another way to situate the observed growth is to determine which U.S. wealth percentiles have the same average value of wealth as the average House member's wealth. Table 15 below provides these comparisons for the various definitions of wealth used above.

Table 15: Comparable Wealth Percentiles: House Comparison

Real Dollars (2013 Base)			
	Average Total Net Wealth	Home Value Excluded	Home Equity Excluded
2004	93.5	94.9	94.6
2007	94.2	95.4	95.2
2010	95.6	96.4	96.2
2013	95.6	96.3	96.2

As we saw earlier, Senate wealth did not growth during this time period. It is still useful to view Senate wealth in context, so similar comparisons are provided below.

Table 16: Average Wealth of Similarly Situated US Residents: Senate Comparison

Real Dollars (2013 Base)				
	Average Total Net Wealth	Home Value Excluded	Home Equity Excluded	Home Equity Included in 2013 Only
2004 In-come Percentile	99th	99.23th	99.2th	99.2th
2004	18,600,000	18,600,000	18,600,000	18,600,000
2007	21,200,000	21,600,000	21,500,000	21,500,000
2010	18,200,000	18,600,000	18,600,000	18,600,000
2013	18,900,000	19,500,000	19,300,000	19,500,000
Average Annual Growth	0.18%	0.53%	0.41%	0.53%

Figure 12: Senate Wealth Compared to U.S. 99 Percentile

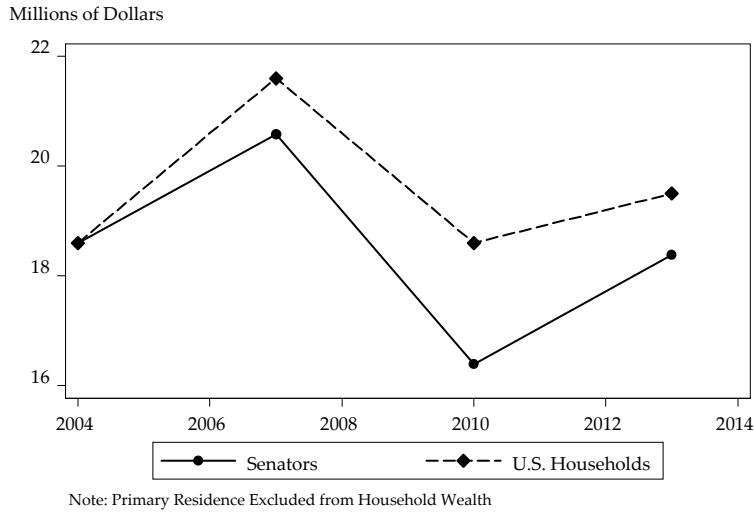


Figure 13: Senate Democrats' Wealth Compared to U.S. 99.6 Percentile

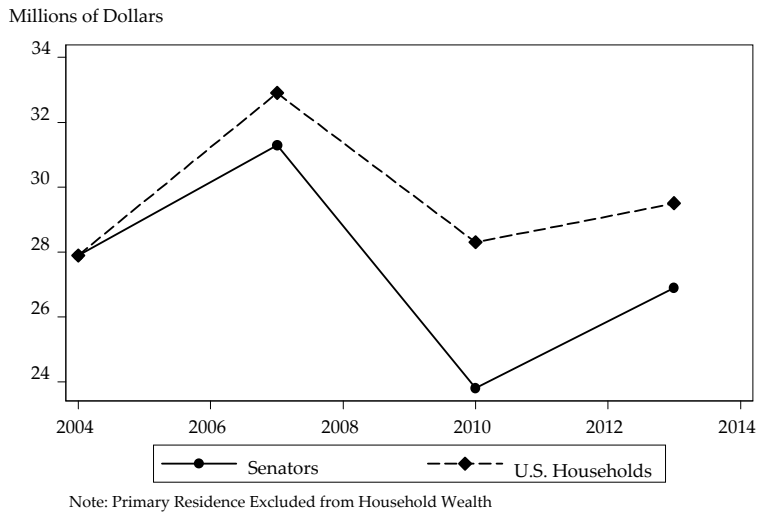
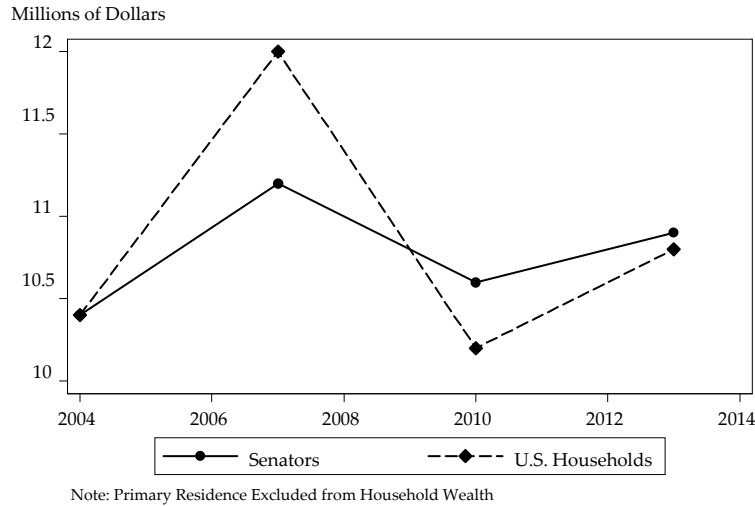


Figure 14: Senate Republicans' Wealth Compared to U.S. 97.9 Percentile

As is clear from Figure 10, Senate members' wealth follows basically the same pattern as that of their comparators in the U.S. population; even if Senators did lose some ground relative to their counterparts, the growth (or decline for the Senators) was close to zero for both groups. If we examine which percentiles of the wealth distribution generate comparable average wealth in Table 17 below, other than the close call in 2010 (on only one of the measures), Senators remained solidly among the one-percenters in terms of wealth.

**Table 17: Comparable Wealth Percentiles:
Senate Comparison**

Real Dollars (2013 Base)			
	Average Total Net Wealth	Average Total Net Wealth—Primary Residence Excluded	Average Total Net Wealth—Primary Residence and Asso- ciated Debt Exclud- ed
2004	99.0	99.2	99.2
2007	99.0	99.1	99.1
2010	98.8	99.0	99.0
2013	99.0	99.1	99.1

IV. CONCERNS

As discussed above, the congressional disclosure data are extremely noisy, given the large ranges used to report asset and liability values. Further, their exclusion of the value of primary residences as well as other non-income producing real property leads to a significant understatement of the net worth of members of Congress. To the extent that these issues simply add random noise to the estimates of a member's net worth, or to the extent that these issues have a constant effect on the wealth estimates, the previous calculations of the growth of congressional wealth will be unbiased. However, if the degree to which the disclosed figures depart from reality is changing systematically over time, the growth estimates will be problematic. Although there is no obvious reason to believe these errors are changing systematically over time, I cannot rule the possibility out either.

Another issue involves the exclusion of spousal income. The failure to include spousal income potentially understates the degree to which serving in Congress can help to enrich a household.⁶⁹ However, this issue too will only bias the growth

69. For example, there was speculation that Michelle Obama's promotion to the position of vice president of external affairs for the University of Chicago Hospital system in March 2005 was meant to capitalize on her husband's recent election to the Senate. Her promotion reportedly increased her salary from \$121,910 in 2004 to \$316,962 in 2005. See Mike Dorning, *Employer: Michelle Obama's Raise Well-Earned*, CHI. TRIB. (Sept. 27, 2006), <http://articles.chicagotribune.com/2006-09->

calculations if the degree to which serving in Congress helps a spouse's job prospects is changing systematically over time.

Beyond these data issues, a deeper shortcoming of the foregoing analysis is the inability to identify the causal mechanism through which members of the House may be getting richer while they serve. Because such a mechanism cannot be identified, the results in this Article should be taken as descriptive in nature. Perhaps future research can provide insight into what is driving the growth in House members' net worth.

V. CONCLUSION

Conventional wisdom indicates that members of Congress are getting richer. One story holds that as it becomes more expensive to run for Congress, selection effects ensure that richer people get elected. Another story suggests that members enrich themselves during their tenures by exploiting the valuable information and connections they have by virtue of their offices. A different story yet simply suggests that the kind of people who win seats in Congress are talented people, and we should not be surprised that talented people do a good job managing their money.

The results presented in this Article do not exactly resolve which of these stories is correct, if any. However, as a descriptive matter, the results in this paper confirm the notion that House members, at least, did indeed get richer during the 2004–2014 period. This was not due to richer individuals securing House seats throughout the period. Instead, it does appear to have been that individuals in the House got richer as they served. The growth rates they enjoyed outpaced the growth seen by very wealthy private citizens. The effect was not differentiated by party affiliation or by committee membership. The growth was enjoyed across the House, and it was especially pronounced relative to other wealthy individuals in the U.S. after the economic downturn of the late 2000s.

While these descriptive results may appear to support the hypothesis that it is all about leveraging privileged information, such a conclusion has trouble explaining why similar results were absent for Senate members. Unfortunately, data limitations, such as the imprecision of the disclosures themselves, as well as the

normal problems of causal inference (such as an inability to observe truly comparable individuals both inside and outside of Congress), make it difficult to draw strong conclusions about the source of growth enjoyed by House members.

THE PRESIDENT'S PEN AND THE BUREAUCRAT'S FIEFDOM

JOHN C. EASTMAN*

*"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."*¹

The very first provision of the Constitution beyond the preamble, quoted above, specifies that the lawmaking power of the national government is to be exercised by Congress. A necessary corollary, recognized by the Supreme Court early in our nation's history, is that purely legislative powers can be exercised *only* by Congress, not by the executive or judicial branches of government.²

Of course, where to draw the line between purely legislative power that cannot be delegated, and permissible delegations of authority to fill in the details of a legislative judgment made by Congress, has proved to be a rather difficult task. The formula eventually worked out by the Supreme Court, one that upholds delegations as long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body [authorized

* Henry Salvatori Professor of Law & Community Service, Chapman University Fowler School of Law; Senior Fellow, The Claremont Institute and Founding Director of the Institute's Center for Constitutional Jurisprudence. Portions of this Article were first presented at the 2015 Annual Lawyers Convention of the Federalist Society at a panel entitled "Deference Meets Delegation: Which is the Most Dangerous Branch?", <http://www.fed-soc.org/multimedia/detail/deference-meets-delegation-which-is-the-most-dangerous-branch-event-audiovideo> [<https://perma.cc/9KEY-DEW4>]. Other portions of this Article were first presented as testimony before the U.S. Senate Judiciary Committee on December 10, 2014, at a hearing entitled "Keeping Families Together: The President's Executive Action On Immigration and the Need To Pass Comprehensive Reform."

1. U.S. CONST. art. I, § 1.

2. *Wayman v. Southard*, 23 U.S. 1, 42 (1825); *see also* *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S.Ct. 1225, 1246 (2015) (Thomas, J., concurring in judgment) ("We have held that the Constitution categorically forbids Congress to delegate its lawmaking power to any other body.").

to fill in the details] is directed to conform,"³ sounds good in theory, but has not proved very helpful in practice, for several reasons. First, the Court has approved such broad delegations as to render the "intelligible principle" limitation virtually meaningless, and has not invalidated a law on unconstitutional delegation grounds since 1935.⁴ As Justice White observed in his dissent in *INS v. Chadha*,⁵ the "intelligible principle" through which agencies have attained enormous control over the economic affairs of the country has been held to include such formulations as "just and reasonable,"⁶ "public interest,"⁷ "public convenience, interest, or necessity,"⁸ and "unfair methods of competition."⁹ In other words, the "intelligible principle" restriction on delegations of legislative power has amounted to no restriction at all and, as Justice Thomas recently noted, the Court "has abandoned all pretense of enforcing" it.¹⁰

Second, various deference doctrines created by the Supreme Court have exacerbated the problem that arose from failure to enforce the non-delegation doctrine. There is *Chevron* deference, pursuant to which the courts defer to administrative agency interpretations of ambiguous statutes as long as the interpretation is reasonable and not contrary to law.¹¹ There is

3. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

4. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

5. 462 U.S. 919, 985 (1983) (White, J., dissenting).

6. *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 440 (1930) (upholding delegation to Secretary of Agriculture "to determine what are the just and reasonable rates" for stockyard services).

7. *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 21 (1932) (upholding delegation to Interstate Commerce Commission of power to authorize a railroad's acquisition of control of another railroad when the Commission deems the acquisition to be in "the public interest").

8. *Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266, 285 (1933) (upholding delegation to Federal Radio Commission the authority to allot broadcast licenses "from time to time, as public convenience, interest, or necessity requires").

9. *FTC v. Gratz*, 253 U.S. 421 (1920) (upholding delegation to the Federal Trade Commission the authority to determine and make unlawful "unfair methods of competition").

10. *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1250 (2015) (Thomas, J., concurring in judgment).

11. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Skidmore deference,¹² essentially a weaker version of *Chevron* deference. And there is *Auer* deference,¹³ pursuant to which the courts defer to an agency's interpretation of its own ambiguous regulation (no doubt implementing, under *Chevron* deference, an ambiguous statute!). My point here is not to provide a treatise on the nuances of the various deference doctrines, only to note that they have increasingly undermined the Constitution's basic separation of powers between the legislative and executive branches (and have resulted in an abdication of the judicial duty to interpret the law as well).

Several members of the Supreme Court have recently acknowledged the problem with the Court's deference doctrines. In *Perez v. Mortgage Bankers Association*,¹⁴ for example, Justice Thomas took direct aim at the *Auer* deference doctrine. "These cases call into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations," he wrote, adding:

That line of precedents . . . requires judges to defer to agency interpretations of regulations, thus, as happened in these cases, giving legal effect to the interpretations rather than the regulations themselves. Because this doctrine effects a transfer of the judicial power to an executive agency, it raises constitutional concerns. This line of precedents undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent.¹⁵

Justice Thomas also acknowledged that the practice of giving binding effect to agency interpretations of regulations runs afoul of the non-delegation principle as well. "It is difficult to see what authority the President has 'to impose legally binding obligations or prohibitions on regulated parties,'" he wrote. "That definition suggests something much closer to the legislative power, which our Constitution does not permit the Executive to exercise in this manner."¹⁶

12. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

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

14. 135 S. Ct. 1199 (2015).

15. *Id.* at 1213 (Thomas, J., concurring in judgment) (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)).

16. *Id.* at 1219 n.4 (quoting *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251–52 (D.C. Cir. 2014)).

Justice Thomas has also called into question the granddaddy of deference doctrines, *Chevron* deference. In *Michigan v. EPA*,¹⁷ after noting that the EPA had asked the Court to defer to its interpretation of the statutory phrase, “appropriate and necessary,” a phrase that hardly defines *any* principle constraining the regulatory power, much less an intelligible one, Justice Thomas expressed concern that the EPA’s “request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes,” citing *Chevron* as the source of the problem.¹⁸ He then issued a challenge to his colleagues to revisit the entire deference enterprise:

Although we today hold that EPA exceeded even the extremely permissive limits on agency power set by our own precedents, we should be extremely alarmed that it felt sufficiently emboldened by those precedents to make the bid for deference that it did here We seem to be straying further and further from the Constitution without so much as pausing to ask why. We should stop to consider that document before blithely giving the force of law to any other agency “interpretations” of federal statutes.¹⁹

Even Justice Scalia, long an advocate for judicial deference to executive agencies as a remedy for judicial overreach,²⁰ had called into question several of the Court’s deference doctrines:

Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies’ interpretations of statutes and regulations. Never mentioning § 706’s directive that the “reviewing court . . . interpret . . . statutory provisions,” we have held that agencies may authoritatively resolve ambiguities in statutes. And never mentioning § 706’s directive that the “reviewing court . . . determine the meaning or applicability of the terms of an agency action,” we have—relying on a case decided before the APA [*Seminole Rock*]—held that agencies may authoritatively resolve ambiguities in regulations.²¹

17. 135 S. Ct. 2699 (2015).

18. *Id.* at 2712.

19. *Id.*

20. See, e.g., Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

21. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in judgment) (citations omitted).

Justice Scalia seemed to join Justice Thomas in inviting a rethinking of *Chevron* itself: "The problem is bad enough, and perhaps insoluble if *Chevron* is not to be uprooted, with respect to interpretive rules setting forth agency interpretation of statutes."²² But he was positively hostile to the *Auer* deference doctrine, named after a case for which he himself had authored the opinion for the Court. "[A]n agency's interpretation of its own regulations," which the Administrative Procedures Act exempts from notice and comment rulemaking," is another matter," he wrote, adding:

By giving that category of interpretive rules *Auer* deference, we do more than allow the agency to make binding regulations without notice and comment. Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain. To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment. The APA does not remotely contemplate this regime.²³

Justice Scalia concluded his criticism of *Auer* deference by announcing that he would be "abandoning *Auer*,"²⁴ though he passed away before he could make good on that promise.²⁵

The third reason that the Constitution's separation of the lawmaking power from the enforcement power has not held is that Presidents have increasingly found it expedient to bypass even the relatively easy path to lawmaking via delegated regulatory authority implemented through the procedures of the Administrative Procedure Act, by issuing Executive Orders or interpretative guidance memoranda to directly implement what amounts to legislative policy. Here I want to explore a sampling of Executive Orders and guidance memoranda from

22. *Id.* at 1212.

23. *Id.* at 1213.

24. *Id.*

25. Justice Scalia's replacement on the Court, Justice Gorsuch, appears more than ready to pick up where Justice Scalia left off, as he was already calling into question the Court's deference doctrines while sitting as a judge on the U.S. Court of Appeals for the Tenth Circuit. *See, e.g.,* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (2016); De Niz Robles v. Lynch, 803 F.3d 1165 (2015); United States v. Nichols, 784 F.3d 666 (2015).

the past two Presidential administrations that I believe have crossed the line from constitutionally permissible orders directing the conduct of the executive branch to unconstitutional orders that have intruded on the legislative power.

First, let me take up President Bush's re-write of the Troubled Asset Relief Program ("TARP") in 2008. The law adopted by Congress authorized the Secretary of the Treasury "to purchase . . . troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with this chapter and the policies and procedures developed and published by the Secretary."²⁶ As the text of the law makes clear, the authority conferred on the Treasury Secretary by Congress extended only to the purchase of troubled assets "from any financial institution."²⁷ When President Bush decided that the automotive industry also needed bailout relief, he asked Congress to amend the TARP law to authorize auto industry bailouts as well.²⁸ President Bush's proposal, the Auto Industry Financing and Restructuring Act,²⁹ passed the House of Representatives on largely party lines (Democrats in support, Republicans against),³⁰ but died after the bill to which it was attached in the Senate failed

26. 12 U.S.C. § 5211(a)(1) (2012). Standing alone, this provision appears to violate the non-delegation doctrine, but there is something of an "intelligible principle" in the statute's definition of "troubled assets" that arguably cured that problem. "Troubled assets" were defined as mortgages, securities, or other financial instruments "that the Secretary . . . determines the purchase of which is necessary to promote financial market stability . . ." *Id.* § 5202(9). I do not address here the other big constitutional problem of whether the program is a valid exercise of Congress's spending power, though I have argued elsewhere that TARP violated that constitutional provision as well. John C. Eastman, Remarks at Symposium on Federalism and Separation of Powers (Mar. 9, 2009), reprinted in *ENGAGE*, July 2009, at 74, http://www.fed-soc.org/library/doclib/20090720_EastmanEngage102.pdf [<https://perma.cc/9DRQ-HCE2>]; see also John C. Eastman, *Restoring the 'General' to the General Welfare Clause*, 4 *CHAP. L. REV.* 63, 79 (2001) (noting that a proposal to provide a "bounty"—that is, a bailout—to New England cod fisherman was rejected by an early Congress as unconstitutional until it was modified merely to rebate taxes that had been improperly assessed).

27. 12 U.S.C. § 5211(a)(1).

28. Jeanne Sahadi, *Bush: Protect taxpayers in auto bailout*, CNN MONEY (Dec. 5, 2008, 12:53 PM), http://money.cnn.com/2008/12/05/news/economy/economic_fallout_jobs/index.htm?postversion=2008120512 [<https://perma.cc/ALF9-PRFR>].

29. H.R. 7321, 110th Cong. (2008).

30. See 154 CONG. REC. H10935 (2008).

to garner enough support to overcome a filibuster.³¹ Nevertheless, President Bush unilaterally extended TARP loans to the auto industry a week later, the very thing he had sought to do via his proposed but defeated legislation.³²

Although *candidate* Barack Obama was critical of President Bush's use of executive power when he was campaigning for President in 2008,³³ *President* Obama took the precedent established by President Bush and ran with it once he was in the oval office.³⁴ He used the newfound power of the President to direct TARP funds to redirect billions of dollars from secured creditors to unsecured union obligations, for example, contrary to numerous provisions of the bankruptcy code.³⁵ He imposed, by executive order, a ban on taxpayer funding of abortions in

31. See David M. Herszenhorn & David E. Sanger, *Senate Abandons Automaker Bailout Bid*, N.Y. TIMES (Dec. 11, 2008), <http://www.nytimes.com/2008/12/12/business/12auto.html> [<https://perma.cc/W9G9-TNZN>].

32. WHITE HOUSE, OFFICE OF THE PRESS SEC'Y, FACT SHEET: FINANCING ASSISTANCE TO FACILITATE THE RESTRUCTURING OF AUTO MANUFACTURERS TO ATTAIN FINANCIAL VIABILITY (Dec. 19, 2008), <https://georgewbush-whitehouse.archives.gov/news/releases/2008/12/20081219-6.html> [<https://perma.cc/5HXQ-FGR4>].

33. See, e.g., Charlie Savage, *Barack Obama's Q&A*, BOS. GLOBE (Dec. 20, 2007), <http://archive.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA> [<https://perma.cc/8Y93-AEF5>].

34. A similar story played out over the interpretation of the Spending Clause in the 1820s. Jefferson, Madison, and Monroe all vetoed various attempts by Congress to spend for purely local, pork-barrel projects in violation of what was then understood to be the limitation that Congress's spending power extended only to the "general"—that is, national—"welfare" and not to local projects. But at the tail end of Monroe's second term, President Monroe signed a few appropriations bills merely to study a few local spending projects. See, e.g., Act of April 30, 1824, ch. 46, 4 Stat. 22; Act of May 26, 1824, ch. 153, 4 Stat. 38. That minor deviation from the Constitution's limits was then relied on by President John Quincy Adams to support a whole slew of local spending projects, the precedent having been established. Cf. JONATHAN SWIFT, GULLIVER'S TRAVELS 187 (Dover 1996) (1726) ("[Stare decisis] is a maxim among . . . lawyers, that whatever has been done before may legally be done again."); SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946–1992, at 1 (1995). As President Polk would later acknowledge, "the floodgates being thus hoisted, . . . applications for aid from the treasury, virtually to make harbors as well as improve them, clear out rivers, cut canals, and construct roads, poured into Congress in torrents, until arrested by the veto of President Jackson." *President Polk Veto Message, Dec. 15, 1847*, in 43 H.R. JOURNAL 82, 92 (1847).

35. See Andrew M. Grossman, *Bailouts, Abusive Bankruptcies, And the Rule of Law*, HERITAGE FOUND. (May 21, 2009), http://origin.heritage.org/research/testimony/bailouts-abusive-bankruptcies-and-the-rule-of-law#_ftnref17 [<https://perma.cc/3FY5-3ADX>].

order to prevent pro-life Democrats in the House of Representatives from derailing his signature Affordable Care Act after the Senate-passed version failed to include such a ban.³⁶

But there are many other examples of President Obama's use of the presidential pen to accomplish legislative ends, particularly after Democrats lost control of the Senate in 2014. As he infamously said at the first cabinet meeting in 2014:

[W]e are not just going to be waiting for legislation in order to make sure that we're providing Americans the kind of help that they need. I've got a pen and I've got a phone—and I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward.³⁷

So, after years of failed efforts in the Congress to amend federal civil rights laws to include "sexual orientation and gender identity" in the statutory ban on discrimination based on race, color, religion, sex, or national origin,³⁸ President Obama unilaterally imposed on federal contractors, through the use of his executive pen, a mandate that all federal contractors certify that they do not make employment decisions based on "sexual orientation [or] gender identity" as well.³⁹ President Obama's order added "sexual orientation and gender identity" to the mandate on federal contractors contained in Executive Order 11,246,⁴⁰ which was signed by President Lyndon Johnson back in 1965 to help implement the anti-discrimination provisions

36. Exec. Order No. 13,535, 75 Fed. Reg. 15,599 (Mar. 24, 2010); *see also* Lori Montgomery & Shailagh Murray, *In Deal with Stupak, White House announces executive order on abortion*, WASH. POST (March 21, 2010), <http://voices.washingtonpost.com/44/2010/03/white-house-announces-executive.html> [<https://perma.cc/6BQD-UCZQ>]. Alas, the President's promise to Congressman Stupak was short-lived, as regulators at the Department of Health and Human Services shortly thereafter "interpreted" the Affordable Care Act's "preventive care" mandate to include abortifacients. *Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act*, 70 Fed. Reg. 46,621 (Aug. 3, 2011).

37. Barack Obama, *Remarks by the President Before Cabinet Meeting* (Jan. 14, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/14/remarks-president-cabinet-meeting> [<https://perma.cc/DES7-CLM6>].

38. *See, e.g.*, Employment Non-Discrimination Act ("ENDA"), H.R. 1755, 113th Cong. (2013). The first proposal to add "sexual orientation" to Title VII was made by Representatives Bella Abzug and Ed Koch in 1974. H.R. 14752, 93rd Cong. (1974).

39. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014).

40. *See id.*

contained in Title VII of the Civil Rights Act of 1964.⁴¹ The original Executive Order closely tracked the categories contained in the statute itself.⁴² No such statute extending coverage to “sexual orientation and gender identity” has ever been adopted by Congress, however, so President Obama’s Executive Order imposed requirements not rooted in the law.

President Obama’s order also added “gender identity” to the language of Executive Order 11,478 barring discrimination in hiring by the federal government itself.⁴³ That order, originally issued in 1969 by President Richard Nixon, prohibited discrimination in federal employment based on the same grounds prohibited by Title VII of the 1964 Civil Rights Act, and added a prohibition on age discrimination, a category which had been added to federal law by the Age Discrimination in Employment Act of 1967,⁴⁴ thus retaining the order’s statutory mooring.⁴⁵ President Obama’s addition of “gender identity” had no such statutory mooring, but it did have executive branch precedent. President Bill Clinton issued Executive Order 13,087 in 1998, which added “sexual orientation” to the list of categories protected against discrimination in federal employment.⁴⁶ Although that addition, too, was unmoored from any statutory text, perhaps President Clinton assumed that his role as the titular head of a “unitary executive” provided sufficient authority to make hiring policy for the executive branch, but not sufficient authority to impose a similar mandate on private contractors, since he did not simultaneously add “sexual orientation” to the executive order dealing with private government contractors.⁴⁷ President Obama apparently had no qualms about such constitutional niceties. Indeed, one acting deputy assistant secretary for policy in his Department of Health and Human

41. Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965); *see also* Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e to 2000e-17 (2012).

42. *Compare* Exec. Order No. 11,246, 3 C.F.R. at 339 (prohibiting employment discrimination “because of race, creed, color, or national origin”), *with* 42 U.S.C. § 2000e-2 (prohibiting employment discrimination “because of such individual’s race, color, religion, sex, or national origin”).

43. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014).

44. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (2012)).

45. Exec. Order No. 11,478, 3 C.F.R. 803 (1966–1970).

46. Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998).

47. *See id.*

Services reinterpreted Title IX's ban on "sex" discrimination in education as including a ban on "gender identity" discrimination,⁴⁸ thereby rendering meaningless the relatively unambiguous statutory and regulatory exemptions for intimate facilities: single-sex living quarters, restrooms, and showers.⁴⁹ President Obama's Justice Department defended the administrative rewrite of the statute,⁵⁰ bolstered by the claim that the Court's own *Auer* deference doctrine required the courts to give near-dispositive deference to the administration's interpretation of its own regulations,⁵¹ a position so extreme that many Court observers believed that it would actually sound the death knell for the *Auer* doctrine.⁵²

President Obama did a similar end-run around the legislative process with his cap-and-trade maneuver. After the President's proposal to institute a cap-and-trade program legislatively failed in 2010,⁵³ the Environmental Protection Agency, answerable to President Obama, "reinterpreted" provisions of

48. Letter to Emily Prince from James A. Ferg-Cadima, Acting Deputy Assistant Sec'y for Pol'y, U.S. Dep't of Educ., Office for Civil Rights (Jan. 7, 2015), http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf [<https://perma.cc/G8WH-R5MV>].

49. 20 U.S.C. § 1686 (2012) (statutory exception to allow single-sex living quarters); 40 C.F.R. § 5.410 (2016) (same for toilets, locker rooms, and shower facilities).

50. *Gloucester Cty. Sch. Bd. v. G.G.*, 822 F.3d 709 (4th Cir. 2016), *cert. granted, judgment vacated and remanded*, 137 S. Ct. 1239 (2017).

51. The case was remanded to the Fourth Circuit after the Trump administration's Departments of Justice and Education issued a letter withdrawing that regulatory interpretation. *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017); Dear Colleague Letter from Sandra Battle, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., & 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/letters/colleague-201702-title-ix.pdf> [<https://perma.cc/SYZ9-MTHT>].

52. See Casey C. Sullivan, *Could the Transgender Bathroom Fight Upend Decades of Admin Law?*, FINDLAW (Aug. 23, 2016, 2:57 PM), http://blogs.findlaw.com/supreme_court/2016/08/could-the-transgender-bathroom-fight-upend-decades-of-admin-law.html [<https://perma.cc/2LHC-WC2K>].

53. H.R. 2454, 111th Cong. (2009); Bryan Walsh, *Cap and Trade is Dead (Really, Truly, I'm Not Kidding). Who's to Blame?*, TIME (July 22, 2010), <http://science.time.com/2010/07/22/cap-and-trade-is-dead-really-truly-im-not-kidding-whos-to-blame> [<https://perma.cc/8WEB-BAPL>].

the Clean Air Act to achieve the very policy that President Obama had failed to get approved by Congress.⁵⁴

Indeed, President Obama appears to have viewed the basic separation-of-powers principle that all legislative power is vested in Congress as merely a politically useful option to be used when approval by Congress could be obtained, but to be ignored whenever the votes in Congress were simply not there. There are numerous examples, addressing great matters as well as small ones. His Interior Secretary unilaterally renamed Mount McKinley in Alaska to Denali,⁵⁵ for example, despite statutory language from 35 years earlier settling a century-old dispute with Alaskan natives by renaming Mount McKinley National Park as Denali National Park without changing the designation of the mountain itself.⁵⁶ His Justice Department unilaterally expanded federal regulation of firearms dealers by redefining, through interpretive guidance, the statutory phrase “engaged in the business of dealing in firearms” to potentially cover anyone who sold a single firearm from their private ownership if they made a profit on the sale.⁵⁷ His Health and Human Services Department unilaterally issued waivers of the various mandates under the Affordable Care Act to politically

54. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015).

55. Sec’y of the Interior Order No. 3,337 (Aug. 28, 2015), <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/press-release/Denali%20Name%20Change.pdf> [<https://perma.cc/AHD6-8V2J>]; Julie Hirschfield Davis, *Mount McKinley Will Again Be Called Denali*, N.Y. TIMES, <https://www.nytimes.com/2015/08/31/us/mount-mckinley-will-be-renamed-denali.html> [<https://perma.cc/8FQN-PDAN>].

56. 16 U.S.C. § 410hh-1(3)(a) (2012).

57. Compare U.S. DEP’T OF JUSTICE, DO I NEED A LICENSE TO BUY AND SELL FIREARMS? 5 (2016), <https://www.atf.gov/file/100871/download> [<https://perma.cc/E3YQ-Z3X4>], with 18 U.S.C. § 921(a)(21)(C) (2012) (defining “engaged in the business” of selling firearms as “[A] person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms . . .”), and Joseph Greenlee, *The Thin Legal Backbone Behind President Obama’s Executive Actions on Guns*, CONSERVATIVE REV. (Jan. 8, 2016), <https://www.conservativereview.com/commentary/2016/01/the-thin-legal-backbone-behind-president-obamas-executive-actions-on-guns> [<https://perma.cc/Q8KW-TZH9>], and Jonathan H. Adler, *New ATF Guidance on Gun Sales is Legally Meaningless (or Else It Would Be Unlawful)*, WASH. POST: VOLOKH CONSPIRACY (Jan. 5, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/05/new-atf-guidance-on-gun-sales-is-legally-meaningless-or-else-it-would-be-unlawful/?utm_term=.7177c9d69a75 [<https://perma.cc/4N2Q-GK77>].

well-connected interest groups⁵⁸ and unilaterally interpreted the core state exchange subsidy to apply, not just to exchanges “established by the State,” as the statutory language provided, but also to exchanges established *not* by the State but by the federal government.⁵⁹ And it effectively eliminated the welfare-to-work requirement of the Gingrich-Clinton-era Temporary Assistance for Needy Families program by waiving the work requirements.⁶⁰ All of these things were legislative in nature, and none had statutory authority.

President Obama also ignored statutes on the books in the foreign affairs arena, though here the constitutional issues are much more complicated and much more nuanced. He committed military forces into hostilities in Libya and kept them there long after the War Powers Resolution required them to be withdrawn,⁶¹ for example, contending that the War Powers Resolution did not prevent his actions.⁶² But unlike every prior President who disputed the very constitutionality of the War Powers Resolution as an improper intrusion on the President’s Article II powers,⁶³ President Obama merely claimed that the requirements of the War Powers Resolution were not triggered because American military forces had not been introduced into hostilities.⁶⁴ Harold Koh, former Dean of Yale Law School and Senior Legal Advisor to Secretary of State Hillary Clinton, ignominiously offered as his ra-

58. Mark Hemingway, *Over Half of Obamacare Waivers Given to Union Members*, WEEKLY STANDARD (May 16, 2011), <http://www.weeklystandard.com/over-half-of-all-obamacare-waivers-given-to-union-members/article/561115> [https://perma.cc/B4EY-SELJ].

59. See generally *King v. Burwell*, 135 S. Ct. 2480 (2015).

60. Memorandum from the Office of Family Assistance, Dep’t of Health & Human Servs. to States administering TANF Program (July 12, 2012), <http://www.acf.hhs.gov/programs/ofa/resource/policy/im-ofa/2012/im201203/im201203> [https://perma.cc/2ZDS-S6EP].

61. See 50 U.S.C. § 1544(b) (2012).

62. Memorandum from Caroline D. Krass, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, to Eric Holder, Att’y Gen., *Re: Authority to Use Military Force in Libya* (Apr. 1, 2011), <https://fas.org/irp/agency/doj/olc/libya.pdf> [https://perma.cc/6UQM-H852] [hereinafter OLC Libya Memo]; Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES (June 15, 2011), <http://www.nytimes.com/2011/06/16/us/politics/16powers.html> [https://perma.cc/2AVZ-8PW3].

63. See, e.g., Lori Fisher Damrosch, *The Clinton Administration and War Powers*, 63 J.L. & CONTEMPORARY PROBLEMS 125, 128 (2000).

64. OLC Libya Memo, *supra* note 62; Savage & Landler, *supra* note 62.

tionale,⁶⁵ essentially, that “we’re shooting at them, but they aren’t shooting back at us,” a position so preposterous that even the very pro-Obama administration editorial pages of the *New York Times* found it hard to stomach. The *Times* declared the reasoning “[l]egalistic ‘word play,’” a “contorted reading of the law” invented by “an imaginative executive-branch lawyer” that “stretched [Koh] out on a legal limb so long and so thin that one can almost hear it cracking.”⁶⁶

President Obama also revoked statutory sanctions against Iran in early 2016, simultaneously transferring nearly \$150 billion of frozen Iranian assets⁶⁷ under a laughably loose interpretation of statutory appropriations for a Treasury Department litigation judgment fund.⁶⁸ The difficulty with this case, though, as with the case of Libyan intervention, is that any President *does* have a plausible claim to authority even in the face of conflicting congressional statutes when the national security or foreign affairs interests of the United States are at play.⁶⁹ Justice Jackson’s famous “lowest ebb” category from *Youngstown Sheet & Tube Co. v. Sawyer*⁷⁰ is often misunderstood on this score, and most Presidents have, quite correctly, asserted that authority they have directly from Article II cannot be restricted by act of Congress.⁷¹

Thus, if President Obama had asserted authority over the Libyan enterprise based on a plausible claim of U.S. national security interests and the unconstitutionality of the War Powers Resolution, or if he had asserted authority over the Iranian negotiation based on plausible diplomatic concerns and the unconstitutionality-

65. See *Libya and War Powers, Hearing Before the S. Comm. on Foreign Relations*, 111th Cong. 12–16 (prepared statement of Harold Hongju Koh).

66. Paul Starobin, *A Moral Flip-Flop? Defining “War”*, N.Y. TIMES (Aug. 7, 2011), <http://www.nytimes.com/2011/08/07/opinion/sunday/harold-kohs-flip-flop-on-the-libya-question.html> [<https://perma.cc/LL8R-KMR2>].

67. Julian Hattem, *US Finds Iran in Compliance with Deal, Lifts Nuclear Sanctions*, HILL (Jan. 1, 2016), <http://thehill.com/policy/national-security/266151-us-lifts-iran-sanctions> [<https://perma.cc/9237-5Z5C>].

68. Letter from Eric M. Thorson, Inspector Gen., Dep’t of the Treasury, to Sen. Orrin Hatch (Nov. 10, 2016), <https://www.treasury.gov/about/organizational-structure/ig/Audit%20Reports%20and%20Testimonies/OIG-CA-17-006%20Iran%20Payment%20Inquiry.pdf> [<https://perma.cc/7ZSD-Z9HS>].

69. See, e.g., *Zivotofsky v. Kerry (Zivotofsky II)*, 135 S. Ct. 2076, 2095 (2015).

70. 343 U.S. 579, 637–38 (Jackson, J., concurring).

71. See, e.g., *Zivotofsky II*, 135 S. Ct. at 2091–95.

ty of congressional mandates in the conduct of such affairs, he would have been on stronger ground. But because he and his advisors had long been defenders of the War Powers Resolution and strong opponents of claims of “inherent” executive power in the foreign policy arena,⁷² he was relegated to the wildly implausible claims for the authority he did assert.

Even if the inherent foreign affairs power could have provided some support for President Obama’s Libya and Iran actions, however, no such authority could plausibly be claimed in support of what were perhaps the most controversial of President Obama’s unilateral executive actions, the two Department of Homeland Security guidances with respect to illegal immigration: the Deferred Action for Childhood Arrivals (“DACA”) memorandum in 2012,⁷³ and the Deferred Action for Parents of Americans (“DAPA”) memorandum in 2014.⁷⁴ Both flout U.S. immigration policy contained in the statute books, arguably to the point of “suspension” of the laws, and unlike the few prior examples to which the programs were often erroneously compared,⁷⁵ neither dealt with a particular, urgent foreign policy or

72. See, e.g., Savage, *supra* note 33.

73. Memorandum from Janet Napolitano, Sec’y of Homeland Security, to David V. Aguilar, Acting Comm’r, U.S. Customs and Border Protection, Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Servs., and John Morton, Director, U.S. Immigration and Customs Enforcement, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [https://perma.cc/SWR8-337A] [hereinafter DACA Memo].

74. Memorandum from Jeh C. Johnson, Sec’y of Homeland Sec. to León Rodriguez, Director, U.S. Citizenship and Immigration Servs., Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, and R. Gil Kerlikowske, Comm’r, U.S. Customs and Border Protection, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [https://perma.cc/U4JA-7TGX] [hereinafter DAPA Memo].

75. Much has been made, for example, of the Family Fairness Program implemented by President George H.W. Bush’s administration in February 1990. See Memorandum from Gene McNary, Comm’r, Immigration and Naturalization Servs. to Regional Comm’rs, *Family Fairness: Guidelines for Voluntary Departure* (Feb. 2, 1990), <http://www.factcheck.org/UploadedFiles/2014/11/McNary-memo.pdf> [https://perma.cc/39HJ-M2RG]. But that program, which dealt with delayed voluntary departure rather than President Obama’s deferred action, was specifi-

humanitarian crisis. A review of the legality of those executive actions is therefore in order.

On the question of who has authority to set immigration policy for the nation, the Constitution and longstanding Supreme Court precedent could not be more clear. Absent some extraordinary foreign policy crisis that would trigger the President's direct Article II powers over foreign affairs, the Constitution assigns plenary power over immigration and naturalization to the Congress, not to the President.⁷⁶ To be sure, the President has a

cally authorized by statute. Section 242B of the Immigration and Nationality Act at the time provided, in pertinent part:

In the discretion of the Attorney General and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 1251 of this title is such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraphs (4) to (7), (11), (12), (14) to (17), (18), or (19) of section 1251(a) of this title.

Perales v. Casillas, 903 F.2d 1043, 1048 (5th Cir. 1990) (quoting 8 U.S.C. § 1252(b) (1970 & Supp. 1987)) (emphasis added). That specific statutory authority was largely superseded by the Temporary Protected Status program established by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified in scattered sections of 8 U.S.C.), which is available to nationals of designated foreign states affected by armed conflicts, environmental disasters, and other extraordinary conditions. 8 U.S.C. § 1254a (2012). The 1996 Illegal Immigration Reform and Immigrant Responsibility ("IIRIRI") Act, Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 8 U.S.C.), subsequently limited temporary protection to 120 days. See 8 U.S.C. § 1229c. By contrast, as even the OLC opinion acknowledges, "deferred action," which is the asserted basis for the President's recent actions, "developed without express statutory authorization." *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, 38 Op. O.L.C. (Nov. 19, 2014), at 13, <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [<https://perma.cc/SA7Z-Y7WG>] [hereinafter OLC DAPA Opinion]; see also *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (noting that deferred action "developed without express statutory authorization," apparently in the exercise of discretionary response to international humanitarian crises that trigger the President's separate foreign affairs authority of the sort now covered by the Temporary Protected Status Program).

76. See U.S. CONST., art. I, § 8, cl. 3-4 ("The Congress shall have Power . . . To regulate Commerce with foreign nations . . . [and] To establish an uniform Rule of Naturalization"); see also *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 201 (1993) ("Congress . . . has plenary power over immigration matters."); *INS v.*

measure of prosecutorial discretion to determine where to place his enforcement priorities and limited resources, but as the Supreme Court has made clear, there is a line between permissible prosecutorial discretion and an unconstitutional suspension of the law.⁷⁷ Prosecutorial discretion that is exercised categorically (as the President's immigration actions appear clearly designed to do) rather than on a case-by-case basis crosses that line and violates the President's constitutional obligation to "take care that the laws be faithfully executed."⁷⁸ Indeed, the very reason there is such a clause in the Constitution was to prevent the kind of suspension of the lawmaking authority that had been done by King George III in the American colonies.⁷⁹

Chadha, 462 U.S. 919, 940–41 (1983) ("The plenary authority of Congress over aliens under Art. I, § 8, cl. 4, is not open to question."); *Boutilier v. INS*, 387 U.S. 118, 123 (1967) ("Congress has plenary power to make rules for the admission of aliens."). Even the Supreme Court's recent decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012), which contains language arguably suggesting that the President himself can set immigration policy, see 132 S. Ct. at 2498 (locating the source of federal authority over immigration, in part, in the inherent foreign relations power the President holds as the "sole organ of the nation" in foreign relations (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936))), was rooted in statutory language not present in the DACA and DAPA situations.

77. See, e.g., *Heckler v. Cheney*, 470 U.S. 821, 832–33 n.4 (1985) (finding that judicial review of exercises of enforcement discretion could potentially be obtained in cases where an agency has adopted a general policy that is an "abdication of its statutory responsibilities"); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."). The opinion of the Office of Legal Counsel at the Department of Justice written in defense of the DAPA program recognizes the need for individualized determinations for exercises of prosecutorial discretion to be constitutional. See OLC DAPA Opinion, *supra* note 75, at 7 ("[T]he Executive Branch ordinarily cannot . . . consciously and expressly adopt a general policy that is so extreme as to amount to an abdication of its statutory responsibilities, . . ." (quoting *Heckler*, 470 U.S. at 833 n.4)); *id.* ("[A] general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses 'special risks' that the agency has exceeded the bounds of its enforcement discretion." (quoting *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994))).

78. U.S. CONST., art. II, § 3, cl. 5.

79. DECLARATION OF INDEPENDENCE paras. 23–24 (U.S. 1776) (including in the bill of particulars that the King had sought to establish "an absolute Tyranny" over the states by, among other things, "abolishing our most valuable Laws," and "for suspending our own Legislatures, and declaring themselves vested with Power to legislate in all cases whatsoever");

To be sure, where to draw the line between valid, case-by-case prosecutorial discretion and invalid suspension of the law is no easy matter, and might well have led to a Supreme Court determination that such a line is too uncertain a matter for judicial resolution, and hence a holding that the matter is a non-justiciable political question. Justice Scalia's untimely death in February 2016, and the resulting affirmance of the lower court's more narrow ruling on Administrative Procedure Act grounds in the multi-state legal challenge to President Obama's immigration orders, has forestalled such a ruling for the time being.⁸⁰

But as serious as that issue is, it masks a much more fundamental constitutional question about executive power that needs to be addressed. President Obama's Secretaries of Homeland Security did not just decline to prosecute (or deport) those who have violated our nation's immigration laws. They gave to millions of illegal aliens a "lawful" permission to remain in the United States as well, and with that the ability to obtain work authorization, driver's licenses, and countless other benefits that are specifically barred to illegal immigrants by U.S. law.⁸¹ In other words, President Obama's administration took it upon itself to drastically rewrite our immigration policy, the terms of which, by constitutional design, are expressly set by the Congress.⁸²

As Secretary Napolitano noted in her DACA directive: "For individuals who are granted deferred action by either ICE or USCIS," the "USCIS *shall* accept applications to determine wheth-

United States v. Tingey, 30 U.S. 115, 122 (1831) ("The president is enjoined 'to take care that the laws be faithfully executed.' In the performance of this trust, he not only may, but he is bound to avail himself of every appropriate means not forbidden by law"). *But see* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PENN. L. REV. 1835, 1836 (2016) ("Today, at least, no one can really know why the Framers included such language or placed it where they did."); *id.* at 1850 ("At common law, the Crown had long claimed the prerogative to dispense with or suspend acts of Parliament when equity so required. By the Glorious Revolution, English law had ceased to recognize such authority." (citations omitted)).

80. *See* United States v. Texas, 136 S. Ct. 906 (2016) (mem.) (granting petition for writ of certiorari and adding to the APA questions presented an additional question: "Whether the guidance violates the Take Care Clause of the Constitution"), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

81. *See* DACA Memo, *supra* note 73; DAPA Memo, *supra* note 74.

82. U.S. CONST. art. I, § 8, cl. 3–4. *But see* *Arizona*, 132 S. Ct. at 2498 (suggesting at least one other source of the power over immigration policy not explicitly associated with Congress).

er these individuals qualify for work authorization during this period of deferred action.”⁸³ But the statute actually enacted by Congress quite unambiguously prohibits the employment of aliens who are in the country illegally, except for those who meet a couple of carefully circumscribed statutory exceptions.⁸⁴ Napolitano’s memorandum cited no legal authority whatsoever for its extraordinary directive to immigration officers,⁸⁵ and the directive is directly contradicted by legal advice given by the INS’s general counsel during the Clinton administration:

The doctrine of prosecutorial discretion applies to enforcement decisions, not benefit decisions. For example, a decision to charge, or not to charge, an alien with a ground of deportability is clearly a prosecutorial enforcement decision. By contrast, the grant of an immigration benefit, such as naturalization or adjustment of status, is a benefit decision that is not a subject for prosecutorial discretion.⁸⁶

Following the issuance of the Napolitano memorandum, legal experts and academics tried to find a hook for the President’s asserted authority. Speculations centered on a particular federal regulation that allows for work authorization for designated classes of aliens.⁸⁷ It allows for an application for work authorization by “An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment.”⁸⁸ But as any first year law student knows, and as the regulation itself acknowledges, those provisions allowing for work authorization must be grounded in statutory authority, and none of the statutes cited in support of the regulation provide the necessary authority.

The regulation cites three statutory provisions: 8 U.S.C. §§ 1101, 1103, and 1324A.⁸⁹ Section 1103 of title 8 sets out the general au-

83. DACA Memo, *supra* note 73, at 3 (emphasis added).

84. 8 U.S.C. § 1324A (2012).

85. See DACA Memo, *supra* note 73.

86. Memorandum from Bo Cooper, Gen. Counsel, U.S. Immigration and Naturalization Servs., for the Comm’r, *INS Exercise of Prosecutorial Discretion* 4 <http://library.niwap.org/wp-content/uploads/2015/IMM-Gov-ProsDisc-07.11.00.pdf> [<https://perma.cc/RYN2-LFSZ>].

87. See 8 C.F.R. § 274a.12 (2016).

88. *Id.* § 274a.12(c)(14).

89. *Id.* § 274a.

thority of the Secretary of Homeland Security to administer and enforce the immigration laws.⁹⁰ Nothing in that provision gives the Secretary the discretion to ignore those laws.

Section 1101 is the “definition” section of immigration law, but through it, many of the authorizations for legal status are made by way of definitional exemptions from the general rule.⁹¹ The term “alien,” for example, is defined in subsection (a)(3) as any person not a citizen or national of the United States.⁹² The term “immigrant” is, in turn, defined in subsection (a)(15) as every alien except an alien described in one of 22 separate statutory exemptions.⁹³ This is where the “T” visa authority resides, so named because it is found in subsection (a)(15)(T).⁹⁴ That provision carefully delineates the authority to give a visa for lawful residence to victims of human trafficking who are cooperating with law enforcement’s investigation or prosecuting of the trafficking crimes.⁹⁵ Beyond these carefully delineated exceptions, there is no authority in this statute for the Attorney General, the Secretary of Homeland Security, the President, or any other executive official to grant authorization for legal status.

Section 1324A, which deals with employment of illegal immigrants, is the final authority cited in the regulation.⁹⁶ Like section 1101, it provides for certain authorizations by way of exemption from the general rule that employing an unauthorized alien is illegal.⁹⁷ Section (a)(1) specifically makes it unlawful to hire “an unauthorized alien (as defined in subsection (h)(3) of this section).”⁹⁸ Subsection (h)(3) in turn defines “unauthorized alien” as any alien who is not “lawfully admitted for permanent residence” (that would be all those carefully wrought exemptions in section 1101(a)(15), such as the “T” vi-

90. 8 U.S.C. § 1103 (2012).

91. *See id.* § 1101.

92. *Id.* § 1101(a)(3).

93. *Id.* § 1101(a)(15).

94. *Id.* § 1101(a)(15)(T).

95. *See id.*

96. 8 C.F.R. § 274a (2016).

97. 8 U.S.C. § 1324A.

98. *Id.* § 1324A(a)(1).

sa) or an alien “authorized to be so employed by this chapter *or by the Attorney General.*”⁹⁹

That last phrase, “or by the Attorney General,” and by extension the Secretary of Homeland Security,¹⁰⁰ is the only statutory hook to which anyone defending the President’s actions in numerous debates I had following the issuance of the Napolitano DACA memorandum could point.¹⁰¹ That is a pretty slim reed for all of the heavy lifting necessary to accept the President’s assertion of complete discretion not only to decline to prosecute or deport illegal immigrants, but to grant them a lawful residence status and work authorization as well. Never mind that with such absolute discretion, none of the pages and pages of carefully circumscribed statutory entitlements to exemption,¹⁰² and none of the carefully circumscribed statutory grants of discretion to the Secretary to issue exemptions in other circumstances,¹⁰³ would be necessary. And never mind that the much more likely interpretation of that phrase is that it refers back to other specific exemptions in section 1101 or section 1324A. Those provisions specify when the Attorney General might grant a visa for temporary lawful status.¹⁰⁴ Here, then, was some text in the statute

99. *Id.* § 1324A(h)(3) (emphasis added).

100. *Id.* § 1103 (charging the Secretary of Homeland Security with enforcement of most “laws relating to the immigration and naturalization of aliens”).

101. *Cf., e.g.,* Heather Fathali, *The American Dream: Daca, Dreamers, and Comprehensive Immigration Reform*, 37 SEATTLE U. L. REV. 221, 245 & n. 167 (2013).

102. *See* 8 U.S.C. §§ 1103, 1324A.

103. *See id.* § 1324A.

104. *See, e.g., id.* § 1101(a)(15)(V) (allowing the Attorney General to confer temporary lawful status on the close family members of lawful permanent residents who have petitioned the Attorney General for a nonimmigrant visa while an application for an immigrant visa is pending, or to specific statutory provisions that require or give discretion to the secretary to grant work authorization in specific circumstances); *id.* § 1158(c)(1)(B) (aliens granted asylum); *id.* § 1226(a)(3) (otherwise work-eligible alien arrested and detained pending a removal decision); *id.* § 1231(a)(7) (permitting the Secretary to grant work authorization under certain narrow circumstances to aliens who have received final orders of removal).

This view was implicitly espoused by a plurality of the Supreme Court when, in *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968 (2011), it summarized section 1324a(h)(3) as defining an “unauthorized alien” to be “an alien not ‘lawfully admitted for permanent residence’ or not otherwise authorized by federal law to be employed.” 132 S. Ct. at 1981; *see also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (holding that federal immigration law denies “employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States.” (citing 8 U.S.C. § 1324A(h)(3)));

that, taken out of context and ignoring all the elaborate web of requirements for eligibility for lawful status and employment authorization that had been carefully constructed by Congress over decades, purports to give the President, through his Attorney General, absolute discretion to ignore the lion's share of the nation's immigration laws.

And yet it is that slim reed, and that slim reed alone, which was subsequently confirmed as the only asserted source of authority. On November 20, 2014, the same day President Obama announced his expansion of the DACA program to cover millions of additional illegal immigrants, Secretary of Homeland Security Jeh Johnson issued a memorandum of his own, stating: "Each person who applies for deferred action pursuant to the criteria above shall also be eligible to apply for work authorization for the period of deferred action, *pursuant to my authority to grant such authorization reflected in section 274A(h)(3) of the Immigration and Nationality Act.*"¹⁰⁵ As the U.S. Customs and Immigration Service explained on its website, "An individual who has received deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period of deferred action is in effect."¹⁰⁶ That is why hundreds of thousands of DACA applicants were deemed to have a "lawful presence" and able to obtain work authorization and driver's licenses.¹⁰⁷ The DAPA program expanded that number to millions more.¹⁰⁸ And both are a far cry from the exercise of "prosecutorial discretion" claimed by the President and his two Secretaries of Homeland Security.

Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 518–19 (M.D. Pa. 2007), *aff'd in part, vacated in part*, 620 F.3d 170 (3d Cir. 2010), *cert. granted, judgment vacated sub nom.* City of Hazleton v. Lozano, 563 U.S. 1030 (2011), *aff'd in part, rev'd in part*, 724 F.3d 297 (3d Cir. 2013).

105. DAPA Memo, *supra* note 74, at 4–5 (emphasis added).

106. *Frequently Asked Questions*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> [<https://perma.cc/8ZMT-CTKA>] (last accessed May 19, 2017).

107. See DAPA Memo, *supra* note 74.

108. See, e.g., Jens Manuel Krogstad & Ana Gonzalez-Barrera, If original DACA program is a guide, many eligible immigrants will apply for deportation relief, Pew Research Ctr.: Fact Tank (Dec. 5, 2014), <http://www.pewresearch.org/fact-tank/2014/12/05/if-original-daca-program-is-a-guide-many-eligible-immigrants-will-apply-for-deportation-relief> [<https://perma.cc/2RC8-5KFJ>].

The section of the immigration law that includes the brief phrase on which this entire edifice has been erected was added in 1986 as part of the Immigration Reform and Control Act.¹⁰⁹ The legislative record leading to the adoption of that monumental piece of legislation is extensive, but I have located no discussion whatsoever of the clause, much less any claim that by including that clause, Congress was conferring unfettered discretion on the Attorney General to issue lawful status and work authorization to anyone illegally present in the United States he chose, contrary to the finely wrought and hotly contested¹¹⁰ provisions providing for such lawful status only upon meeting very strict criteria.

Nevertheless, the Obama administration's reliance on those four words as authority for the work authorization aspects of the DACA and DAPA programs brings us back full circle to the discussion of the non-delegation doctrine with which this Article begins. Although this important non-delegation principle has been weakened to near death by the courts over the last three-quarters of a century,¹¹¹ the absolute and unfettered discretion that results from the President's interpretation of section 1324a(h)(3) runs afoul of the non-delegation doctrine even in its moribund state. Quite simply, if the phrase, "or by the Attorney General,"¹¹² means what President Obama claimed it meant, there is no principle channeling the discretion of the executive at all, much less an intelligible one.

In sum, the 2012 DACA program and its 2014 DAPA expansion were presidential usurpations of the lawmaking power that the Constitution vests in Congress. The fact that it occurred after Presidents of both political parties failed to accomplish essentially the same policy goal by legislation¹¹³ makes the usurpation even more troubling. For more than a decade, illegal immigration advocates have been pushing for Congress to enact the DREAM Act, the acronym for the Development,

109. Pub. L. No. 99-603, 100 Stat. 3445 (1986).

110. *See, e.g.*, 159 CONG. REC. S458-60 (daily ed. Feb. 4, 2013) (statement of Sen. Charles Grassley).

111. *See supra* notes 3-9 and accompanying text.

112. 8 U.S.C. § 1324A(h)(3) (2012).

113. *See* Robert Pear & Carl Hulse, *Immigration Bill Fails to Survive Senate Vote*, N.Y. TIMES (June 28, 2007), <http://www.nytimes.com/2007/06/28/washington/28end-immig.html> [<https://perma.cc/U35A-3U5P>].

Relief, and Education for Alien Minors Act first introduced by Senators Dick Durbin and Orrin Hatch in 2001.¹¹⁴ The bill would have given lawful permanent residence status and work authorization to anyone who arrived in this country illegally as a minor, had been in the country illegally for at least five years, was in school or had graduated from high school or served in the military, and was not yet 35 years old (although that age requirement could be waived).¹¹⁵ The bill or some version of it has been reintroduced in each Congress since,¹¹⁶ but has usually kicked up such a firestorm of opposition by those who view its principal provisions as an “amnesty” for illegal immigrants that even its high-level bipartisan support has proved insufficient to get the bill adopted.¹¹⁷ But no matter. The President (or more accurately in this case, his Secretary of Homeland Security) had a pen, and in 2012 he unilaterally gave effect to the DREAM Act as if it were law,¹¹⁸ and then extended that “lawful” authorization to millions more.¹¹⁹ Who knew? If the President already had the power unilaterally to impose the DREAM Act and beyond, why all the angst in Congress for over a decade of trying to get the bill passed? Heck, why did President Obama himself claim in 2011 that he had no such authority,¹²⁰ when just a year later he claimed to have it?

This is not how our system of government is designed. Article I, Section 1 of the Constitution makes patently clear that “All legislative powers” granted to the federal government “shall be vested in” Congress, not the executive branch.¹²¹ And Article I, Section 8, Clause 4 makes clear that plenary power over naturalization is vested in Congress, not the President.¹²² Congress cannot give that lawmaking power away. To allow otherwise, as the DACA and

114. S. 1291, 107th Cong. (2001).

115. *Id.*

116. *See, e.g.*, S. 952, 112th Cong. (2011).

117. *See, e.g.*, Julia Preston, *After A False Dream, Anxiety for Illegal Immigrant Students*, N.Y. TIMES (Feb. 8, 2011), http://www.nytimes.com/2011/02/09/us/09immigration.html?_r=0 [https://perma.cc/JC4Y-E2XW].

118. *See* DACA Memo, *supra* note 73.

119. *See* DAPA Memo, *supra* note 74.

120. *See, e.g.*, Barack Obama, Remarks by the President at Univision Town Hall, (Mar. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall> [https://perma.cc/8SR5-L7Z3].

121. U.S. CONST. art. I, § 1.

122. *See id.* art. I, § 8, cl. 4.

DAPA programs, and so many other recent executive orders, require, is to simply negate that most basic of separation of powers principles. That cannot be the right answer in a Constitution devoted to the rule of law and not the raw exercise of power by men. The President's constitutional duty is to "take Care that the Laws be faithfully executed,"¹²³ not to rewrite them as he wishes, enforce them only when he wants, and otherwise render superfluous the great legislative body of the Congress, the immediate representatives of the ultimate sovereign authority in this country, "We the People."

123. *Id.* art. II, § 3.

HOW TO SALVAGE ARTICLE I: THE CRUMBLING FOUNDATION OF OUR REPUBLIC

DAVID SCHOENBROD*

*I pledge allegiance to the flag of the United States of America
and the republic for which it stands*¹

Article I is the first article of the Constitution because it was to be the foundation of our republic. “Republic” means the people’s government rather than that of a king or an oligarchy.² To make the federal government a republic, Article I assigns the power to decide the overarching issues of policy to a legislature whose members are supposed to be accountable to the people.³ The members of this legislature, Congress, would therefore bear personal responsibility to the people for the consequences of these pivotal decisions. This responsibility would tend to link the actions of the federal government to the interests of the people.

As I will argue, this linkage remained strong for over a century and a half—indeed grew stronger as the electorate came to in-

* Trustee Professor of Law, New York Law School. As this Article builds upon my recent book, *DC Confidential: Inside the Five Tricks of Washington*, I owe a debt of gratitude to those who helped me with the book. DAVID SCHOENBROD, *DC CONFIDENTIAL: INSIDE THE FIVE TRICKS OF WASHINGTON* 229–31 (2017). For help specifically with this Article, I owe a special debt to the leadership of the Federalist Society’s Article I Initiative and the fellow participants therein. For thoughtful research assistance on this Article, I thank, Nicole Jolicoeur and Laura Rion, New York Law School class of 2017.

1. 4 U.S.C. § 4 (2012).

2. *Republic*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/republic> [<https://perma.cc/G9NZ-Y38Z>].

3. These primary issues of policy are enumerated in Article I, Section 8. The Constitution requires the House of Representatives to be elected by the people, but prior to the ratification of the 17th amendment allowed the state legislatures to choose Senators. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII. Because, however, the states had to have a republican form of government *id.* art. IV, § 4, the Senators were directly or indirectly accountable to the people. The idea was to make members of Congress personally responsible to the people. *See* THE FEDERALIST NO. 10 (James Madison).

clude a larger portion of the population—until a half century ago when, members of Congress and Presidents of both parties began to evade Article I’s foundational purpose. They devised and used new ways of drafting legislation that let them take the credit for promises of good news while avoiding the blame when government produces bad results. With five key tricks, elected officials now avoid accounting to us for many unpopular consequences.

Part I of my analysis argues that Article I’s purpose of making politically accountable officials personally responsible for consequences is vital to the success and endurance of the republic. Part II shows how elected officials began to evade such personal responsibility a half century ago. Part III explains how this evasion of personal responsibility has led to bumptious promises, failed policies, and spiraling distrust of government as well as polarization, gridlock, and the increased influence of special interests. The ensuing distrust set the stage for outsider candidates such as Bernie Sanders and Donald Trump. Whatever the fate of the Trump presidency, the distrust is likely to build so long as the tricks continue. Part IV proposes a statute, the Honest Deal Act, which would change the ground rules of legislative politics to force elected officials to once again shoulder personal responsibility for consequences. We cannot stop the tricks by broadening the powers of the President, constitutional adjudication, or constitutional amendments. Part V argues that it is possible, surprising as it might seem, to get elected officials to enact a statute that forces them to shoulder responsibility.

I. ARTICLE I’S PURPOSE OF IMPOSING PERSONAL RESPONSIBILITY IS CRITICAL

The people who met in Philadelphia in the summer of 1787 to draft a constitution for the United States were not all-knowing, but they did respond sensibly to the challenge of finding a way that a population with clashing interests could get along. They put at the heart of the country’s new government a legislative process in which a House of Representatives and a Senate whose members would both represent different constituencies and made them personally responsible for the

consequences of their legislative decisions by requiring them to publish the “Yeas and Nays” on controversial matters.⁴

The Constitution assigned to this legislative process the most pivotal decisions, such as decisions to spend the people’s money, take the people’s money through taxes, or incur debt.⁵ Those assignments put these legislators, including the President when acting under Article I,⁶ in the middle of such conflicts as those between constituents who want more money from the government, constituents who do not want to pay more taxes to the government, and constituents who oppose debt because they fear that it will require cutting spending cuts or increasing taxes in the future.

The legislators would thus be personally responsible for both the popular and unpopular consequences of their decisions. That, in turn would tend to generate open debate. If, for example, citizens of one city pressed their representatives to get Congress to spend money to improve their harbor, those representatives might run up against other representatives whose constituents would resent the cost and might garner support from still-other representatives whose constituents wanted to ship goods through the improved harbor.⁷ Congress would thus collect information from far afield about the consequences of proposed legislative actions. So, however legislators resolved a controversial issue, the clash between them would tend to make evident to both representatives and constituents who would gain and who would lose from the proposed action and in what ways.

Consider now the manifold advantages potential in a form of government in which politically accountable officials are responsible for both the popular and unpopular consequences of the pivotal decisions.

A. A republican form of government

The Declaration of Independence held that governments derive “their just Powers from the Consent of the Governed.”⁸

4. U.S. CONST. art. 1, § 5, cl. 3.

5. *Id.* art. 1, § 8, cl. 1.

6. *Id.* art. 1, § 7.

7. See THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

8. U.S. CONST. art. 1, § 8.

The personal responsibility of accountable officials for both popular and unpopular consequences rested the federal government upon the consent of the governed.

B. Careful attention to the public interest

The Framers were famously concerned about “factions,” by which they meant special interests that, unless checked, would hijack government for selfish purposes.⁹ Personal responsibility for both popular and unpopular consequences would mean that, the Framers hoped, faction would check faction.¹⁰

This hope was borne out to a substantial extent. The open debate between clashing interests, together with the personal responsibility of legislators for both benefits to one group of voters and burdens on another group of voters would give them strong incentives to take into account the interests of both groups. This was the case, for example, during the early 1800s when domestic manufacturers of cloth wanted Congress to set high tariffs on imported cloth to protect them from foreign competition.¹¹ Others opposed higher tariffs because they would increase the price of cloth, and they told their representatives so. These representatives, as Daniel Webster observed at the time, were “afraid of their constituents.”¹² Congress ultimately produced legislation that balanced the interests of both manufacturers and purchasers.¹³

9. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) (“By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”).

10. *Id.* at 84 (“The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source.”).

11. 42 ANNALS OF CONG. 3124–28 (1824) (reporting a memorial “[o]f sundry manufacturers, mechanics, and friends to national industry . . .”).

12. Letter from Daniel Webster to Isaac P. Davis (Apr. 11, 1825), in THE PRIVATE CORRESPONDENCE OF DANIEL WEBSTER 383, 383 (Fletcher Webster ed., 1857).

13. See MARK THORNTON & ROBERT EKELUND, TARIFFS, BLOCKADES, AND INFLATION: THE ECONOMICS OF THE CIVIL WAR 20 (2004).

C. An informed electorate

The drama of open debates would also educate citizens about the choices facing the government, even those who did not take to schooling in classrooms. The people desired this education. Once the states ratified the Constitution, voters insisted on transparency in the political process. For example, when the Senate violated the Constitution by keeping its proceedings secret, public pressure forced it to relent. As historian and professor Robert Wiebe stated, "The anger at secrecy, the demand for openness, was a functional response to situations that made democracy impossible."¹⁴ In the decades after the Constitution was ratified, Congresses actually voted upon the great issues of their era, deciding the law itself on hot-button issues such as tariffs.¹⁵ Legislators took positions on the hard choices; constituents understood.¹⁶ The Constitution had made the government a drama.

Desire to read about the drama contributed to an upsurge in literacy. From 1800 to 1840, literacy rates among white adults increased from 75 percent to around 95 percent in the North and from 50 percent to 80 percent in the South.¹⁷ With a largely literate public, the United States had more newspapers in 1822 than any other country despite its smaller population.¹⁸ According to historian and professor Daniel Walker Howe, "Foreign visitors marveled at the extent of public awareness even in remote and provincial areas."¹⁹

D. A virtuous circle

The open debate informing the public of who would gain and who would lose from a legislative proposal would tend to bring some moderation of demands on government. Given human nature, however, there would still be disagreements,

14. ROBERT H. WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* 68 (1995).

15. See DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT* 272–73 (2007).

16. WIEBE, *supra* note 14, at 21 ("By the late 1820's, as Alexis de Tocqueville noted, it was already American practice in politics to 'strip off . . . whatever conceals it from sight, in order to view it more closely and in the broad light of day.'"); *id.* at 576.

17. *Id.* at 67.

18. HOWE, *supra* note 15, at 227.

19. *Id.* at 231.

but, because Congress would resolve the disagreements in the open with consequences in public view, legislators would usually be required to balance conflicting interests and voters could generally accept the system as fair. Win some; lose some. *The Economist* approvingly summarized the viewpoint of Nobel Prize-winning political economist James M. Buchanan as follows: “A democratic system can maintain legitimacy despite rancorous politics if broad agreement exists on the fairness of the underlying rules [of decision].”²⁰

The circle of repeated demand, feedback, moderation, balancing, decision, and acceptance induced by the responsibility of representatives would tend to foster virtue. This virtuous circle could, in the best of times, put the goodness in peoples’ hearts into the heart of government. There were, of course, the worst of times, such as the Civil War. Yet, despite clashing interests, the nation not only held together, but its Congress could legislate on such sharply contested issues as tariffs in the early 1800s and civil rights in the early 1960s.²¹

II. HOW LEGISLATORS CAME TO EVADE PERSONAL RESPONSIBILITY

Ironically, the skirting of Article I’s purpose came from the success it helped to produce. In the mid-1960s, the federal government seemed capable of working wonders. It had gotten the country through the Great Depression, won World War II, invented the atomic bomb, built the interstate highway system, came to preside over the world’s richest economy, and enacted meaningful civil rights legislation. Such successes understandably led voters to want Washington to deal with additional problems such as pollution and haphazard health care for the poor and elderly. Yet voters, of course, preferred not to feel the burdens required to satisfy their wants. That is human nature. Besides, as I can attest from witnessing the inception of the “Great Society,”

20. *The Voice of Public Choice*, *ECONOMIST* (Jan. 19, 2013), <http://www.economist.com/news/finance-and-economics/21569692-james-buchanan-who-died-january-9th-illuminated-political-decision-making> [<https://perma.cc/Q63F-2VF7>].

21. See David Schoenbrod, *We Have a Dream*, 59 N.Y. L. SCH. L. REV. 11, 14 (2014).

many people thought that they would not have to feel burdens when they had a wonder-working government.

In this context, politicians came to sincerely embrace theories that made it seem possible to provide benefits without the burdens needed to deliver the benefits—that is, to bestow something for nothing or very little. One theory: setting strict deadlines to make the air healthy would force industry to invent technologies that would make it feasible to meet the deadlines.²² In fact, the wishing-will-make-it-so theories usually fell short. An example: meeting the deadlines in the 1970 Clean Air Act would have required taking most of the cars off the road in southern California.²³ Instead of confessing error, however, legislators from both parties quietly lobbied the EPA not to impose unpopular burdens and then publicly blamed the EPA for failing to deliver healthy air on schedule and for those burdens it did impose.²⁴

Once Congress began to overpromise, there was no going back. A new way of legislating had begun that changed legislators' personal incentives. To promise good news while avoiding the blame for bad results, members of Congress and Presidents devised and used five key tricks. Here they are very briefly described.

A. *The Money Trick*

The money trick lets members of Congress and Presidents get credit for tax cuts and spending increases while shifting the blame for the inevitable tax increases and spending cuts to their successors in office when the deficits and debt will otherwise become unsustainable. President Franklin Roosevelt and Congress did not play the money trick when they established Social Security in 1935.²⁵ They took responsibility for both the benefits and the burdens, including taxes on employers and employees fully sufficiently to pay the pensions promised into the future. In contrast,

22. See David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740, 813–14 (1983) (discussing the enactment of the 1970 Clean Air Act with mandatory goals as a means to develop better technology).

23. See DAVID SCHOENBROD, *SAVING OUR ENVIRONMENT FROM WASHINGTON* 23–28, 39–51 (2005).

24. Schoenbrod, *supra* note 22, at 774 (“As 1977 approached, it became increasingly evident that the deadlines would not be met in many locales.” (citing COMM’N ON AIR QUALITY, *TO BREATHE CLEAR AIR* 3 (1981) (explaining the failure to meet deadlines due to the inadequacy of certain state regulations.))).

25. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620.

when President Lyndon Johnson and Congress established Medicare in 1965,²⁶ they took credit for the popular health coverage for the aged but shifted blame for raising some of the necessary revenue to their successors in office. President Richard Nixon and Congress acted similarly when they increased Social Security pensions shortly before the 1972 election.²⁷

B. The Debt Guarantee Trick

The debt guarantee trick lets members of Congress and Presidents get support from the too-big-to-fail financial giants whose profits politicians increase by guaranteeing their debts without charging market-based fees for the guarantees. Members of Congress and Presidents shift the blame for the inevitable bailouts to their successors in office when the speculation encouraged by the cheap debt guarantees triggers fiscal crises and economic crashes. The debt guarantee trick began to come on strong in the 1960s. Previously, when President Franklin Roosevelt and Congress established the Federal Deposit Insurance Corporation in 1933,²⁸ they limited the guarantees to \$2,500 per depositor. So the FDIC and thus the government would not guarantee the debts that banks owed to major depositors and other large investors who lent money to the banks. Because these debts would still be at risk, investors would demand higher interest rates from banks that took more risk and refuse to lend at all to those that took much more risk. This approach protected depositors of limited funds without the means to gauge the riskiness of their bank, yet gave banks a powerful incentive to control their appetite for risk. In contrast, when President Johnson and Congress established the Fannie Mae as a private corporation in 1968,²⁹ they implicitly guaranteed all of its debts. In time, it was clear to large investors that

26. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286.

27. Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329. This brief description of the trick is drawn from DAVID SCHOENBROD, *DC CONFIDENTIAL: INSIDE THE FIVE TRICKS OF WASHINGTON* 57–62 (2017).

28. Glass-Steagall Act, § 7, Pub. L. No. 73-66, 48 Stat. 162, 168 (1933).

29. Housing and Urban Development Act of 1968, §§ 801–810, Pub. L. No. 90-448, 82 Stat. 476, 536–46.

the federal government essentially guaranteed all the debts of too-big-to-fail financial giants.³⁰

C. *The Federal Mandate Trick*

The federal mandate trick lets members of Congress and Presidents get credit for benefits they coerce state and local government to deliver, but shift the blame for the burdens required to deliver those benefits to state and local officials. The federal mandate trick rose to prominence in the 1970s. Previously, when Congress and Presidents placed conditions on federal grants, it was generally to ensure that the purposes of the grant were achieved, such as requiring that federally-funded highways must be solidly constructed, or to enforce constitutional rights. In 1995, President Clinton stated, “Before 1964, the number of explicit mandates from the Congress on state and local governments was zero,” but “on the day I took office [January 20, 1993] there were at least 172 separate pieces of legislation that impose requirements on state and local government.”³¹

D. *The Regulation Trick*

The regulation trick lets members of Congress and Presidents get credit for granting rights to regulatory protection, but shift to federal agencies the blame for the burdens required to vindicate those rights and the failures to deliver the protection promised. The regulation trick began around 1970. Previously, Congress and Presidents either enacted regulations themselves through the Article I process or told agencies to promulgate the regulations in statutes that said to agencies, in essence, “Here’s a problem, solve it.” Such broad delegations gave the agency most of the credit for the benefits as well as the blame for the burdens.³² In contrast, Congress found a way to get credit for

30. This brief description of the trick is drawn from SCHOENBROD, *supra* note 27, at 62–64, 111–22.

31. William J. Clinton, Remarks on Signing the Unfunded Mandates Refort Act of 1995 (Mar. 22, 1995), *reprinted in* 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, WILLIAM J. CLINTON, 1995, at 381, 382 (1996). This brief description of the trick is drawn from SCHOENBROD, *supra* note 27, at 65–70.

32. While a few law professors suppose that delegation of rulemaking power does not let members of Congress shift blame, the weight of the political science literature is to the contrary. See David Schoenbrod, *Statutory Junk*, 66 EMORY L.J. ONLINE 2023 (2017). Although delegation does shift blame to officials appointed

the benefits, but shift blame for the burdens and the failures to deliver the benefits. With the 1970 Clean Air Act,³³ for example, President Nixon and Congress purported to grant iron-clad rights to regulatory protection (thus reaping credit) and told the agency to impose the duties needed to vindicate those rights (thus shifting blame).³⁴

E. *The War Trick*

The war trick lets members of Congress evade responsibility for wars that might later prove controversial. Until 1950, the tradition was that wars were either declared or authorized by statute, with the great bulk of wars authorized by statute. This tradition made both Presidents and Congress responsible for war. Then, in 1950, President Harry Truman launched the Korean War without seeking authorization from Congress. In 1973, responding to the unpopularity of wars in Vietnam, Laos, and Cambodia, Congress passed the War Powers Resolution.³⁵ It purported to block wars that are neither declared nor authorized by Congress. The Resolution, however, has been interpreted as providing a loophole that allows Presidents to avoid seeking approval from Congress, and Presidents use this loophole when Congress might balk at approving the war.³⁶ Congress has found it convenient to avoid closing the loophole. In 1995, then-Senator Joseph Biden stated that legislators have failed to fix the War Powers Resolution because “they do not have the political courage to take a stand on whether or not we should go to war.”³⁷ So members of Congress use the statute to take credit for supposedly wanting to take responsibility for going to war, while colluding with the President to evade responsibility for wars that might later prove controversial. Members of Congress can thus march in the parade if the war

by the President, the President who signs the statute also largely evades most of the blame. See SCHOENBROD, *supra* note 27, at 74–75.

33. Pub. L. No. 88-206, 77 Stat. 392 (1970).

34. This brief description of the trick is drawn from SCHOENBROD, *supra* note 27, at 70–74.

35. Pub. L. No. 93-148, 87 Stat. 555 (1973).

36. See, e.g., *Proposed Deployment of United States Armed Forces into Bosnia*, 19 Op. O.L.C. 327, 334–35 (1995).

37. 141 CONG. REC. S3971 (1995) (statement of Sen. Joseph Biden).

proves popular, but put the entire blame on the President if the war proves unpopular.³⁸

Voters, of course, understand that trickery is going on, but cannot see the sleights of hand that allow the legislators to take credit but shift blame. Indeed, legislators cater to constituents' concerns about the trickery through more trickery. Take a bill that the House passed on January 5, 2017, the Regulations from the Executive in Need of Scrutiny Act ("REINS Act").³⁹ The title, which suggests that the root of the problem is aggressive agencies rather than blame-shifting legislation, shows that blame-shifting is again at work. According to the Republican leadership of the House Judiciary Committee, the REINS Act "requires that federal agencies submit major regulations (those that cost the economy \$100 million or more) to Congress for approval" but no mention is made of regulations that cut the costs of compliance.⁴⁰

The REINS Act's sponsors have fashioned it to sound anti-regulatory rather than pro-accountability, which minimizes the chance that it would survive a filibuster in the Senate. The Act's failure would allow its sponsors to strike an anti-regulatory pose popular with their constituents without ever having to vote against specific regulatory protections that their constituents want. No less opportunistically, Democrats are for promises of regulatory protection without having to vote for regulatory burdens.

III. HOW EVADING PERSONAL RESPONSIBILITY HAS BROKEN GOVERNMENT

By allowing legislators to evade personal responsibility, the tricks rob us of critical advantages that we should get from Article I.

38. This brief description of the trick is drawn from SCHOENBROD, *supra* note 27, at 130–37.

39. H.R. 26, 115th Cong. (2017).

40. Press Release, H. Judiciary Comm., Goodlatte and Collins Praise House Passage of Bill to Curb Regulations with Highest Costs (Jan. 5, 2017), <https://judiciary.house.gov/press-release/goodlatte-collins-praise-house-passage-bill-curb-regulations-highest-costs> [<https://perma.cc/U9G2-37GJ>].

A. *From a republican form of government to a republican façade of government*

The tricks deny us a republican form of government by breaking the link between actions and responsibility for their consequences upon which representation depends. We have elections without accountability. By more than a two-to-one margin, voters believe that the federal government does not have the consent of the governed.⁴¹

B. *From careful attention to the public interest to carelessness and worse*

By insulating members of Congress from blame for unwisely entering wars, the war trick short-circuits the debate that ought to take place before the nation commits itself to war. This has led to many ill-conceived military enterprises.⁴²

By insulating members of Congress and Presidents from blame for the burdens needed to deliver on the promises on taxing, spending, debt guarantees, mandates, and regulation, the other tricks encourage legislators to make grandiose promises without regard to the consequences for the public. This means that they fail to consider whether government can in fact fulfill the promises, whether the promises are worth the burdens, and how to minimize the burdens needed to deliver them. Instead of framing legislation to deliver the most benefit to the constituents with the least burden, they frame legislation to deliver the most credit to themselves with the least blame to themselves.⁴³ Framing legislation to maximize the net benefit to constituents would require legislators to do hard work. Framing legislation to maximize the net benefit for themselves requires no hard work for legislators because they are past masters at optics.

It is thus unsurprising that legislators have cut the amount of time they spend in Washington and devote little of that time to legislation. They spend about as much time on legislation as de-

41. See 19% Think Federal Government Has Consent of the Governed, RASMUSSEN REP. (Apr. 11, 2014), http://www.rasmussenreports.com/public_content/politics/general_politics/april_2014/19_think_federal_government_has_consent_of_the_governed [<https://perma.cc/H4WP-NEEV>].

42. See SCHOENBROD, *supra* note 27, at 136–37.

43. See *id.* at 50–53.

voted weekend golfers spend on the golf course.⁴⁴ They have also greatly increased the portion of their budgets that go to the district offices that provide constituent service as opposed to the staffs in Washington assigned to help them with Article I legislative work.⁴⁵ The biggest share of the legislators' time in Washington is spent on soliciting campaign contributions.⁴⁶ As political scientists have found, blame-shifting allows legislators to benefit big campaign contributors at the expense of the general public without losing votes at the next election.⁴⁷ Conservatives as well as liberals argue that the tricks have encouraged policies that have benefited the rich at the expense of average citizens.

C. *From an informed electorate to a deceived electorate*

Some observers dismiss voters as ignorant and therefore rightly left in the dark. Yet, others have found, the trickery helps to cause ignorance.⁴⁸ As the legal philosopher and professor Jeremy Waldron wrote, those who dismiss voters as ignorant "have done democracy a great disservice" by portraying the public's seeming lack of understanding as an inevitable fact rather than as "the consequence of something comparable to malfeasance in office or corruption or electoral fraud"⁴⁹—in other words, the tricks.

D. *From a virtuous circle to a vicious circle*

The perverse consequences of trickery have included distrust of government. According to Pew Research, in 1964, before the trickery began, 76 percent of voters trusted Washington to "do the right thing almost always or most of the time."⁵⁰ That impressive figure fell to a woeful 19 percent in 2015.⁵¹

44. *See id.* at 89–90.

45. *See id.*

46. *See id.*

47. *See id.* at 90–92.

48. *See* JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS (2010).

49. Jeremy Waldron, *Accountability: Fundamental to Democracy* 28 (NYU Sch. of L. Pub. L. Paper No. 14-13, Apr. 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410812 [<https://perma.cc/UR66-5Q4Y>].

50. *Public Trust in Government: 1958–2015*, PEW RES. CTR. (Nov. 23, 2015), <http://www.people-press.org/2015/11/23/1-trust-in-government-1958-2015> [<https://perma.cc/K62J-5YT8>].

51. *Id.*

The great bulk of American people believe that Washington insiders have tricked them. By a four to one margin, voters agreed with the statement in Trump's inaugural address that "a small group in our nation's capital has reaped the rewards of government while the people have borne the cost."⁵² The Rasmussen poll showed that large majorities of Democrats, Republicans, and independents agreed.⁵³ It is thus unsurprising that Bernie Sanders and Donald Trump, both running as outsiders, did better than expected in the 2016 presidential primaries and so many voted to "drain the swamp" in the 2016 general election.

Whatever the fate of the Trump presidency, unless the legislators stop shirking their Article I duties and the accountability that comes with them, an increasingly resentful electorate will bring an increasingly erratic government. For example, then-Judge Stephen Breyer showed how something-for-nothing environmental statutes produced a "vicious circle," by telling the EPA to produce benefits by imposing burdens that the legislators failed to acknowledge in passing the statutes.⁵⁴ When the agency attempted to implement the statutes and constituents voiced objections to the burdens, legislators pressured administrators not to impose those burdens. This, in turn, meant that the agency failed to deliver the promised environmental quality. As a result, environmental advocates blasted the agency and complained to members of Congress, who responded by ordering the agency in yet-more-absolute statutes to protect the environment, still of course without taking responsibility for the required burdens. The result of this vicious circle, Breyer showed, is that the EPA sometimes fails to stop major environmental harms for modest costs, instead stopping trivial environmental harms at huge costs.⁵⁵ Not only in the environmental arena but in general, something-for-nothing legislation has turned the virtuous circle into a vicious circle by promising

52. *Voters Strongly Share Trump's Criticism of D.C. Establishment*, RASMUSSEN REP. (Jan. 24, 2017), http://www.rasmussenreports.com/public_content/politics/general_politics/january_2017/voters_strongly_share_trump_s_criticism_of_d_c_establishment [https://perma.cc/F3F7-Y3VG].

53. *See id.*

54. STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 3–54 (1995).

55. *See id.* at 21–23.

benefits the government fails to deliver and burdens of which legislators fail to forewarn us. As a result, all sides feel cheated.

Voters, of course, know that the promises of something for nothing, or for very little, are too good to be true, and so we sense that trickery is going on even though we do not quite understand how the trickery works. The sense that cheating is going on negates the broad agreement on the fairness of a democratic system that has the ability to be legitimate despite rancorous politics. With cheating in the air, people grab for what they can get.

By using the tricks, Congress fails to set realistic expectations and thereby provide a context in which society can prosper and its members can individually pursue happiness. To the contrary, Congress tells everyone, in essence, that he or she is entitled to prevail, much like the corrupt officials in *The Hunger Games* tell each and every combatant, “May the odds be ever in your favor!”⁵⁶ The conflicting expectations that Congress creates set up our government to disappoint. No wonder we distrust the federal government.

Moreover, by failing to face up to the inevitable trade-offs between benefits and burdens, Congress fails to educate voters about what makes sense and what is fair. Legislators tell us what they are against rather than what they are for. Most legislators say they are against killing children with pollution. Most legislators also say they are against killing jobs with regulation. Which they say depends upon whom they are talking to. Such absolutism is possible in sound bites or tricky statutes, but not in deciding how much to cut emissions of a pollutant, where trade-offs between health and jobs are inevitable. Yet, only when government leaders focus on the concrete rather than the abstract can they tap into our shared sense of fairness.⁵⁷

56. SUZANNE COLLINS, *THE HUNGER GAMES* 19 (2012) (emphasis omitted).

57. Ralph Nader described this sense of fairness as “the common core of people’s humanity, which finds expression in factual realities, and the many senses of fairness and fair play that appear right where people are interacting every day—their workplaces, neighborhoods, marketplaces, public spaces, and the all-encompassing physical environment.” RALPH NADER, *UNSTOPPABLE* 16 (2014).

The distrust of the federal government is often blamed on gridlock and polarization, but the trust steeply declined in the 1960s and 1970s, long before the gridlock and polarization set in.⁵⁸

IV. HOW THE LEGISLATORS COULD STOP THE SHIRKING

We cannot escape the tricks of Congress by looking to Presidents for salvation. As already noted in passing, Presidents have often instigated the tricks that Congress uses. With the power to veto bills, the President usually has more power over legislation than anyone and therefore more responsibility. As the legislator-in-chief, the President is the trickster-in-chief.

The tricks poison the entire government rather than just the legislative branch. The executive branch's primary job is to execute the statutes legislated, and the judicial branch's primary job is to apply those statutes in litigation. Statutes once gave the executive more leeway, but to take full advantage of the blame-shifting tricks, the statutes enacted since the 1960s impose so many precisely specified duties on the executive branch that it has much less leeway to rescue us from the bad decisions that statutes make. For example, in December, 2008, the newly elected President, Barack Obama, asked Congress to pass a bill to stimulate an economy in the depths of recession by putting people to work on "shovel-ready" projects repairing roads and other deteriorated infrastructure.⁵⁹ Later, however, he lamented that "there's no such thing as shovel-ready projects."⁶⁰ The White House reported in February 2014 that the government could devote only 3.6 percent of the \$832 billion program to fixing bridges, roads, and the rest of our transportation system.⁶¹ As Philip Howard explained: "[T]he President had no authority to build anything, and most of the money got

58. See *Public Trust in Government*, *supra* note 50 (demonstrating increases and declines in public trust of government).

59. Michael D. Shear, *Obama Lesson: 'Shovel Ready' Not So Ready*, N. Y. TIMES (Oct. 15, 2010), http://thecaucus.blogs.nytimes.com/2010/10/15/obama-lesson-shovel-ready-not-so-ready/?_php=true&_type=blogs&_r=0 [https://perma.cc/G78J-7B8X].

60. *Id.*

61. See EXEC. OFFICE OF THE PRESIDENT, COUNCIL OF ECON. ADVISORS, THE ECONOMIC IMPACT OF THE AMERICAN RECOVERY AND REINVESTMENT ACT 8, 34 (Feb. 2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_arra_report.pdf [https://perma.cc/JR7C-FLBD].

diverted to a temporary bailout of the states. The money was basically wasted.”⁶² Howard showed that the President’s hands were tied again and again by old statutes.⁶³

Presidents are often tempted to circumvent Congress by usurping the legislative powers that the Constitution assigns to Congress. In this, commentators on the left and the right see grave danger. For example, on the left, Bruce Ackerman, a prominent progressive professor of law and political science who had vigorously defended the growth of executive power during the New Deal, expressed alarm at more recent changes in our government. Writing in 2010, he warned that although Presidents try to dress their unilateralism in high purpose:

[I]n America, it is not enough to be right. Before you can impose your views on the polity, you have to convince your fellow citizens that you’re right. That’s what democracy is all about. So it makes good sense to require the president to gain the support of Congress even when his vision is morally compelling. He should not be allowed to lead the nation on a great leap forward through executive decree.⁶⁴

Nor do the American people want their President to usurp the powers of Congress. Although opinion polls for decades have reflected disapproval of Congress, the public continues to believe that Congress, rather than the President, should make the major policy choices.⁶⁵ I share that belief, because systematic studies show that nations with strong executives and weak legislatures tend to suppress political liberty, go to war more frequently, and suffer from more corruption.⁶⁶

So we must fix the legislative process, but we cannot do so by enforcing the Constitution in court. Some of the tricks, such as the money trick, plainly violate no constitutional structure.

62. PHILIP K. HOWARD, *THE RULE OF NOBODY: SAVING AMERICA FROM DEAD LAWS AND BROKEN GOVERNMENT* 156 (2014).

63. *See id.*

64. BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 39 (2010). Posner and Vermeule’s *The Executive Unbound* is a spirited defense of the President being unbound by legislative power. ERIC POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010). Their argument is deeply flawed. *See* SCHOENBROD, *supra* note 27, at 74–75.

65. *See e.g.*, DAVID R. MAYHEW, *THE IMPRINT OF CONGRESS* (forthcoming 2017).

66. F. H. BUCKLEY, *THE ONCE AND FUTURE KING: THE RISE OF CROWN GOVERNMENT IN AMERICA* 181–234, 315–320 (2014).

The federal mandate trick has been stopped in court, but only once until 2012.⁶⁷

Nor can we feasibly stop the tricks in court by amending the Constitution. Take, for example, the decades-long drive to amend the Constitution to limit budget deficits. Whether such an amendment is good economics, it is unlikely to succeed. Such an amendment has never gotten the required two-thirds approval in both houses of Congress needed to submit it to the states for ratification. Even if it were to get this approval, it is unlikely that it would then be ratified by three-quarters of the states, as is necessary to amend the Constitution.⁶⁸ The balanced budget amendment does, however, let some elected officials strike a pose in favor of fiscal responsibility without actually having to take the blame for raising taxes or cutting spending.

The good news is that, even under the existing Constitution, the Republic avoided the five tricks for over a century and a half. Tradition impelled legislators to act in ways that gave them responsibility for consequences. That tradition got swept away in the middle of the twentieth century. We should not necessarily go back to the old tradition. Today's times are different. We need a new tradition suitable for our times that will stop the five tricks.

To that end, my recent book, *DC Confidential: Inside the Five Tricks of Washington*, proposes a statute, the Honest Deal Act.⁶⁹ It would change the ground rules of legislative politics to force elected officials to shoulder blame for unpopular consequences. Here, in a nutshell, is how each of the five tricks lets them shift blame and the way that the Honest Deal Act would stop the blame shifting.

The money trick lets members of Congress and Presidents shift to their successors in office the blame for the tax increases and benefit cuts that will result from current policy. Much as the Truth

67. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 632 (2012). Jonathan Adler argues that *NFIB*, even though framed as a response to extreme and patent coercion, may have an impact in some other instances. Jonathan H. Adler & Nathaniel Steward, *Is the Clean Air Act Unconstitutional? Coercion, Cooperative Federalism and Conditional Spending after NFIB v. Sebelius*, 43 *ECOLOGY L.Q.* 671, 721–22 (2017).

68. U.S. CONST. art V.

69. The following discussion of the Honest Deal Act is based on SCHOENBROD, *supra* note 27, at 139–60.

in Lending Act requires lenders to disclose to prospective borrowers how much they will have to pay in the future,⁷⁰ the Honest Deal Act would require government to disclose to voters in the present the average cost per family of the spending cuts or tax increases needed for it to make ends meet in the long run and how much that cost changed in the last Congress.⁷¹

The debt guarantee trick lets members of Congress and Presidents shift to their successors in office the blame for the fiscal crises and economic misery that will result from current debt guarantees that increase profits on Wall Street. The Honest Deal Act would charge the businesses that benefit from the debt guarantees market-based fees. The market would drive the fee up when a firm takes more risk, thereby cutting its profits when it take risks that could help lead to a fiscal crisis.⁷²

The federal mandate trick lets federal officials shift to state officials the blame for the burdens needed to deliver the benefits for which the federal officials take credit. The Honest Deal Act would trigger roll call votes on the most controversial new mandates and thus make members of Congress responsible for the burdens that they impose through state and local government.⁷³

The regulation trick lets current members of Congress and Presidents shift blame to federal agencies for the burdens required to vindicate rights to regulatory protection and the failures to deliver the promised regulatory protection. Implementing the proposal by James Landis, the New Deal expert, as fleshed out by then judge Stephen Breyer, the Honest Deal Act would require members of Congress to cast roll call votes on major regulatory changes, whether to strengthen or weaken regulation.⁷⁴

The war trick lets members of Congress shift to the President blame for wars that prove unpopular. The Honest Deal Act would require members of Congress to vote on wars at the outset.⁷⁵

These proposals do not tilt for or against spending or taxing, benefits or burdens, war or peace, or any of the rest; rather,

70. 15 U.S.C. §§ 1631–51 (2012).

71. *Id.* at 139–45.

72. *Id.* at 145–48.

73. *Id.* at 148–50.

74. *Id.* at 150–56.

75. *Id.* at 156–60.

they tilt toward making elected officials accountable to us for the consequences they impose.⁷⁶

V. HOW WE CAN GET THE LEGISLATORS TO GIVE US AN HONEST DEAL

Getting the Honest Deal Act passed looks impossible when we blame our broken government on politicians currying favor with special interests on the left or the right. Such special interests can seem invincible because, as Professor Mancur Olson famously taught, the small number of their members—sometimes only a single monopolistic firm—makes it easier for them to organize to wield political influence.⁷⁷ This appearance of impossibility rests, however, on two false premises: (1) that special interests can't be defeated and (2) the fault lies exclusively with members of Congress and Presidents.

The first premise is false because the general public can sometimes prevail over special interests. As Professor Olson wrote:

[I]deas certainly do make a difference. May we not then reasonably expect, if special interests are (as I have claimed) harmful to economic growth, full employment, coherent government, equal opportunity, and social mobility, that students of the matter will become increasingly aware of this as time goes on? And that the awareness eventually will spread to larger and larger proportions of the population? And that this wider awareness will greatly limit the losses from the special interests? That is what I expect, at least when I am searching for a happy ending.⁷⁸

Ideas are indeed what allowed the broad public interest to prevail over special interests in the 1970s. The idea that government should protect the public from pollution brought regulation despite imposing large costs on the well-organized interests in the auto, coal, and other industries. And the idea that the government regulation of airlines, railroads, telephone, and other companies

76. For a description of the terms of the Honest Deal Act and a detailed explanation for its design, see DC-CONFIDENTIAL, <http://www.dc-confidential.org> [<https://perma.cc/PWP4-S9V3>].

77. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

78. MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 237 (2008).

was actually enabling these firms to charge inflated prices brought deregulation that has saved consumers huge sums.

I wrote *DC Confidential* to spread the idea that the trickery does us great harm. The time is ripe for the public to see the harm that five tricks do to us. As noted in Part III, distrust of the federal government had reached an all-time high in 2015. Although the public generally does not yet understand the sleights of hand that enable these tricks to work, we have glimpsed the harm that comes from them. To mollify our anger, Congress has passed a succession of statutes:

- Anger about unauthorized or sloppily-authorized military campaigns led to the War Powers Resolution in 1973.⁷⁹
- Anger about deficits led to the budget-balancing statutes of the 1980s⁸⁰ and 1990s.⁸¹
- Anger about mandates to states and localities led to the Unfunded Mandates Reform Act of 1995.⁸²
- Anger about regulation led to the Congressional Review Act of 1996.⁸³
- Anger about bailouts of financial giants led to Dodd-Frank.⁸⁴

These statutes have not, however, stopped the tricks. The problem was that the citizens voicing complaints to Congress

79. Pub. L. No. 93-148, 87 Stat. 555 (1973). For more information about the origins of the War Powers Resolution, see *War Powers Legislation: Hearings Before the Committee on Foreign Relations*, 92nd Cong. 58 (1971) (statement of Sen. J. W. Fulbright); *id.* at 125 (statement of Sen. Claiborne Pell); *id.* at 261 (statement of Sen. Robert Taft, Jr.); *id.* at 336 (statement of Sen. Charles Mathias).

80. Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037.

81. Budget Enforcement Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388. For origins of budget balancing statutes, see, for example, Dick Thornburgh, *Gramm-Rudman-Hollings and the Balanced Budget Amendment: A Page of History*, 25 HARV. J. LEGIS. 615 (1988).

82. Pub. L. No. 104-4, 109 Stat. 48. For origins of the Unfunded Mandate Reform Act, see 141 CONG. REC. 7, S833-34 (daily ed. Jan. 12, 1995) (statement of Sen. Bob Dole).

83. Pub. L. No. 104-121, 110 Stat. 847 (1996). For origins of the Congressional Review Act, see, for example, James T. O' Reilly, *EPA Rulemaking after the 104th Congress: Death from Four Near-Fatal Wounds?*, 3 ENVTL L. 1, 5-10 (1996).

84. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). For information on the origins of Dodd-Frank, see SCHOENBROD, *supra* note 27, at 120.

did not insist on a specific design for new ground rules sufficient to stop the tricks. With the design left to Congress, it produced reforms that were more apparent than real, at least in the long run.⁸⁵ My book suggests specific changes to the ground rules of legislative politics sufficient to stop the tricks. I have dealt with these five tricks together because that shifts the focus from their adverse policy consequences in specific contexts to being cheated. Being cheated gets the blood boiling.

The second false premise behind the notion that we cannot stop the tricks is that the fault lies exclusively with politicians. We, in fact, participate in cheating ourselves. Many politicians would embrace honesty if we only made clear that we prefer honesty to being falsely promised something for nothing. To see why politicians who so often duck blame might enact a statute that forces them to accept responsibility, we need a fuller understanding of why they behave as they do, for it will show our own part in their behavior.

Many people go into politics in the hope of exercising power responsibly, but find that they must engage in trickery in order to have power to exercise. The reason is, as suggested in Part II, many voters have become accustomed to being promised something for nothing, and will reject politicians who fail to promise it. Tim Penny wrote, after serving in the House as a Democratic representative from Minnesota, “Voters routinely punish lawmakers who . . . challenge them to face unpleasant truths.”⁸⁶ So legislators are “running scared,” as the political scientist and professor Anthony King put it.⁸⁷

Thus, legislators found that using tricks was a recipe for getting reelected, and showing other legislators how to do the same was a recipe for getting the power to shape legislation within Congress. When today’s incumbents came to Congress,

85. Members of Congress played a critical role in designing these illusory ground-rule statutes. *See, e.g.*, JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH*, 48–49 (1993); PAUL L. POSNER, *THE POLITICS OF UNFUNDED MANDATES* 180–207 (1998); *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2176–83 (2009).

86. TIMOTHY PENNY & MAJOR GARRETT, *COMMON CENTS: A RETIRING SIX-TERM CONGRESSMAN REVEALS HOW CONGRESS REALLY WORKS—AND WHAT WE MUST DO TO FIX IT* 72 (1995).

87. Anthony King, *Running Scared*, ATLANTIC (Jan. 1997), <http://www.theatlantic.com/magazine/archive/1997/01/running-scared/376754/>, [<https://perma.cc/G4XP-K78C>].

they found themselves in an institution that was doing business through tricks. They had to go along or become irrelevant. In sum, powerful evolutionary pressures have turned Congress into the trick-playing institution that it is today.

As a result, we cannot simply get rid of the tricks by voting against the members of Congress who join in them. Their replacements would also feel pressures to deceive voters. So, both voters and politicians are trapped in a dishonest game. As the saying goes, "Don't hate the player, hate the game." The Honest Deal Act is a way to change the ground rules of the game.

We can begin to escape the trap by asking politicians to pledge to pass the Honest Deal Act and faithfully implement it. An associated webpage⁸⁸ provides voters with the means to quickly and easily send such messages. It also provides the means to ask friends to send such messages.

Taking the pledge would appeal to the part of the many incumbents who went into office hoping to exercise power honorably. True, some legislators may prefer to keep up the trickery and the ridiculous posturing it entails because they believe that trickery will ease their reelection. Their hunger to get reelected would, however, similarly force them to support the Honest Deal Act if many voters wanted them to.

Voters should want them to because the five tricks harm far more voters than they help. To see why, ask yourself this question: do you want your government to be run by officials who are accountable to us on the basis of sound bites or the consequences of their actions? Incumbents will not have to start taking responsibility until later, when the necessity to do so will apply to both parties.

Each one of us who asks politicians to pledge to support the Honest Deal Act will make a substantial difference, because in the end it will not take the concern of that many people to tilt the political balance against the tricks. This response is because many sorts of politicians—Presidents, governors, mayors, other state and local officials, and the candidates for these offices—have reasons to want to stop the tricks.

The Presidents will welcome the Honest Deal Act, except perhaps for the cure for the war trick, which would deprive

88. DC-CONFIDENTIAL, <http://www.dc-confidential.org> [<https://perma.cc/PWP4-S9V3>].

them of the power to wage war without securing approval from Congress. While some legislators find the tricks helpful to secure their seats for many terms, the President is limited to two terms and is often frustrated by the unwillingness of Congress to come to grips with pressing issues before those two terms end. In addition, by pledging to press for passage of the entire Honest Deal Act, candidates for President can show voters that they support the accountability that is the prerequisite for democracy. We have had successful candidates for President who promised a New Deal and a Fair Deal. Now, let us have one promise an Honest Deal. Governors, mayors, and other state and local officials will want to stop the federal mandate trick, which Congress and the Presidents use to shift blame to them.

VI. CONCLUSION

The need for change is urgent. In 2016, former Indiana Governor Mitch Daniels, now the President of Purdue University, warned that democracy itself is at risk:

A record 1 in 4 young people say that democracy is a “bad way” to run the country, and an even larger fraction of the citizenry would prefer an authoritarian leader who did not have to deal with the nuisance of elections If national leadership continues to allow our drift toward a Niagara of debt, until solemn promises are broken as they would then inevitably be, today’s sense of betrayal will seem tame. When today’s young Americans learn the extent of the debt burden we have left them, they may question the premises of our self government, with good reason. When tomorrow’s older Americans finally understand how they have been actively misled about the nature and the reliability of our fundamental social welfare programs, it may be the last straw breaking the public confidence on which democracy itself depends.⁸⁹

Failure to stop the tricks would bring even greater peril than we already face.

89. *Federal Debt: Direction, Drivers and Dangers: Hearing Before U.S. Cong. Joint Econ. Comm.*, 114th Cong. (2016), http://www.jec.senate.gov/public/_cache/files/e0c59f8a-c965-416c-b6f1-3ffcd78e343d/daniels-jec-testimony-9-8-16.pdf [<https://perma.cc/Z8DQ-5V9P>] (written testimony).

EDUCATING THE DISADVANTAGED—TWO MODELS

AMY L. WAX*

INTRODUCTION

Rising social and economic inequality has become a national pre-occupation. Lower and upper class communities have separated geographically and diverged in family structure, civic participation, work patterns, and criminality.¹ Disparities in educational attainment are both a source and effect of these trends.² Children growing up in poor families and neighbor-

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1. On disparities by socioeconomic status (“SES”) across a range of social indicators, see generally CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA 1960–2010* (2012). On arrest rates by race, see U.S. DEP’T OF JUSTICE, FED. BUREAU OF INVESTIGATION, *CRIME IN THE UNITED STATES, 2015 TABLE 43* (2016), <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-43> [<https://perma.cc/HKT2-EZLS>]. On family structure by SES, see generally Shelly Lundberg et al., *Family Inequality: Diverging Patterns in Marriage, Cohabitation, and Childbearing*, J. ECON. PERSP., Spring 2016, at 79. On residential segregation by income, see generally Kendra Bischoff & Sean F. Reardon, *Residential Segregation by Income, 1970–2009*, in *DIVERSITY AND DISPARITIES: AMERICA ENTERS A NEW CENTURY 208* (John R. Logan ed., 2014).

2. For recent data on achievement gaps by race and ethnicity, see U.S. DEP’T OF EDUC., NAT’L CTR. FOR EDUC. STATISTICS, *SCHOOL COMPOSITION AND THE BLACK-WHITE ACHIEVEMENT GAP*, NCES 2015-018 (2015), https://nces.ed.gov/nationsreportcard/subject/studies/pdf/school_composition_and_the_bw_achievement_gap_2015.pdf [<https://perma.cc/4U5H-2FAQ>] [hereinafter BLACK-WHITE ACHIEVEMENT GAP]; Natalie Gross, *When Does the Racial Achievement Gap First Appear?*, ATLANTIC (Feb. 22, 2017), https://www.theatlantic.com/education/archive/2017/02/the-racial-achievement-gap-is-prevalent-even-in-kindergarten/516831/?utm_source=atlib [<https://perma.cc/FY93-B5CX>]; Richard V. Reeves & Dimitrios Halikias, *Race gaps in SAT scores highlight inequality and hinder upward mobility*, BROOKINGS INST. (Feb. 1, 2017), <https://www.brookings.edu/research/race-gaps-in-sat-scores-highlight-inequality-and-hinder-upward-mobility> [<https://perma.cc/JB32-A2SS>]; Sean F. Reardon et al., *The Geography of Racial/Ethnic Test Score Gaps* (Stanford Ctr. For Educ. Policy Analysis, Working Paper No. 16-10, 2016), <https://cepa.stanford.edu/sites/default/files/wp16-10-v201604.pdf> [<https://perma.cc/Y4Y5-8RAT>]. For a summary of current findings on skills and school achievement by SES, see *Education and Socioeconomic Status*, AM. PSYCHOLOGICAL ASS’N, <http://www.apa.org/pi/ses/resources/publications/education.aspx> [<https://>

hoods, including many blacks and Hispanics, complete less schooling and acquire fewer academic skills than those from more affluent backgrounds.³ Gaps in academic outcomes by socioeconomic status (“SES”) and race remain a stubborn feature of American life.

The origins of existing achievement gradients, and potential strategies for mitigating them, have been the subject of research and study over decades, generating a complex theoretical and empirical literature. Numerous innovations and programs, involving large expenditures of public and private funds, have been devoted to increasing and equalizing achievement.⁴ Despite sustained efforts on multiple fronts, SES gaps in educa-

perma.cc/Y67U-KEP3] (last accessed May 18, 2017); Daniel Willingham, *Why Does Family Wealth Affect Learning?*, AM. EDUCATOR, Spring 2012, at 33. For data on college attendance and completion by SES, see Sarah Turner, *Education Markets: Forward-Looking Policy Options* (Hutchins Ctr. on Fiscal and Monetary Policy at Brookings, Working Paper No. 27, 2017), https://www.brookings.edu/wp-content/uploads/2017/01/wp27_turner_educationmarkets_final.pdf [<https://perma.cc/8APX-AJBY>].

3. See BLACK-WHITE ACHIEVEMENT GAP, *supra* note 2; Martin Carnoy & Emma Garcia, *Five key trends in U.S. student performance*, ECON. POL’Y INST. (Jan. 12, 2017), <http://epi.org/113217> [<https://perma.cc/8ZTG-LP2X>] (providing data on trends in achievement gaps by race and socioeconomic status); Mark Dynarski & Kirsten Kainz, *Why Federal Spending on Disadvantaged Students (Title I) Doesn’t Work*, BROOKINGS INST. (Nov. 20, 2015), <https://www.brookings.edu/research/why-federal-spending-on-disadvantaged-students-title-i-doesnt-work> [<https://perma.cc/6YTD-66X9>] (“Achievement gaps between disadvantaged students and their better-off peers are large and have existed for decades.”); Christopher Jencks & Susan Mayer, *The Social Consequences of Growing Up in a Poor Neighborhood*, in INNER-CITY POVERTY IN THE UNITED STATES 111, 116 (Laurence E. Lynn, Jr. ed., 1990) (“Other things equal, low-SES children do worse in school than high-SES children.”); Reeves & Halikias, *supra* note 2; Willingham, *supra* note 2; Reardon et al., *supra* note 2; Turner, *supra* note 2; *Education and Socioeconomic Status*, *supra* note 2.

4. For a succinct review of efforts to improve educational achievement among the disadvantaged, see Brian A. Jacob & Jens Ludwig, *Improving educational outcomes for poor children*, FOCUS, Fall 2009, at 56. For a 2017 report on the failure of federally funded “school improvement grants” to enhance student learning and outcomes, including, for example, math and reading scores and years of schooling completed, see U.S. DEP’T OF EDUC., NAT’L CTR. FOR EDUC. EVALUATION AND REGIONAL ASSISTANCE, SCHOOL IMPROVEMENT GRANTS: IMPLEMENTATION AND EFFECTIVENESS, NCEE 2017-4013 (2017), <https://ies.ed.gov/ncee/pubs/20174013/pdf/20174013.pdf> [<https://perma.cc/EC65-7JPW>] [hereinafter SCHOOL IMPROVEMENT GRANTS REPORT]. On the recent School Improvement Grants initiative, see *School Improvement Grants*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/programs/sif/index.html> [<https://perma.cc/H3JU-VL63>] (last accessed May 16, 2017).

tional indicators have barely budged overall, resisting repeated waves of school reform and myriad initiatives designed to improve prospects for low income students.⁵

The aim of this Article is to compare and contrast two approaches to addressing inequalities in K–12 education that have recently received wide popular attention and strong professional advocacy. The first seeks to reduce the number of high poverty schools, which tend to be segregated both by class and race, by dispersing students from poor families to educational settings with predominantly middle class or affluent students. So-called economic integration initiatives have gained traction in a number of public school districts nationwide.⁶ The second type of effort is directed at drastically altering the character of the schools disadvantaged students attend. So-called “no excuses” K–12 charter programs create a high-intensity, demanding, all-encompassing atmosphere designed to work a comprehensive improvement in poor students’ academic prospects as well as their outlook, habits, and behavior.⁷

Both initiatives represent a response to the disappointing results achieved by prior efforts to make headway against racial and economic inequalities in learning and achievement. Begin-

5. See, e.g., SCHOOL IMPROVEMENT GRANTS REPORT, *supra* note 4, at ES-2–ES-3; Stephen L. Morgan & Sol Bee Jung, *Still No Effect of Resources, Even in the New Gilded Age?*, RUSSELL SAGE FOUND. J. SOC. SCI., Sept. 2016, at 83 (documenting the continuing dominance of family background, income, and circumstances, and the minimal effects of efforts to narrow and eliminate SES gaps in educational attainment).

6. See THE FUTURE OF SCHOOL INTEGRATION: SOCIOECONOMIC DIVERSITY AS AN EDUCATION REFORM STRATEGY (Richard D. Kahlenberg ed., 2012); RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE (2001); JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART (2010); see also Amy L. Wax, *Income Integration at School*, Pol’y Rev., Oct. & Nov. 2011 (reviewing RYAN, *supra*), <http://www.hoover.org/research/income-integration-school> [<https://perma.cc/5AUF-DH8K>].

7. For a comprehensive review of so-called “no excuses” charter schools, which are sometimes designated as “high expectations” schools, see DAVID WHITMAN, SWEATING THE SMALL STUFF: INNER-CITY SCHOOLS AND THE NEW PATERNALISM (2008); *History: KIPP Public Charter Schools*, KIPP, <http://www.kipp.org/about/history> [<https://perma.cc/SA3-X8J3>] (last accessed May 16, 2017). For a broader study of “oversubscribed” charters, defined as school which have more applicants than places, and thus hold a lottery to determine admission, see U.S. DEP’T OF EDUC., NAT’L CTR. FOR EDUC. EVALUATION & REGIONAL ASSISTANCE, THE EVALUATION OF CHARTER SCHOOL IMPACTS: FINAL REPORT, NCEE 2010-4029 (2010), <https://ies.ed.gov/ncee/pubs/20104029> [<https://perma.cc/D87Z-U6ZU>].

ning with *Brown v. Board of Education*⁸ in 1954, nationwide efforts to dismantle segregation and integrate schools through anti-discrimination lawsuits, although occasionally achieving modest success, have ultimately foundered, producing neither dramatic racial integration nor significant improvements in academic outcomes for black students.⁹ A long and growing list of factors have undermined formal and informal efforts to achieve significant racial integration of public schools nationwide: rapidly changing demographics, white flight to the suburbs, increasing residential segregation by class and race, parents' strong preference for neighborhood schools, a tenacious tradition of local control of public education, the shortcomings and limitations inherent in judicial oversight of complex institutions,¹⁰ and the growing recognition that past school segregation is not the main cause of, nor integration the likely cure for, black students' present academic problems.¹¹ In the wake of these demographic and political realities and litigations' limited success, lawsuits extending over decades have almost all been abandoned or phased out by the courts.¹²

Legal efforts to correct the effects of past official discrimination were followed by sporadic attempts, initiated by local governments and school districts, to reduce school segregation through the adoption of race-conscious school assignment plans.¹³ In *Parents Involved in Community Schools v. Seattle School District No. 1*,¹⁴ the United States Supreme Court turned back

8. 347 U.S. 483 (1954).

9. For a concise history of the rise and fall of school desegregation lawsuits, see James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 139–43 (2007).

10. See *id.* at 140 (stating that during the heyday of the Supreme Court's integration jurisprudence, "many urban school districts in and outside of the South had become predominantly black, which obviously made integration harder if not impossible to achieve;" that "busing within cities gave those with economic means a reason to flee to the suburbs;" and that residential segregation—generated in part by private preferences—was the unaddressed primary cause of school segregation).

11. BLACK-WHITE ACHIEVEMENT GAP, *supra* note 2, at 2 (noting that "the portion of the Black-White achievement gap attributed to within-school differences in achievement was larger than the portion attributed to between-school differences").

12. See Ryan, *supra* note 9.

13. See KAHLBERG, *supra* note 6, at 92–93.

14. 551 U.S. 701 (2007).

these local initiatives. There the Court invalidated race-conscious plans in Seattle, Washington and Louisville, Kentucky, finding that using race to achieve racial balance in K–12 schools was impermissible under the Equal Protection Clause.¹⁵

In the wake of these failures, attention turned to “in place” enrichment programs designed to upgrade and improve public schools that serve low income children in general, which tend to be concentrated in heavily minority areas. A longstanding national initiative is Title I of the Elementary and Secondary Education Act of 1965,¹⁶ which funnels money and resources to high poverty schools in an attempt to produce greater equality across districts and to supplement educational offerings for disadvantaged children.¹⁷ A more recent legislative effort, the 2001 No Child Left Behind Act,¹⁸ relied chiefly on block grants to states and localities backed up by a detailed set of mandates and goals for teacher quality, curriculum, and student performance.¹⁹ In addition, the Obama administration devoted over \$7 billion dollars to a School Improvement Grant (“SIG”) Program designed to supplement the funding and resources for distressed students and the schools they attend.²⁰ Although working modest improvements in some cases, these initiatives have not measurably enhanced low-income students’ learning overall.²¹ Nor have they significantly narrowed race and class achievement gaps, which remain substantial.²²

15. *Id.* at 710–11; *see also* Ryan, *supra* note 9, at 131–32.

16. 20 U.S.C. §§ 6301–6578 (2012).

17. For a report on Title I funding history and efforts, *see* Dynarski & Kainz, *supra* note 3.

18. Pub. L. No. 107-110, 115 Stat. 1425 (2001).

19. For description of No Child Left Behind, as currently operating, *see* *No Child Left Behind: Elementary and Secondary Education Act (ESEA)*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/nclb/landing.html> [<https://perma.cc/83YJ-Q6NW>] (last accessed May 18, 2017). For a review of other programs designed to direct resources to disadvantaged students and their schools, and their effectiveness (or, rather, lack thereof), *see* SCHOOL IMPROVEMENT GRANTS REPORT, *supra* note 4.

20. *See* *Funding*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/print/programs/sif/funding.html> [<https://perma.cc/AT88-NMJM>] (last accessed May 18, 2017) (reporting on the “SIG” program).

21. *See* SCHOOL IMPROVEMENT GRANTS REPORT, *supra* note 4, at ES-2–ES-3.

22. For up-to-date data on the persistence of racial achievement gaps, *see* U.S. DEP’T OF EDUC., NAT’L CTR. FOR EDUC. STATISTICS, STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS 2016, NCES 2016-007 (2016), <https://nces.ed.gov/pubs2016/2016007.pdf> [<https://perma.cc/5ZFK-GX93>] [*herein*

Given these disappointing results, policymakers have continued to search for ways to improve academic outcomes and life chances for minority and low income students. Two important approaches have emerged. In the wake of the Supreme Court's hostility to race-conscious integration and in recognition of the disproportionate number of minority, and especially black, children, from poor families, localities have adopted plans to integrate schools by social class instead of race. Alternatively, "no excuses" charter schools have sprung up in a number of urban, heavily minority districts around the country, targeting their efforts at the populations of disadvantaged students in those locations.

Economic integration plans and "no excuses" schools share important common threads. First, both rest on the well-documented fact that children from deprived backgrounds (including a disproportionate number of minority students, and especially blacks) have, on average, fewer academic skills than affluent students, and have more trouble meeting academic demands.²³ Second, both are grounded in a growing appreciation, validated by some research in education and social science, that non-academic, characterological traits, such as persistence, initiative, ambition, self-discipline, self-control, attentiveness, organizational skill, and the ability to delay gratification, are important to academic and life success.²⁴ Finally,

after STATUS AND TRENDS REPORT]. On gaps by class, income, and SES, see Sean Reardon, *The Widening Academic Achievement Gap between the Rich and the Poor*, Community Investments, Summer 2012, at 19; Sean Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES* 91 (Greg J. Duncan & Richard J. Murnane eds., 2011); Morgan & Jung, *supra* note 5 (reviewing the research on various programs designed to improve education for disadvantaged students).

23. See STATUS AND TRENDS REPORT, *supra* note 22; Reardon, *supra* note 22; Sean Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY?*, *supra* note 22, at 91; Morgan & Jung, *supra* note 5.

24. See Robert J. Sampson, *The Characterological Imperative: On Heckman, Humphries, and Kautz's The Myth of Achievement Tests: The GED and the Role of Character in American Life*, 54 *J. ECON. LITERATURE* 493, 493 (2016); RICHARD REEVES & DIMITRIOS HALIKIAS, *CTR. ON CHILDREN AND FAMILIES AT BROOKINGS, THE LIBERAL CASE FOR CHARACTER IN A POPULIST AGE* (2017), https://www.brookings.edu/wp-content/uploads/2017/04/ccf_20170421_liberal_case_for_character_reeves.pdf [<https://perma.cc/Z7K3-TGWG>]; Richard V. Reeves, *The New Politics of Character*, 20 *NAT'L AFF.* 111, 112 (2014); Pedro Carneiro &

both models assume, whether tacitly or overtly, that, as compared to middle class counterparts, the average low income student is lacking in these so-called “non-cognitive” attributes, and that these deficits can express themselves in attitudes and behaviors that interfere with learning.²⁵

In light of these insights, both “no excuses” schools and income integration initiatives operate on the understanding that learning cannot be separated from proper socialization and good habits. It follows that raising the academic profile of disadvantaged students and enhancing their gloomy life prospects requires improving not just their level of academic skill, but also their outlook, attitudes, and behavior. Although both models target academic and personal deficits, they differ crucially in their methods. As elaborated more fully below, “no excuses” schools are committed to a detailed program of behavior modification and active acculturation. In contrast, economic integration seeks to improve students through a passive process of immersion, osmosis, and contagion. That model assumes that removing poor students from high poverty schools and placing them in a more middle class environment will automatically lead them to adopt the higher expectations and more functional habits of their better off classmates.

I. “NO EXCUSES” SCHOOLS

The “no excuses” model sets up charter schools designed to actively address the attributes thought to hold back low income students through a hands-on, paternalistic model of behavioral modification and direction.²⁶ As funded and designed mainly by private entrepreneurs, these schools have proliferated nationwide in the past two decades.²⁷ Although differing in precise methods and location, they draw their students chiefly from low income communities, and the great majority are heavily or exclusively

James Heckman, *Human Capital Policy* 5 (Nat'l Bureau of Econ. Research, Working Paper No. 9,495, 2003), <http://www.nber.org/papers/w9495> [<https://perma.cc/3CYR-7WT3>].

25. See WHITMAN, *supra* note 7, at 35 (“The paternalistic presumption, implicit in the [‘no-excuses’] schools portrayed here, is that the poor lack the family and community support, cultural capital, and personal follow-through to live according to the middle-class values that they, too, espouse.”).

26. See *id.* at 3–4.

27. See *id.* at 61, 280.

populated by disadvantaged minorities.²⁸ Most are modeled on the KIPP, or Knowledge is Power Program, academies, a nationwide chain of about 150 schools operating mostly at the elementary and middle school level.²⁹ Schools that represent variations on this theme include the New York Success Academies, the Harlem Children's Zone school, the Amistad Academy in Boston, the Christo Ray Jesuit School in Chicago, and the SEED Academy boarding school in Washington, D.C.³⁰

The hallmark of "no excuses" schools is a frankly paternalistic and unapologetic commitment to acculturating low income students to the achievement-oriented habits and norms typical of their middle class and affluent counterparts.³¹ That project is motivated by the belief that low-income children will benefit from a stable, highly structured environment in which conventional, bourgeois behaviors are actively endorsed, expected, and demanded.³² The list of these schools' common features is long and detailed. On the academic side, they prescribe a uniform, rigorous pre-college curriculum, with little student discretion in course of study.³³ Most extend academic instruction through a longer school day, week, and year, with activities and assignments scheduled throughout the summer months.³⁴ Basic skill acquisition receives heavy emphasis, with performance levels and progress continually monitored and measured through frequent testing.³⁵

In support of the academic mission, the schools work unceasingly to inculcate decorum and refinement, according to the unspoken rules of behavior that characterize middle and upper class families, schools, and communities. A key part of the

28. See, e.g., *id.* at 111 (noting that 98 percent of students at Amistad Academy, a "no-excuses" school, are Black or Hispanic).

29. CHRISTINA CLARK TUTTLE ET AL., MATHEMATICA POL'Y RESEARCH, UNDERSTANDING THE EFFECT OF KIPP AS IT SCALES 1 (2015), <https://www.mathematica-mpr.com/our-publications-and-findings/publications/understanding-the-effect-of-kipp-as-it-scales-volume-i-impacts-on-achievement-and-other-outcomes> [<https://perma.cc/JW89-Z55C>].

30. See WHITMAN, *supra* note 7, at 3.

31. See *id.* at 3–4.

32. See *id.*

33. See, e.g., *id.* at 195 (noting that the SEED Academy prescribes a "rigorous college-prep curriculum").

34. See *id.* at 268–69.

35. See *id.* at 264–65.

KIPP code, adopted by many other schools, is to “be nice.”³⁶ Courtesy is expected and street language and profanity strictly forbidden.³⁷ Verboten also are fighting, loud talk, boisterous behavior, harsh teasing, and ridicule of other students.³⁸ There is also an active attempt to inculcate “learned optimism.”³⁹ Children are expected to adopt positive attitudes toward academic work and an ambitious, hopeful outlook on the future.⁴⁰ Without exception, these schools strive to build a collective culture of learning and achievement, with repeated emphasis on college attendance and college completion.⁴¹

In pursuit of reshaping student outlook and behavior, these schools impose precise, prescriptive, and conventional codes of conduct, both in and out of the classroom. Students are expected to obey teachers and administrators, be punctual, work steadily, and study hard. They are taught how to sit and comport themselves in class, to refrain from interrupting, and to maintain attention and eye contact.⁴² They must follow instructor’s movements, engage in active listening, participate in classroom discussions and school activities, and complete all homework carefully and on time.⁴³ Dress codes are ubiquitous, and disrespectful words or conduct towards teachers, as well as boisterousness, vandalism or destruction of property, are not tolerated.⁴⁴ Trustworthiness, punctuality, and reliability are emphasized. Violations of the elaborate code are swiftly punished, and a “zero tolerance” atmosphere prevails.⁴⁵ To enforce rules great and small, these schools do not shrink from imposing conventional penalties, including in-school and out of

36. *Id.* at 101–102 (stating that a commonplace KIPP school motto is “Work Hard, Be Nice”).

37. *See id.* at 16.

38. *See id.* at 262 (“[‘No-excuses’ schools] drill into students the importance of traditional virtues like hard work, politeness, diligence, respect for their elders, and good citizenship.”).

39. *See id.* at 23.

40. *See id.* at 103 (noting Amistad Academy expects students to “Bring an A+ Attitude” and be “excited to climb the mountain to college”).

41. *See id.* at 266–67.

42. *See id.* at 261–62.

43. *See id.* at 101–02.

44. *See id.* at 260.

45. *See id.* at 102–03.

school suspensions, community service, corrective exercises, and occasional expulsion.⁴⁶

Principals and teachers are given a high degree of autonomy, but also must put in long days teaching, advising, grading, and monitoring students.⁴⁷ They are also expected to be “on board” with the school mission, which can involve enforcing a detailed laundry list of rules and requirements.⁴⁸ In all but rare cases, the teachers at “no excuses” schools, which are almost all private charters, are not unionized.⁴⁹ This creates flexibility for assignments, hours, and allocation of responsibility. Most teachers arrive through unconventional channels, with significant numbers coming from stints with Teach for America, which draws many elite college graduates.⁵⁰

“No excuses” schools do not expect deep or active involvement from parents. But all necessarily rely on parents’ getting their children to school on time and checking homework, and most ask parents to sign a contract pledging to meet these requirements.⁵¹ Finally, in contrast to many public and private schools, most “no excuses” charter schools are bare bones operations without fancy facilities or technologies.⁵² In general, teaching methods are old fashioned, with an emphasis on

46. The highly regimented and “zero tolerance” aspects of KIPP have been targeted by a regular drumbeat of online critiques, often directed more broadly at strict school disciplinary practices. See, e.g., Sarah Carr, *How Strict Is Too Strict? The backlash against no-excuses discipline in high school*, ATLANTIC (Dec. 2014), <http://www.theatlantic.com/magazine/archive/2014/12/how-strict-is-too-strict/382228> [<https://perma.cc/XX4Y-8U9M>]; see also *infra* notes 112–22 and accompanying text (discussing criticisms of the “no excuses” methods and assumptions); Monica Disare, *‘No excuses’ no more? Charter schools rethink discipline after focus on tough consequences*, CHALKBEAT (Mar. 7, 2016), <http://www.chalkbeat.org/posts/ny/2016/03/07/no-excuses-no-more-charter-schools-rethink-discipline-after-focus-on-tough-consequences> [<https://perma.cc/QY8Z-LUAU>]; P.L. Thomas, *Criticizing KIPP Critics*, RADICAL EYES FOR EQUITY (Feb. 3, 2014), <https://radicalsolarship.wordpress.com/2014/02/03/criticizing-kipp-critics> [<https://perma.cc/9G6N-7NST>].

47. See WHITMAN, *supra* note 7, at 38, 271.

48. *Id.* at 275.

49. See *id.* at 272.

50. See *id.* at 272–73.

51. See, e.g., *id.* at 115, 259.

52. See, e.g., *id.* at 169.

memorization, structured learning, and “drill and kill” exercises directed at the mastery of basic skills.⁵³

In sum, “no excuses” schools are totalizing, prescriptive, and heavily traditional in their approach. They attempt to control and regulate low-income children’s in-school experience by setting high and clear standards through an elaborate and explicit code of conduct. The hope is that students will learn new behaviors that are more in keeping with middle and upper class expectations and that will foster and enhance their academic progress and success.⁵⁴

II. ECONOMIC INTEGRATION

In contrast with “no excuses” schools, which operate on the principle of express socialization and prescriptive micromanagement, the economic integration model depends on the benefits of demographic manipulation alone.⁵⁵ Nonetheless, income mixing initiatives, like “no excuses” charters, rely on the effectiveness of behavioral and academic uplift.⁵⁶ They seek to improve low-income students’ academic performance as well as the conduct and attitudes that impede performance.⁵⁷ The assumption is that attending school with mostly poor classmates depresses achievement, and that being surrounded by more affluent students enhances it.⁵⁸ The enhancement can be accomplished simply by immersing poor students in a predominantly “middle class” environment.⁵⁹

53. See *id.* at 4.

54. For a comprehensive description of these features and a profile of schools that adhere to them, see *id.*

55. See KAHLBERG, *supra* note 6, at 23–25; RYAN, *supra* note 6, at 164–70.

56. See RYAN, *supra* note 6, at 168–69.

57. See *id.*

58. See, e.g., Richard D. Kahlenberg, *Introduction: Socioeconomic School Integration*, in *THE FUTURE OF SCHOOL INTEGRATION*, *supra* note 6, at 1, 32–33 (describing the expected immersive benefits accruing to poor children living or attending schools in more affluent neighborhoods as including “increas[ed] academic expectations and performance through increased access to positive role models and high-performing peers” and exposure to “pro-social attitudes and behaviors”); *id.* at 3–5 (noting that most middle class and wealthier students are “more academically engaged and less likely to act out,” and that the schools they attend have more resources and enrichment programs, stronger teachers, more vigilant and involved parents, and higher academic and behavioral expectations).

59. See RYAN, *supra* note 6, at 164–70.

How does this model actually work? Two leading proponents, Richard Kahlenberg of the Century Foundation, and James Ryan, Dean of the Harvard Graduate School of Education, cite an amalgam of institutional and interpersonal forces. On the institutional side, they note that schools dominated by affluent students have more elaborate and well-kept facilities, better educated and effective teachers, less teacher turnover, more capable principals, and a richer variety of academically demanding courses and extra-curricular offerings.⁶⁰ Parents of the children who attend these schools tend to be involved in the day to day management of the school, vocal and politically savvy in looking out for their children's interests, and effective in procuring desirable resources and services.⁶¹ Income mixing gives lower income students access to the material and institutional advantages of these schools, including the benefits of more vigilant parental oversight.⁶²

Although the goal of enhancing low income students' academic achievement is paramount, improvements in the behaviors and attitudes that support learning are key to the model's success. On the interpersonal side, income mixing proponents rely heavily on assumed peer effects and cultural contagion.⁶³ At the typical well-off suburban school, the atmosphere is more often one of order, cooperation, compliance with rules, and respect for authority.⁶⁴ Most students hold high expectations for academic achievement, rigor, diligence, effort, and future pro-

60. See KAHLENBERG, *supra* note 6, at 67–76.

61. See RYAN, *supra* note 6, at 169–70.

62. See *id.*; see also Richard D. Kahlenberg, *Introduction: Socioeconomic School Integration*, in THE FUTURE OF SCHOOL INTEGRATION, *supra* note 6, at 3–5; Amy L. Wax, *Income Integration at School*, 169 POL'Y REV. 49, 51 (2011); HALLEY POTTER & KIMBERLY QUICK, CENTURY FOUND., A NEW WAVE OF SCHOOL INTEGRATION: DISTRICTS AND CHARTERS PURSUING SOCIOECONOMIC DIVERSITY (Feb. 9, 2016), <https://tcf.org/content/report/a-new-wave-of-school-integration> [<https://perma.cc/4WHS-87XQ>] (examining 91 school districts and charters pursuing income mixing initiatives); Michael J. Petrilli, *All Together Now? Educating high and low achievers in the same classroom*, EDUC. NEXT, Winter 2011, at 48, 50–51.

63. See, e.g., Marco Basile, *The Cost-Effectiveness of Socioeconomic School Integration*, in THE FUTURE OF SCHOOL INTEGRATION, *supra* note 6, at 127, 143–44 (stressing peer effects); Richard D. Kahlenberg, *Introduction: Socioeconomic School Integration*, in THE FUTURE OF SCHOOL INTEGRATION, *supra* note 6, at 1, 32–34; Petrilli, *supra* note 62, at 50–51.

64. See KAHLENBERG, *supra* note 6, at 48–58.

spects.⁶⁵ Because individuals tend to conform to the dominant culture, it is assumed that low income students placed in such schools will come to hold those high expectations as well, and change their behavior accordingly.⁶⁶

III. DO THESE SCHOOLS IMPROVE OUTCOMES?

Do these initiatives work? Do low-income students placed in “no excuses” schools or attending institutions with more affluent classmates improve their school performance, future prospects and occupational success? How do these approaches stack up against each other in achieving this goal?

For economic integration, the questions of whether, how much, and under what circumstances going to school with more advantaged students benefits low-income or minority students are the subject of controversy, with much ink spilled over conflicting assertions.⁶⁷ Advocates point to successes, such as the program in Montgomery County, Maryland, which claims measurable, albeit modest, academic improvements in reading and math for low income elementary school students placed in predominantly middle class or affluent schools through a program of dispersed low income housing.⁶⁸ The quality and quantity of data available from Montgomery County is unusual. In general, the evidence on schools integrated by class and income, whether deliberately engineered or arising spontaneously through “natural experiments,” is strikingly spotty, sparse, and equivocal. In a comprehensive 1990 literature review on the effects of demographic variation in schools, for instance, Christopher Jencks and Susan Mayer found some support for a boost in the high school graduation rates for poor and minority students attending higher quality schools, but inconsistent and variable effects on college attendance and completion, academic achievement, cognitive skills, socialization, and

65. See RYAN, *supra* note 6, at 165.

66. See *id.* at 169.

67. See, e.g., Heather Schwartz, *Housing Policy is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland*, in *THE FUTURE OF SCHOOL INTEGRATION*, *supra* note 6, at 27, 33 (acknowledging that “it has proved quite difficult to quantify the degree to which economic integration benefits children”).

68. See *id.*; Heather Schwartz, *Housing Policy Is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland*, 76 *EDUC. DIGEST*, no. 6, 2011, at 42.

behavior.⁶⁹ Specifically, the authors noted that “studies of how a school’s mean SES affects students’ academic achievement yield mixed results” that depend on a complex set of situational and demographic factors.⁷⁰ A more recent, but limited, review of the literature, which focused on the academic effects of the demographic composition of high schools, also reported equivocal results.⁷¹ Finally, a 2016 summary report by a prominent researcher, Roslyn Arlin Mickelson, for the National Coalition on School Diversity, an advocacy group, claims mainly positive results from economically integrated schools.⁷² Although providing citations to a plethora of studies conducted over decades, the report is mainly conclusory, and lacks any detailed critical analysis of the actual research upon which it relies.

The vagaries of the findings can in part be ascribed to the diversity of situations in which economic integration initiatives have been tried or class mixing in schools has spontaneously occurred. Income integration programs have been adopted by school districts in such far-flung locales as Wake County, North Carolina; Champaign, Illinois; La Crosse, Wisconsin; and Louisville, Kentucky.⁷³ Variations can be found in the range of mechanisms for achieving integration (such as student assignment plans versus magnet school programs), how the demographic composition of schools is characterized (with the most common, albeit not uniform, marker of “low income” being eligibility for free or reduced price meals) and the profile of the schools into which students are shifted (which range widely in size, funding, and economic and racial composition).

Moreover, because almost all plans require students to travel to out-of-neighborhood schools, the programs are restricted in

69. Christopher Jencks & Susan Mayer, *The Social Consequences of Growing Up in a Poor Neighborhood*, in *INNER-CITY POVERTY IN THE UNITED STATES*, *supra* note 3, at 111.

70. *Id.* at 174.

71. See Russell W. Rumberger & Gregory J. Palardy, *Does Segregation Still Matter? The Impact of Student Composition on Academic Achievement in High School*, 107 *TEACHERS C. REC.* 1999, 2005 (2005).

72. ROSLYN ARLEN MICKELSON, NAT’L COALITION ON SCH. DIVERSITY, *SCHOOL INTEGRATION AND K–12 OUTCOMES* (2016), <http://school-diversity.org/pdf/DiversityResearchBriefNo5Oct2016Big.pdf> [https://perma.cc/LSA8-K92N].

73. See *e.g.*, RYAN, *supra* note 6; Richard D. Kahlenberg, *Introduction: Socioeconomic School Integration*, in *THE FUTURE OF SCHOOL INTEGRATION*, *supra* note 6, at 1 (describing various programs).

their ability to shift poor students to more affluent settings, with most achieving only a modest degree of economic or racial mixing.⁷⁴ Most initiatives have also been of variable duration, with some either scaled back or phased out after a few years due to logistical obstacles or political opposition. The story of Wake County, North Carolina, which received widespread publicity for its initial successes, is emblematic of the obstacles encountered by such programs.⁷⁵ Initial school assignments designed to create socioeconomic balance within school were soon disrupted by demographic changes (including a large influx of Hispanic students and fluctuations in the number of more affluent white families) that required continual reassignment of students, and sometimes disparate assignment of siblings, to achieve targets of economic diversity in most schools. Parental discontent soon set in, resulting in turmoil and divisions between those who “valued home-to-school proximity, parental choice, less frequent reassignment, or more ‘stability,’” and “those who advocated for . . . the role of socioeconomically diverse classrooms in improving student performance, and . . . the value of diversity irrespective of its impact on achievement.”⁷⁶ The ensuing political struggles yielded an eventual phasing out of the program in 2010, with reversion to a more traditional neighborhood school assignment plan.

In sum, resolving empirical questions surrounding the effectiveness of educational integration by income is hampered by most examples being small-scale, recent, short-lived, and too eclectic to permit systematic comparison. The task is made even

74. The author of one study, for example, concluded that transfers of poor students between districts, which would be necessary to achieve optimal income mixing in many cases, are “unlikely to increase most students’ educational opportunities significantly” due mainly to “prohibitive increases in travel time” combined with “the capacity limitation of eligible receiving schools.” Meredith P. Richards et al., *Can NCLB Choice Work? Modeling the Effects of Interdistrict Choice on Student Access to Higher-Performing Schools*, in *THE FUTURE OF SCHOOL INTEGRATION*, *supra* note 6, at 223, 228 (discussing a study by Erin Dillon).

75. For a concise account of the Wake County effort, see Sheneka M. Williams, *The Politics of Maintaining Balanced Schools: An Examination of Three Districts*, in *THE FUTURE OF INCOME INTEGRATION*, *supra* note 6, at 257, 262–268.

76. Jenni Owen & Megan Kauffmann, *The End of a Diversity Policy? Wake County Public Schools and Student Assignment Case 12 (2015)*, [https://www.maxwell.syr.edu/uploadedFiles/parcc/eparcc/cases/End%20of%20Diversity%20-%20Case%202015\(1\).pdf](https://www.maxwell.syr.edu/uploadedFiles/parcc/eparcc/cases/End%20of%20Diversity%20-%20Case%202015(1).pdf) [<https://perma.cc/APG9-8UD6>]. This report contains a detailed history of the Wake County School integration effort. *See id.* at 24–25.

more difficult by uncertainty about the precise features that are supposed to be responsible for the model's benefits. The focus of the work claiming positive benefits from income integration has been on establishing measurable improvements rather than on disentangling causal mechanisms.⁷⁷ Accordingly, as Christopher Jencks and Susan Mayer note in their 1990 review, while the "epidemic model" of schools and neighborhoods is widely embraced, "few examine the implications of this idea in detail."⁷⁸ This lack of a well-developed causal model, combined with mixed and unpredictable effects, means that income integration, whether geographical or educational, remains something of an empirical "black box," with the precise factors supposedly responsible for its benefits as yet poorly understood.

The research on the question is both sparse and inconclusive. A 2005 review of demographic effects in high schools found evidence that the factors that seem to predict improvements for low income students in integrated settings included high teacher expectations, more hours of homework completed, college prep courses, and a lower percentage of students reporting feeling unsafe.⁷⁹ But the authors found no measurably positive effects from superior peer examples, more school resources, and a range of other institutional factors.⁸⁰ In the same vein, William Dobbie and Roland Fryer, in examining 39 demographically varied New York City charter schools, reported that many traditional "resource based" inputs, such as class size, per pupil expenditure, and teacher credentials, had no measurable effects on student achievement or persistence.⁸¹ Rather, what Dobbie and Fryer characterized as "best practices" from successful charter schools—such as frequent teacher feedback, data-guided instruction, intensive tutoring, increased instructional time, and high expectations for academic performance and deportment—explained about half the variation in

77. See, e.g., MICKELSON, *supra* note 72.

78. Christopher Jencks & Susan Mayer, *The Social Consequences of Growing Up in a Poor Neighborhood*, in *INNER-CITY POVERTY IN THE UNITED STATES*, *supra* note 3, at 111, 113–14.

79. See Rumberger & Palardy, *supra* note 71, at 2016.

80. *Id.* at 2032–35.

81. See William Dobbie & Roland G. Fryer, Jr., *Getting Beneath the Veil of Effective Schools: Evidence From New York City 2* (Nat'l Bureau of Econ. Research, Working Paper No. 17,632, 2011), <http://www.nber.org/papers/w17632.pdf> [<http://perma.cc/Y7GH-VYQK>].

school effectiveness. Although the study did not examine economic integration as such, its implication is that many of the features income mixing proponents associate with “better off” schools and claim to be crucial to boosting low income students’ prospects do not appear to make a difference, whereas others (most closely associated with intensive charters) appear to be more important.

Despite the limitations in the data on economically integrated schools and the difficulties of drawing firm conclusions on many questions, a few reasonably reliable results have emerged. The research from Montgomery County, Maryland, and other programs strongly suggests that improvements for low income students dissipate when their numbers start to exceed more than about 20–30% of the school population.⁸² Also, there is little question that the research so far has failed to eliminate selection effects as a factor in positive outcomes. This means that existing evidence cannot definitively establish whether, and to what extent, income integration actually *causes* any observed improvements. For instance, the low-income students in the Montgomery County study were all from public housing families willing to move to a suburban setting. As the report on the program itself notes, these families were likely not representative of urban low income populations generally.⁸³ In the absence of truly random assignment (which is rare), the same point applies to low income families who take the trouble to seek out and transfer to higher income schools.

Finally, although disadvantaged students educated in more affluent schools may sometimes outperform peers in high-poverty settings, they start out far behind their better-off classmates and, as a group, continue to lag throughout their educational career. As a result, low-income students attending low-poverty schools tend to be “tracked” into non-accelerated classes.⁸⁴ They also are

82. See Schwartz, *supra* note 68, at 44 (noting that “academic returns from economic integration diminished as school poverty levels rose,” with low income children in schools that were no more than 20% poor doing best, and those in schools over 35% poor showing no improvement).

83. *Id.* at 47.

84. The classic study of racial differences in academic achievement, and the resulting stratification by race in placement, courses, and grades within the same school, was John Ogbu’s portrait of Shaker Heights High School, located in an affluent Cleveland suburb. JOHN OGBU, *BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB: A STUDY OF ACADEMIC DISENGAGEMENT* (2003). For evidence

underrepresented in Advanced Placement and gifted and talented programs.⁸⁵ And they earn worse grades and score lower on standardized tests than more affluent classmates.⁸⁶

These results are not surprising in light of James Coleman's original findings in the 1960s⁸⁷, repeatedly confirmed in the decades since, that a child's economic, social, and family background—and not school composition and quality—are the most important influences on students' academic performance. As stated in the Coleman report, “the school appears unable to exert independent influences to make achievement levels less dependent on the child's background—and this is true within

from the 1970s, see, for example, Barbara Heyns, *Social Selection and Stratification Within Schools*, 79 AM. J. SOC. 1434, 1434–51 (1971) (noting that, although academic merit determines assignments within schools, performance is correlated with student background). For more recent data, see Grace Kao & Jennifer Thompson, *Racial and Ethnic Stratification in Educational Achievement and Attainment*, 29 ANN. REV. SOC. 417 (2003). As this article states:

[N]umerous studies have shown that poor children and racial and ethnic minorities are disproportionately placed in low-ability groups early in their educational careers and in non-college-bound groupings in junior high and high school . . . Likewise, research shows that low-income and minority students participate at higher rates in vocational curricula and at lower rates in academic curricula than do affluent and white students.

Id. at 423. The authors go on to observe that most research attributes these patterns to average racial and SES differences in academic performance and skills. *Id.*

85. See Kao & Thompson, *supra* note 84, at 424–25 (“On the academic side of the curriculum, low-income and non-Asian minority students disproportionately take low-level and remedial courses, whereas whites and Asians tend to dominate enrollments in advanced and honors courses.”); see also Christina Veiga, *The Push to Diversity Gifted-and-Talented Programs*, ATLANTIC (Nov. 26, 2016), <https://www.theatlantic.com/education/archive/2016/11/the-push-to-diversify-gifted-and-talented-programs/508415/> [<https://perma.cc/CQM9-XUG5>] (noting the paucity of non-Asian minority students in New York City gifted programs).

86. For the association between SAT scores and SES, see, for example, KRISTA D. MATTERN ET AL., COLL. BD., EXAMINING THE RELATIONSHIP BETWEEN THE SAT, HIGH SCHOOL MEASURES OF ACADEMIC PERFORMANCE, AND SOCIOECONOMIC STATUS: TURNING OUR ATTENTION TO THE UNIT OF ANALYSIS (2008), <https://research.collegeboard.org/sites/default/files/publications/2012/7/researchnote-2008-36-relationship-sat-high-school-socioeconomic.pdf> [<https://perma.cc/JW7E-DFND>]. For SAT scores by race, see *The Widening Racial Scoring Gap on the SAT College Admissions Test*, J. BLACKS HIGHER EDUC., http://www.jbhe.com/features/49_college_admissions-test.html [<https://perma.cc/HWE3-AGTW>] (last accessed May 18, 2017).

87. JAMES COLEMAN ET AL., NAT'L CTR. FOR EDUC. STATISTICS, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966), <files.eric.ed.gov/fulltext/ED012275.pdf> [<https://perma.cc/C6SV-SG3J>] [hereinafter COLEMAN REPORT].

each ethnic group, just as it is between groups.”⁸⁸ More than 30 years later, Jencks and Mayer reiterate this result in their review of school and neighborhood effects on student achievement, observing that “as a rule the more aspects of family background we control, the smaller school effects look.”⁸⁹ Thus, the evidence accumulated to date indicates that economic mixing can, at best, somewhat narrow achievement gaps. It cannot come close to eliminating them.

What about “no excuses” programs? As with economic integration, vaunting claims and optimism abound, but the hard evidence of enduring success is scant. Many of the schools profiled by David Whitman in *Sweating the Small Stuff* claim dramatic test score gains for their students. For instance, Amistad Academy in New Haven, Connecticut, has reported a significant jump in math and reading proficiency scores on state-wide tests, with some students performing “almost as well” as wealthier students in nearby Greenwich, Connecticut.⁹⁰ While some of these numbers appear impressive, closer examination counsels caution. Claims of academic improvement are based almost exclusively on state-wide elementary school-level tests,

88. *Id.* at 297. As Russell Nieli summarizes, Coleman had found that:

[S]uch things as the quality of a schools’ physical plant, the average number of students in the class, the per-pupil students expenditures and the size of the school’s library, and the salary of the school’s principal didn’t seem to make much of a difference in student performance on standardized tests . . . and [did not] vary nearly as much as previously thought among schools attended by students of differing ethno-racial background.

Russell K. Nieli, *Challenging Conventional Wisdom: Four Moments in the Research Career of James S. Coleman*, 29 ACAD. QUESTIONS 394, 397 (2016). Rather, “the most important factor by far . . . was the quality of the students in the school, their individual family background (socioeconomic, educational, racial) and the background of their classmates’ families.” *Id.* at 398; see also Karl Alexander & Stephen L. Morgan, *The Coleman Report at Fifty: Its Legacy and Implications for Future Research on Equality of Opportunity*, 2 RUSSELL SAGE FOUND. J. SOC. SCI., no. 5, 2016, at 1, 1–16; Stephen L. Morgan & Sol Bee Jung, *Still No Effect of Resources, Even in the New Gilded Age?*, 2 RUSSELL SAGE FOUND. J. SOC. SCI., no. 5, 2016, at 83, 83–116 (discussing the continuing empirical validity of Coleman’s observation that school quality, demography, attributes, and resources, have, at most, a minor effect on children’s academic performance).

89. Christopher Jencks & Susan Mayer, *The Social Consequences of Growing Up in a Poor Neighborhood*, in INNER-CITY POVERTY IN THE UNITED STATES, *supra* note 3, at 111, 176.

90. WHITMAN, *supra* note 7, at 98–99, 113–15.

which assess relatively basic skills, and which many “no excuses” schools target with intensive drilling.⁹¹ Overall, the data is spotty and limited by small samples and short time frames. Score gains are often modest and selective,⁹² and appear subject to fade out with time, as measured by sustained achievement into high school and beyond.

Most notably, on these schools’ long-term goal of getting students into and through college, the jury is out.⁹³ Numerical data on the actual college admissions test scores (SAT and ACT) of students who have attended “no excuses” schools are remarkably hard to come by, with data searches turning up practically nothing. The information reported tends to be geared towards showing that students do comparatively better than expected given their background, without revealing precise numbers, baselines, or percentages.⁹⁴ The one set of college admissions scores reported

91. See, e.g., *Amistad Academy in New Haven, CT*, U.S. NEWS BEST HIGH SCH., <http://www.usnews.com/education/best-high-schools/connecticut/districts/amistad-academy-district/amistad-academy-4406/> [https://perma.cc/33GT-D454] (last accessed May 18, 2017) (listing recent Amistad scores on Connecticut high school exit exams); *School Report Card*, SUCCESS ACADEMY, <http://sca.leeschools.net/school-report-card> [http://perma.cc/WJ8G-AY27] (listing scores for Success Academy students on the Florida state tests). In contrast, some KIPP charters have failed to show positive results even on state tests of basic skills. See, e.g., *School Performance Profile: KIPP Philadelphia Charter School*, PA. SCH. PERFORMANCE REP., <http://paschoolperformance.org/Profile/7184> [https://perma.cc/CXT2-2QDR] (last accessed May 18, 2017).

92. See, e.g., Joshua Angrist, et al., *Who Benefits from KIPP 19* (Inst. for the Study of Labor, Discussion Paper, No. 5,690, 2011), <http://economics.mit.edu/files/6965> [https://perma.cc/M737-CQ92] (finding that, in a KIPP school in Lynn, Massachusetts, “[r]eading gains are realized almost exclusively by special education and limited English proficiency students,” with little improvement for others).

93. See, e.g., Robert Pondiscio, *“No Excuses” Kids Go to College*, EDUC. NEXT, Spring 2013, at 8, 10 (reporting that KIPP seems to enhance college attendance rates for low income students, but that over two-thirds of KIPP students either do not get through college or fail to graduate in 6 years).

94. For example, a report on the Noble network of intensive charters in Chicago states that “Noble students score markedly higher than the [Chicago Public School] average and the charter average on all sections of the ACT,” but does not give actual scores, making it difficult to evaluate whether students attain the levels needed for selective college admissions and success. See Matthew Davis & Blake Heller, *Raising More Than Test Scores*, EDUC. NEXT, Winter 2017, at 64, 67. The report also states that “Noble students were 15 percentage points more likely to attend a four-year school and 14 percentage points more likely to attend a college where the median two-subject SAT score was above 1,000 [out of 1600],” but does not reveal how many Noble students attained that score. *Id.* at 68. And although the data showed that Noble students at one school were more likely to

in David Whitman's book is abysmally low and below the minimum levels for any college, let alone competitive ones.⁹⁵ The admissions scores made available by some KIPP schools are above the average for students from similar social backgrounds, but too low to qualify students for selective four-year colleges.⁹⁶ In general, although many "no excuses" students appear to outperform public school students from comparable backgrounds, their scores fall well short of those achieved by higher SES students. It is telling that, of the more than 400 students that have graduated from Success Academy elementary and middle school programs in New York City, none gained admission in 2014 and 2015 to the three highly competitive, elite New York City "exam" high schools (Stuyvesant, Brooklyn Tech, or Bronx Science), and only six (out of fifty-four who took the admission test for these schools) were admitted in 2016.⁹⁷ Although this 11% success rate is somewhat above the New York City average for black students (4%) and Hispanic students (6%) overall,⁹⁸ the portion of black and Hispanic Success Academy students sitting for the test (25%) is similar to the 22% rate of black and Hispanic 8th-grader test takers citywide.⁹⁹ In sum, significant performance gaps by family income and education remain even for students educated at intensive "no excuses" charters, and future prospects are unknown.

attend and persist through the second year of college than comparable students in the Chicago public school system, there was no information on how many actually graduated and later found employment. *See id.* at 66.

95. *See, e.g.,* WHITMAN, *supra* note 7, at 244–50 (reporting class of 2003 average SAT score for University Park Mission Possible School in Worcester, Massachusetts, as under 800 out of 1600).

96. *See* Pondiscio, *supra* note 93, at 13 ("As of 2011, KIPP students' average SAT score was 1426 [out of 2400]; the average ACT score was 20 [out of 36]. For the colleges KIPP is targeting for its alumni, 'a 20 ACT ain't gonna cut it.'").

97. *See* Diane Ravitch, *Success Academy Students Finally Gain Admission to Elite High Schools*, DIANE RAVITCH'S BLOG (June 17, 2016), <https://dianeravitch.net/2016/06/17/success-academy-students-finally-gain-admission-to-elite-high-schools> [<https://perma.cc/A496-NVDL>]; *see also* Sandra Stotsky, *Testing Limits*, 29 ACAD. QUESTIONS 285, 298 (2016) (observing that, despite high scores on state tests compared to nearby urban schools, "[i]t is too early to evaluate long term results [for Success Academy charters] because less than 400 students have gone on to high school").

98. Ravitch, *supra* note 97.

99. *City Announces New Initiatives to Increase Diversity at Specialized High Schools*, N.Y.C. DEP'T EDUC. (June 9, 2016), <http://schools.nyc.gov/Offices/mediarelations/NewsandSpeeches/2015-2016/City+Announces+New+Initiatives+to+Increase+Diversity+at+Specialized+High+Schools.htm> [<https://perma.cc/M9UW-MT4N>].

Most “no excuses” schools are too new to produce data on the extended effects on graduates’ future employment and earnings, family structure, crime, and other long-term parameters.

As with economic integration, attempts to show the benefits of a “no excuses” education are also confounded by the difficulty of excluding the role of selection bias. A recent government-sponsored comprehensive study on selective charter schools—which looked not just at “no excuses” schools, but all competitive charters with students chosen by lottery—found a decidedly mixed picture on the benefits of selective charters overall. Middle-class children did not improve their academic performance and sometimes did worse than expected. But some low-income children gained, albeit fairly modestly, compared to children who were not admitted and were educated elsewhere.¹⁰⁰ The question is whether this study’s results are valid for the relatively rarefied, and far less numerous, category of “no excuses” charters. Many of these schools use some form of lottery to select their students. They routinely insist that they are committed to taking all comers and do not cherry-pick.¹⁰¹ The superior results they achieve, it is argued, are even more remarkable in light of the typical “no excuses” charter’s openness to all students, regardless of prior achievement levels or background, and a student body that is overwhelmingly poor and drawn from underperforming minority groups.

Nonetheless, there is reason to believe, as critic Richard Rothstein has noted, that the students in these schools are not representative of the low-income population as a whole, or even of children attending the broader category of selective charters ex-

100. See PHILIP GLEASON, ET AL., INST. EDUC. SCI., THE EVALUATION OF CHARTER SCHOOL IMPACTS 43 (2010), <https://ies.ed.gov/ncee/pubs/20104029/pdf/20104029.pdf> [<https://perma.cc/U4V2-TYPY>].

101. See, e.g., Davis & Heller, *supra* note 94, at 68–69 (students chosen by random lottery for Chicago network of Noble schools, with 11,000 students over 17 campuses); Jim Epstein, *Success Academy Posted Its Latest Test Scores. The Results are Astounding*, REASON: HIT & RUN (Aug. 15, 2015, 10:30 AM), <http://reason.com/blog/2015/08/15/success-academy-test-scores-charter> [<https://perma.cc/ZJC5-VNUA>] (noting that New York’s Success Academy network claims to choose students by lottery); *Frequently Asked Questions*, KIPP, <http://www.kipp.org/faq> [<https://perma.cc/6E7Q-2MSD>] (last accessed May 18, 2017) (noting that “[w]hen parent demand exceeds enrollment capacity at the school, students are admitted based upon on a lottery”).

amined in recent government reports.¹⁰² The parents of students who persist and succeed at these schools must pledge to get their children to school every day and on time and to ensure that homework is done.¹⁰³ Unfortunately, many parents from poor, urban communities are either unwilling or unable to meet even these modest requirements, which means their children never end up enrolling in these schools or eventually drop out. In addition, there is evidence that the families of many “no excuses” students are financially better off than average in their communities and are more likely to have two parents at home.¹⁰⁴ A pattern of selective teacher referrals to “no excuses” charters, those schools’ high attrition rates, and an overrepresentation of girls and siblings suggest that the students at “no excuses” schools are more capable and determined than poor students generally.¹⁰⁵ All of these factors tend to enhance students’ academic performance independent of school effects.

IV. APART FROM OUTCOMES, WHICH MODEL IS BETTER?

The data on the benefits for poor children from the two types of initiatives covered here are voluminous, but also incomplete and conflicting. A comprehensive assessment is beyond this Article’s scope. Nonetheless, given the evidence to date, it is fair to say that neither model consistently bests the other at improving academic outcomes for disadvantaged students. Although there are data pointing to positive gains from both, and some especially impressive numbers coming out of “no excuses” charters, most evidence is short-term. The magnitude and duration of the gains from each model, and the long-term effects on poor children’s employment, earnings, and general life success, remain to be seen. But educational efficacy is not the only consideration in deciding which of these strategies to fa-

102. See RICHARD ROTHSTEIN, *CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP* 72–74 (2004); WHITMAN, *supra* note 7, at 7–8 (noting researchers claiming selection effects for “no excuses” charters).

103. See WHITMAN, *supra* note 7, at 115, 259.

104. See RAYMOND WOLTERS, *THE LONG CRUSADE: PROFILES IN EDUCATION REFORM—1967–2014*, at 350–525 (2015) (detailing these observations and others made by Richard Rothstein).

105. See *id.*; WHITMAN, *supra* note 7, at 177–78.

vor or how much to invest in each. In assessing these models' feasibility, pragmatic and political considerations loom large.

For "no excuses" schools, one frequently heard objection is that programs of this type are hard to "scale up." KIPP Academies, the most extensive network of high-intensity charter schools, has opened only about 200 schools nationwide in the two decades since its founding, serving 80,000 of the nation's 50 million school-age children.¹⁰⁶ One important obstacle to faster growth is teachers. As David Whitman puts it, "There are serious questions as to whether there is adequate depth in the current teacher and principal pool to expand the new paternalism to scale."¹⁰⁷ There is no question that these institutions are demanding, with the roles assigned to teachers regularly described as a "calling" and a total lifestyle. As the descriptions of these charters confirm, teachers at "no excuses" schools must be willing to put in long hours, take on heavy workloads, engage in regular, personalized review of student assignments, and be available around the clock to support students and handle crises.¹⁰⁸ They must also agree to hold students to high standards, to closely monitor their behavior, and to impose consistent discipline for infractions.¹⁰⁹ The number of teachers who can and will fulfill these intense, and sometimes counter-cultural, demands is necessarily limited. Thus, classroom staffing is a constant challenge, and turnover and burnout are important limitations. Also, knowledgeable, dedicated, well-trained teachers cost money, and the challenge of staffing these schools adds considerably to their price tag.¹¹⁰

Finally, opposition to the "no excuses" approach from within the ranks of professional educators and the public slows efforts to adopt this model on a wide scale. Although drawing support from across the political spectrum, the movement to expand school choice through the spread of private charters,

106. KIPP, <http://www.kipp.org/schools> [<https://perma.cc/V3L5-SD94>] (last accessed May 18, 2017); accord Frederick Hess, *Ten Priorities for Education Policy*, NAT'L REV., Oct. 24, 2016, at 30, 32 (noting that "KIPP has taken more than two decades to open 200 schools that serve 80,000 of our nation's 50 million students").

107. WHITMAN, *supra* note 7, at 296.

108. *See id.* at 38, 276.

109. *See id.* at 275.

110. *See id.* at 297–98.

which include schools run on high-intensity “no excuses” lines, has some powerful detractors, especially on the left. Fears that charters will drain resources from public schools, as reflected, for example, in the recent decision of Massachusetts voters, with the NAACP’s blessing, to cap charter school expansion in their state,¹¹¹ motivate some of the opposition to charters in general and to any sort of public support for “no excuses” schools in particular.

More importantly, schools of this type bring out ideological fault lines. At the heart of the “no excuses” project is the assumption that poor children’s educational deficits are best addressed by actively reshaping the norms, habits, and behaviors formed by their families and communities. This idea is in tension with important strands of progressive thinking, which abhors “blaming the victim,” disdains the notion that the poor are somehow lacking, is suspicious of the paternalistic imposition of bourgeois, mainstream values, and ascribes disadvantaged children’s poverty and academic troubles to oppressive structures and defective institutions rather than to personal or cultural deficits.¹¹² Progressive scholars such as Alfie Kohn,¹¹³ William Crain,¹¹⁴ Joan Goodman,¹¹⁵ Joanne Golann,¹¹⁶ and Jim Horn,¹¹⁷ as well as teachers in-

111. See David Scharfenberg, *Mass. voters reject ballot question on charter schools*, BOS. GLOBE (Nov. 8, 2016), <https://www.bostonglobe.com/metro/2016/11/08/charter/v34OA3vMI8dRABDsFc4JuM/story.html> [<https://perma.cc/SE33-PNXX>].

112. See, e.g., Jeff Bryant, *A New LawsUIT Challenges The Legality Of “No Excuse” Charter Schools*, PROGRESSIVE (Jan. 21, 2016), <http://progressive.org/public-school-shakedown/new-lawsuit-challenges-legality-no-excuse-charter-schools> [<https://perma.cc/3TGS-7KE4>] (opining that, in imposing high expectations on all of their students, these schools ignore the effects of “the complex trauma of poverty”).

113. See WOLTERS, *supra* note 104 (noting Alfie Kohn’s observation that KIPP students are “subjected to a level of control that is downright militaristic,” turning them into “trained seals who have to bark out correct answers on command”); Alfie Kohn, *How Not to Teach Values: A Critical Look at Character Education*, PHI DELTA KAPPAN, Feb. 1997, at 428.

114. See WOLTERS, *supra* note 104 (noting observations of William Crain, a psychologist at the City College of New York, that KIPP and Success Academy type programs push a “limited definition of success” that includes achieving high standardized test scores and memorizing facts and formulae, while slighting important values such as “creativity, empathy, sensitivity to nature, love of learning, and students’ ability to think for themselves”).

115. According to Joan Goodman, “no excuses” schools’ strict behavior and character expectations tend to mold students who are too submissive and “do whatever they’re told.” See Valerie Strauss, *Why “no excuses” charter ‘schools mold*

fluenced by their ideas,¹¹⁸ are also hostile to the old-fashioned pedagogy, conventional codes of conduct, and detailed, prescriptive rules that “no excuses” schools adopt—features that, as David Whitman observes, assume disadvantaged students must be told “exactly what to learn and how to conduct themselves in middle-class society.”¹¹⁹ Some critics disdain the double standard that prescribes regimentation, conformity, discipline, and “drill

“very submissive” students—starting in kindergarten, WASH. POST ANSWER SHEET (Sept. 19, 2014), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/09/19/why-no-excuses-charter-schools-mold-very-submissive-students-starting-in-kindergarten> [<https://perma.cc/P6DD-8LQ5>]. Goodman also bemoans the loss of play and relaxation time in these schools. *Id.* Further, Goodman believes that “no excuses” students do not realize they are being “oppressed” because they unwittingly “identif[y] with the oppressor” when they acculturate to a school’s behavioral and character expectations. *Id.* As a result, she asserts, they come to believe that they will be happier and better off if they adopt the middle-class behavioral and character traits these schools advocate. *Id.* She regards this attitude change as unfortunate and undesirable.

116. See Joanne W. Golann, *The Paradox of Success at a No-Excuses School*, 88 SOC. EDUC. 103, 103 (2015) (complaining that “because of . . . their emphasis on order as a prerequisite to raising test scores,” no-excuses schools “develop worker-learners—children who monitor themselves, hold back their opinions and defer to authority—rather than lifelong learners”).

117. Horn, an education professor, disagrees with the premise that middle-class or mainstream values are more useful to students than low-income minority values. He deplors “the ministrations . . . to save Black and brown urban children today from their defective cultural traits” and sees the “behavioral and character training” at acculturation schools as “a thinly-veiled effort to impose a new variety of cultural eugenics by those who view the transmission of urban cultural traits as a threat to [w]hite middle-class values and economic prosperity.” Jim Horn, *Corporatism, KIPP, and Cultural Eugenics*, in *THE GATES FOUNDATION AND THE FUTURE OF US “PUBLIC” SCHOOLS* 80, 93 (Philip E. Kovacs ed., 2011). Horn worries that behavioral and character education is “an attempt to impose a form of cultural sterilization” that requires “children to transfer their loyalty from community and family to a new loyalty to the [school] family and its group values.” *Id.* at 94. He also expresses the concern that deliberate middle-class acculturation represents a “blame-the-poor” mindset. *Id.*

118. See WHITMAN, *supra* note 7, at 300 (noting that the “no excuses” model “would obligate educators to rethink their knee-jerk antipathy to educational paternalism and rebuff the reigning Romantic philosophy of Jean-Jacques Rousseau and John Dewey”).

119. *Id.* (“The idea that principals and teachers should rigorously supervise the education and acculturation of inner-city teenagers is too alien to the education establishment to be adopted on a comprehensive scale at present. Instigating educational paternalism writ large would require reversing the powerful tides of progressive education . . . and the teacher training regimens of most education schools.”).

and kill” for low-income students, while reserving creative pursuits, self-expression, and a broader, content-rich curriculum for the better off.¹²⁰ Likewise, teachers’ unions, which are hostile to charter schools generally, are wary of the heavy, open-ended teaching duties and discretionary administrative authority that are the hallmarks of “no excuses” institutions. These reservations mean that introducing the “no excuses” model into public schools is a tough sell, and even expanding private schools along these lines will be an uphill battle. For now, “no excuses” charters remain a niche phenomenon that relies heavily on private funds. This necessarily limits how many such schools can be created and how many students these institutions can educate.

Finally, the obsession of “no excuses” schools with getting disadvantaged students into and through college is a potential weakness that might eventually slow these schools’ momentum. Despite heroic efforts and some positive results, too many students emerging from these schools remain ill equipped for higher education.¹²¹ The “Yale or jail” mentality that regards joining the elite knowledge class as the only viable strategy for low-income children may not prove workable for most graduates. But the emphasis on strengthening character, fostering good habits, and building self-discipline might still be useful, especially if repurposed to other paths, including vocational training and a variety of low- or middle-skill jobs. The “no-excuses” approach could also help disadvantaged students build stronger and more stable families and develop a durable work ethic. Both are as important as academic ability to overall life success.¹²²

The economic integration model has its own practical shortcomings. The most important of these is demography. As noted, research confirms that income mixing produces measurable

120. See WOLTERS, *supra* note 104, at 353–57; Golann, *supra* note 116 (asserting that the behaviors taught by high expectations charters are those that “undermine success for middle class children”); see also Strauss, *supra*, note 115 (describing Joan Goodman’s critiques). For more commentary, see, for example, Margaret E. Raymond, *To No Avail: A Critical Look at the Charter School Debate*, PHI DELTA KAPPAN, Feb. 2014, at 8.

121. See *supra* notes 93–97 (discussing college admissions data).

122. See, e.g., Sampson, *supra* note 24, at 494–95; REEVES & HALIKIAS, *supra* note 24; PAUL TOUGH, *HOW CHILDREN SUCCEED: GRIT, CURIOSITY, AND THE HIDDEN POWER OF CHARACTER* 3–4 (2012); Reeves, *supra* note 24, at 125. *But see* Grover J. Whitehurst, *Hard Thinking on Soft Skills*, EVIDENCE SPEAKS REP., Mar. 24, 2016, at 1, 5 (expressing skepticism about schools’ ability to improve students’ character).

improvements only if poor students attend mostly middle-class or affluent schools. But the obstacles to shifting students out of low-income schools to more affluent settings are formidable. Existing neighborhood patterns of segregation by race and class are pronounced, so many students must travel long distances and attend schools far from home. Long travel times are expensive, undermine parental involvement and community support for local schools, and run up against parents' reluctance to have children spend hours in transit.¹²³ In addition, urban districts with students most likely to benefit from class integration serve predominantly poor and minority students, with middle- and upper-class families in short supply or opting for private education. The paucity of middle-class students in the system thus often renders within-district, or even inter-district, income integration infeasible.¹²⁴ As recent *New York Times* articles on the push to racially (and, by extension, economically) integrate New York City public schools reveal, such facts are often overlooked in debates on the subject.¹²⁵

123. See, e.g., Meredith P. Richards et al., *Can NCLB Choice Work?: Modeling the Effects of Interdistrict Choice on Student Access to Higher-Performing Schools*, in *THE FUTURE OF SCHOOL INTEGRATION*, *supra* note 6, at 223, 237.

124. See, e.g., RYAN, *supra* note 6, at 217 (observing that "there are currently not enough middle-income or white students in most urban districts, in public and private schools combined, to create meaningfully integrated schools throughout the district"); see also *Middle-Class Kids Aren't Magic Pixie Dust*, SPOTTED TOAD (June 10, 2016), <https://spottedtoad.wordpress.com/2016/06/10/middle-class-kids-arent-magic-pixie-dust/> [<https://perma.cc/L4TZ-L7EC>] (noting that white and affluent students are a small minority of New York City public school students).

125. See, e.g., Nikole Hannah-Jones, *Choosing a School for my Daughter in a Segregated City: How one school became a battleground over which children benefit from a separate and unequal system*, N.Y. TIMES MAG. (June 9, 2016), <https://www.nytimes.com/2016/06/12/magazine/choosing-a-school-for-my-daughter-in-a-segregated-city.html> [<https://perma.cc/DW79-URQP>]; Elizabeth A. Harris, *Small Steps, but No Major Push, to Integrate New York's Schools*, N.Y. TIMES (July 5, 2016), <https://www.nytimes.com/2016/07/06/nyregion/new-york-city-schools-segregation-carmen-farina.html> [<https://perma.cc/ACT2-RXTH>]; Kate Taylor, *Family by Family, How School Segregation Still Happens*, N.Y. TIMES (April 28, 2017), https://www.nytimes.com/2017/04/28/nyregion/school-segregation-nyc-district-3.html?emc=eta1&_r=0 [<https://perma.cc/JL2V-YG3L>]; Kate Taylor, *Parent Group Seeks More Integration in New York's Schools*, N.Y. TIMES (Oct. 18, 2016), https://www.nytimes.com/2016/10/19/nyregion/new-york-schools-segregation.html?_r=0 [<https://perma.cc/CH8P-6FVR>].

In commenting on the Hannah-Jones article, one blogger pointed out that the complaints about lack of integration in New York City schools are oblivious to the city's lopsided demography, which includes a relatively small number of white

Efforts to model income mixing using national demographic data confirm these insights. According to Ann Mantil and others at the Harvard Graduate School of Education, redistribution within and across multiple neighboring districts, even if implemented nationwide on a large scale, would decrease the percentage of high poverty schools by no more than about 10–15%. The number of schools with a low-income population below 20%, the only category shown to have measurable benefits for poor students, would barely budge.¹²⁶

In addition, even in the locations where income mixing is most feasible, integration can prove unstable. The plan adopted in Wake County, North Carolina exemplifies this danger. Due to a growing and volatile student population, officials in Wake County were forced constantly to rebalance the composition of the district's schools by reassigning students on a frequent and often yearly basis and placing children from the same families in different locations. These adjustments generated considerable disruption for parents and children. In the face of growing opposition and political turmoil, the Wake County school board eventually curtailed and then phased out the county's centrally coordinated

children who are also disproportionately affluent and tend to be concentrated in a small number of locations. See *Kids Aren't Magic Pixie Dust*, *supra* note 124. Noting that only 15% of the city's public school population is white, the blogger comments:

This is the main logical tension of the whole article. Even if you distributed those 15 percent of [non-minority] students equally across the entire city, you'd have all schools that are 85% non-white. Unless you believe that a small number of white students would act as a magic pixie dust on schools, you have to assume that this would have zero effects on outcomes. Moreover, about a fifth of the white students are in Staten Island and can't be plausibly moved to other more segregated schools. The Bronx only has 4% white students

Id. For data on the demography of New York City schools generally, both public and private, see N.Y.C. INDEP. BUDGET OFFICE, HOW MANY STUDENTS ATTEND NON-PUBLIC K–12 SCHOOLS IN NEW YORK CITY (Apr. 22, 2014), <http://ibo.nyc.ny.us/cgi-park2/2014/04/how-many-students-attend-nonpublic-k-12-schools-in-new-york-city> [https://perma.cc/G4L9-EHTV]. From the numbers provided in this report, it can be calculated that about 24% of school-age children in New York City are white. Because many of these children attend private school, the population of the city's public schools is 15% white overall. See *id.* (data on file with Author).

126. See Ann Mantil et al., *The Challenge of High Poverty Schools: How Feasible Is Socioeconomic School Integration?*, in THE FUTURE OF SCHOOL INTEGRATION, *supra* note 6, at 155, 188–89, 207.

program, opting for continuity, predictability, convenience, and the benefits of neighborhood schools over diversity.¹²⁷

Yet another problem with income mixing is the paucity of reliable evidence on whether going to school with low-income students can harm more affluent classmates. The income-mixing model is premised on the understanding that norms are contagious and that uplift does not require active inculcation but rather will occur spontaneously. Simply by being exposed to better habits and values, the less fortunate will adopt the ways of the more privileged. But what about the opposite possibility? Perhaps students from tough backgrounds will impart bad habits and attitudes to better-off schoolmates.

Although such “reverse contagion” tends to be soft-pedaled by proponents, its potential to operate in some contexts has not been definitively repudiated. As reviewed in 1990 by Christopher Jencks and Susan Mayer, the evidence on whether affluent students suffer academically from infusions of poor or minority students is both sparse and inconclusive.¹²⁸ Nonetheless, based on more recent data, Russell Rumberger and Gregory Palardy concluded in 2005 that, to the extent that students across the income and ability spectrum can be shown to benefit from attending high-performing schools, aggressive efforts to homogenize schools’ demographic profiles could well hurt better prepared students. Indeed, their calculations predicted that declines for the highest achieving students (who are now concentrated in high SES schools) would likely exceed the expected gains for low-income and minority students.¹²⁹

The migration of school-age children from New Orleans, Louisiana, to Houston, Texas, in the wake of Hurricane Katrina has also provided the occasion to examine potential negative peer effects from an influx of low-income students into better-off districts. The research group that examined the data from this natural experiment found that negative peer effects are real. Those researchers concluded that “the arrival of low-

127. See Sheneka M. Williams, *The Politics of Maintaining Balanced Schools: An Examination of Three Districts*, in *THE FUTURE OF SCHOOL INTEGRATION*, *supra* note 6, at 257, 262–68 (detailing the political struggles in Wake County).

128. Christopher Jencks & Susan Mayer, *The Social Consequences of Growing Up in a Poor Neighborhood*, in *INNER-CITY POVERTY IN THE UNITED STATES*, *supra* note 3, at 111, 164–67.

129. See Rumberger & Palardy, *supra* note 71, at 2019–21.

achieving evacuees dragged down the average performance of the Houston students and had a particularly negative impact on high-achieving Houston kids."¹³⁰

On the behavioral front, data on reverse contagion are even sparser. A series of recent papers suggests that disruptive peers can lower classmates' future earnings,¹³¹ but there are few other rigorous measures of the consequences of schoolmates' delinquency and rule-breaking. As reported by Jencks and Mayer, there is research suggesting that students can be adversely influenced by classmates' sexual and reproductive behavior, with one study showing that attending school with low-SES or minority teens increases the likelihood of childbearing before graduation, and another indicating that students with a significant number of disadvantaged black classmates (who, on average, initiate sex at younger ages) tend to engage in earlier sexual intercourse.¹³²

Finally, there are costs to the beneficiaries themselves. Robert Crosnoe and others have noted that, because students are evaluated relative to their peers in the same school, poor students transferred to more affluent institutions tend to experience a "frog pond effect," losing out to more capable and sophisticated students in the competition for grades and social standing. Low income students surrounded by higher income classmates also report more social isolation, and a decline in self-perception and emotional well-being.¹³³

130. Scott Imberman et al., *Katrina's Children: Evidence on the Structure of Peer Effects from Hurricane Evacuees* (Nat'l Bureau Econ. Research, Working Paper No. 15,291, 2009); see also Petrilli, *supra* note 62, at 51 (discussing the Katrina study results).

131. See Scott E. Carrell et al., *The Long-Run Long-Run Effects of Disruptive Peers* (Nat'l Bureau Econ. Research, Working Paper No. 22,042, 2016); see also Scott E. Carrell et al., *The Long-Run Effects of Disruptive Peers*, VOX (Apr. 25, 2016), <http://voxeu.org/article/long-run-effects-disruptive-peers> [<https://perma.cc/G4QM-PRC4>].

132. Christopher Jencks & Susan Mayer, *The Social Consequences of Growing Up in a Poor Neighborhood*, in *INNER-CITY POVERTY IN THE UNITED STATES*, *supra* note 3, at 111, 167-71 ("The evidence on how schools influence teens' sexual behavior is thin, but it suggests that teenagers' sexual behavior is quite sensitive to their classmates and neighbors' SES and race.").

133. Robert Crosnoe, *Low income Students and the Socioeconomic Composition of High Schools*, 74 AM. SOC. REV. 709 (2009). Although he does not discuss negative contagion at any length, Richard Kahlenberg does acknowledge the potential negative consequences of economic integration for low income students. See Richard D. Kahlenberg, *Introduction: Socioeconomic School Integration*, in *THE FUTURE OF*

V. THE DOWNSIDE OF INCOME INTEGRATION: PROGRESSIVE
PRESSURES ON MIDDLE CLASS SCHOOLS

The discussion so far reveals that the two approaches reviewed here each have strengths and shortcomings. But there is one important reason why a “no excuses” environment represents a more functional and effective model than economic integration for improving poor children’s educational prospects. In schools dominated by teachers, administrators, and, often, parents who embrace progressive ideas—including many public schools situated in affluent neighborhoods—forcing integration by class and race threatens to unleash a dynamic that undermines the very conditions that income mixing depends upon to achieve its hoped-for effects. Because income integration generates pressure to erode the hallmark features that account for the strengths of a “middle class” educational setting, the project contains the seeds of its own destruction.

As noted, both income mixing and “no excuses” schools assume that, to succeed in school and in life, poor children need to be socialized away from their culture of birth to more desirable habits. Because of their commitment to actively crafting and imposing mainstream norms, “no excuses” proponents must embrace this uncomfortable judgment openly and publically. Economic integration, by contrast, relies on passive forces, which means that advocates can more easily get away with couching their support in euphemism and indirection and avoiding overt expressions of the model’s basic assumptions. But once economic integration actually occurs, the cold realities of race and class disparities cannot long be suppressed. Even within high quality schools, stratification soon emerges. Differences in academic skill, socialization, behavior, and discipline stubbornly persist.

This should not be surprising. As already discussed, schools alone cannot abolish inequalities by race and class. In keeping with James Coleman’s observations decades ago,¹³⁴ and as described by John Ogbu in his report on Shaker Heights High School,¹³⁵ students from different socioeconomic and ethnic back-

SCHOOL INTEGRATION, *supra* note 6, at 1, 33 (“It is quite possible that economic integration of children from low-income families could isolate or otherwise alienate children, detracting from their performance.”).

134. COLEMAN REPORT, *supra* note 87.

135. OGBU, *supra* note 84.

grounds, even within the same school, tend to gravitate to different levels in the academic pecking order. Unfortunately, these inconvenient realities rankle. For those wedded to a stringent version of egalitarian principles, the goals of uplift and amelioration quickly transmogrify into the demand for equal results.

This danger is laid bare in *Despite the Best of Intentions*, a recent ethnographic study of Riverview, a “highly resourced” but racially mixed public high school in a comfortable suburb of a large Midwestern city.¹³⁶ Although containing few truly poverty-stricken students, the school population runs the gamut of racial and ethnic groups across the economic spectrum.¹³⁷ Describing the school from a self-consciously progressive point of view, the study’s authors toggle erratically between accusations that the school’s disparities by race and class are delusory figments of distorted thinking, or that, although objectively real, they are the products of structural racism, class privilege, parental selfishness, and discrimination both deliberate and “structural.”¹³⁸ Wielding a panoply of social justice rhetoric, and repeatedly invoking the baleful influence of stereotype threat and lower teacher expectations,¹³⁹ the authors’ message is clear: group differences in school outcomes represent illegitimate and ill-gotten gains that schools must equalize by ridding themselves of “white privilege,”¹⁴⁰ “racialized . . . hierarchies,”¹⁴¹ and “opportunity hoarding.”¹⁴²

136. AMANDA LEWIS & JOHN DIAMOND, *DESPITE THE BEST OF INTENTIONS* (2015). Along the same lines, see, for example, Susan Berfield, *Black Students Don't Even Get an Equal Education in Diverse Schools*, BLOOMBERG BUSINESSWEEK (Sept. 15, 2016), <https://www.bloomberg.com/features/2016-america-divided/education> [<https://perma.cc/EWF4-TJQR>] (documenting complaints about racial disparities in achievement, ascribed to white parents’ “opportunity hoarding,” in affluent Evanston, Illinois, public schools); Peter Berkowitz, *It's Racial Indoctrination Day at an Upscale Chicagoland School*, WALL ST. J. (Feb. 17, 2017), <https://www.wsj.com/articles/its-racial-indoctrination-day-at-an-upscale-chicagoland-school-1487375679> [<https://perma.cc/87VH-8NS3>] (describing seminars at an affluent high school near Chicago designed to sensitize students to racial discrimination, and the objections of some non-minority parents to such “indoctrination”).

137. LEWIS & DIAMOND, *supra* note 136, at xiv–xv.

138. *Id.* at 8.

139. *See id.* at 11.

140. *Id.* at 54.

141. *Id.* at 16.

142. *Id.* at 119.

To that end, the authors endorse the radical reforms proposed by the school's most progressive elements. On the academic side, demands issue to eliminate tracking, dismantle honors classes, dumb down and "diversify" the curriculum, revise or water down the grading system, and lower the bar for enrolling in AP classes. Standardized tests are a target of attack, with a number of black parents complaining that advanced and honors classes are "white dominated spaces," that black and Latino students are overrepresented in basic and remedial classes, and that their children's low test scores are being used unfairly to impede their admission to honors and AP classes.¹⁴³

Likewise, disparities in patterns of school discipline loom large. Middle class standards of behavior and decorum are recast as a form of cultural hegemony imposed by well-off, mainly white parents intent on remaining in control.¹⁴⁴ The imperative of equal outcomes gives rise to accusations of racial bias and double standards, and exerts pressure to relax rules, reject zero tolerance, excuse defiance and disobedience as the expression of an alternative "cultural style," and abandon conventional sanctions like suspensions in favor of cumbersome and unproven options like therapeutic counseling, mediation, and "restorative justice."¹⁴⁵ Those who resist these efforts, or attribute the differential academic and disciplinary results to parenting practices, cultural differences, and social class rather than "institutional practices of the school or their own everyday practices as white parents," are accused of "cultural racism," insensitivity, "victim-blaming" and indulging in "racialized discourse."¹⁴⁶

Although the book's portrait of Riverview High is focused primarily on race, the exposition makes clear that race and class differences at Riverview largely overlap, with white parents disproportionately among the most affluent.¹⁴⁷ The ac-

143. See *e.g.*, *id.* at 97, 106, 129–32, 135–36 (describing pressure to diversify AP and higher level classes by, *inter alia*, relaxing selection and admission criteria); see also *id.* at 104–06 (noting black parents objecting to their child's failure to be placed in the honors track because the child "did this and that on the test," or "doesn't do well on tests," or "on her standardized tests . . . she did not do very well").

144. *Id.* at 15–16, 46–50, 80–81.

145. *Id.* at 68–71, 81, 178.

146. *Id.* at 144–45.

147. See *id.* at 9.

count is emblematic of how programmatic efforts to integrate schools demographically can go awry in the wake of expectations and demands that all inequalities be rectified. These demands highlight the cultural contradictions inherent in all uplift models. Proponents of income integration must deal with the cognitive dissonance created by the clash between the model's foundational premise, which is that disadvantaged students' habits and attitudes are deficient and will be improved by immersion in a superior environment, and discomfort with the idea of class-based cultural differences. This dissonance, and its attendant uneasiness, yield strenuous efforts to deny or abate existing disparities by any means necessary. If poor children cannot be brought up to privileged standards, then those standards must be revised, or even lowered, to put everyone on the same level.

The problem is that those efforts weaken the very qualities of middle class schools that are essential to the model's effectiveness. On the academic side, rigor, ranking, testing, conventional measures of achievement, and strong academic standards foster the analytic skills and mindset essential to disadvantaged students' performance and learning. Acceptance and accommodation of poor students' "cultural style" can interfere with the goal of bringing students' deportment up to the level of their more affluent classmates, and "defining deviancy down" through the relaxation of standards and sanctions threatens to disrupt the decorous, orderly, and respectful classroom environment that, recent research suggests, is essential to all students' academic progress.

Above all, weakening the disciplinary expectations that prevail in middle-class schools threatens to compromise school quality through its negative effects on teachers. Although confounded by recent accusations of discrimination in school discipline,¹⁴⁸ considerable evidence supports the observation that children from poor families are more likely to engage in a range of misbehaviors that are disruptive both to their own and others' learning.¹⁴⁹ For this reason alone, an influx of disadvan-

148. See *infra* note 156.

149. The current literature on school discipline, which is focused on allegations of racial bias, tends to underplay the role of social class and family structure in contributing to the risk and incidence of misbehavior. However, it is generally conceded that low SES does tend to be associated with a higher risk of delinquen-

tagged students can itself increase the risk of classroom disorder. Restrictions on sanctions for poor behavior just threaten to compound this effect. The problem for the economic integration model is that unruly classrooms tend to drive away the best teachers, who are known to avoid unsafe, disorderly environments, and to resent the incursions on their authority that come from disrespectful and disruptive students.¹⁵⁰ This helps

cy and disruptive conduct in children and adolescents. See, e.g., ERIC JENSEN, *TEACHING WITH POVERTY IN MIND* ch. 2 (2009), <http://www.ascd.org/publications/books/109074/chapters/How-Poverty-Affects-Behavior-and-Academic-Performance.aspx> [<https://perma.cc/9EVN-7BJH>]; Russell W. Rumberger, *Poverty and High School Dropouts*, AM. PSYCHOL. ASS'N (May 2013), <http://www.apa.org/pi/ses/resources/indicator/2013/05/poverty-dropouts.aspx> [<https://perma.cc/NW2S-N3X2>]; see also AMIE BETTENCOURT ET AL., BALTIMORE EDUC. RES. CONSORTIUM, *THE COSTLY CONSEQUENCES OF NOT BEING SOCIALLY AND BEHAVIORALLY READY BY KINDERGARTEN* (Mar. 2016) (exploring the linkage in Baltimore public school students between poverty, lack of readiness for kindergarten, later behavioral problems, and disciplinary infractions); Nicole Lyn Letourneau et. al., *Socioeconomic status and child development: A Meta-Analysis*, 21 J. EMOTIONAL & BEHAV. DISORDERS 211 (2013).

In addition, municipal data on the demography of school violence and disruption, which school districts have recently been compiling, confirm that minority and low-income schools are more likely to be persistently dangerous and unsafe, with schools in more affluent districts virtually never appearing on those lists. See, e.g., *Persistently Dangerous Schools*, PENN. DEP'T EDUC., <http://www.education.pa.gov/Teachers%20-%20Administrators/No%20Child%20Left%20Behind/Pages/Unsafe%20Schools/Persistently-Dangerous-Schools.aspx#tab-1> [<https://perma.cc/XR8X-ZNRN>]. Finally, there is some recent research suggesting the existence of racial differences in juvenile violence and bullying, with black students more likely to get into fights and white students in diverse schools more likely to be the targets of bullying. See Sycarah Fisher et al., *Not Just Black and White: Peer Victimization and the Intersectionality of School Diversity and Race*, 44 J. YOUTH ADOLESCENCE 1241 (2015); Christopher P. Salas-Wright, et al., *Trends in Fighting and Violence Among Adolescents in the United States: Evidence From the National Survey on Drug Use and Health, 2002–2014*, 107 AM. J. PUB. HEALTH 977 (2017), <http://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2017.303743> [<https://perma.cc/2ZNT-9PNE>].

150. See AM. FED'N OF TEACHERS, *MEETING THE CHALLENGE: RECRUITING AND RETAINING TEACHERS IN HARD-TO-STAFF SCHOOLS* 3–4 (2007), http://www.aft.org/sites/default/files/hardtostaff_2007.pdf [<https://perma.cc/48V2-64UY>] (“A key component of working conditions [for teachers] is workplace safety. Despite a public perception that schools have become increasingly unsafe over time, data show otherwise . . . The reality, though, is that some schools are safer than others, and this takes a toll on the ability of the less safe schools to attract and retain teachers.”); ERIC HIRSCH ET AL., CTR. FOR TEACHING QUALITY, *TEACHING AND LEARNING CONDITIONS ARE CRITICAL TO THE SUCCESS OF STUDENTS AND THE RETENTION OF TEACHERS* 8–17 (2006), <http://files.eric.ed.gov/fulltext/ED499286.pdf> [<https://perma.cc/XW9E-KTJQ>]; Eileen Lai Horng, *Teacher Tradeoffs: Disentangling*

explain why high-poverty schools have more trouble attracting and keeping the most qualified teachers, who are important to maintaining academic excellence. Indeed, many K–12 experts claim that the presence of outstanding teachers contributes significantly to the superiority of middle-class schools.

These concerns are not merely theoretical. School districts all over the country have taken steps to reform and relax conventional sanctions for misbehavior.¹⁵¹ This has not always worked out well. The Highline school district in Washington State precipitated a full-scale teacher rebellion by proposing to replace suspensions with in-school “restorative practices.”¹⁵² A similar initiative in St. Paul, Minnesota, resulted in an increase in violence within its schools, producing vociferous teacher opposition.¹⁵³ According

Teachers’ Preferences for Working Conditions and Student Demographics, 46 AM. EDUC. RES. J. 690, 707 (2009) (“[For teachers,] the difference between facilities that are clean and safe versus facilities that are not clean and safe is, on average, 30% more important to the respondents than the difference between \$0 additional salary per year versus an \$8,000 increase in annual pay. Another way to interpret this finding is that if the teachers sampled had to choose between working at a school that was clean and safe or to receive an \$8,000 annual salary increase, on average, they would choose the former over the latter.”); see also Theresa Watanabe & Howard Blume, *Why Some LAUSD Teachers are Balking at a New Approach to Discipline Problems*, L.A. TIMES (Nov. 7, 2015), <http://www.latimes.com/local/education/la-me-school-discipline-20151108-story.html> [<https://perma.cc/A9ED-WGEF>] (documenting teachers’ objections to the relaxation of school disciplinary standards and sanctions).

151. See MAX EDEN, MANHATTAN INST., *SCHOOL DISCIPLINE REFORM AND DISORDER* 5 (2017), <https://www.manhattan-institute.org/sites/default/files/R-ME-0217v2.pdf> [<https://perma.cc/T72E-AQ8B>] (“Twenty-seven states have revised their laws to reduce the use of exclusionary discipline, and more than 50 of America’s largest school districts, serving more than 6.35 million students, have implemented discipline reforms. From 2011–12 to 2013–14, the number of suspensions nationwide fell by nearly 20%.”).

152. See Claudia Rowe, *Highline District Struggles with Fallout After Limiting Student Suspensions*, SEATTLE TIMES (Sept. 16, 2016), <http://www.seattletimes.com/education-lab/highline-struggles-with-fallout-of-limiting-student-suspensions> [<https://perma.cc/YC7G-ZEA8>].

153. See Dave Huber, *What Happens When You Impose a Radical (and Racial) Agenda in Schools: The Public Revolts*, COLL. FIX (July 30, 2016), <https://www.thecollegefix.com/post/28314/> [<https://perma.cc/D53S-UKL4>]; Katherine Kersten, *Federal Racial Discipline Quotas Create Chaos in St. Paul Schools*, FEDERALIST (Jul. 29, 2016), <http://thefederalist.com/2016/07/29/federal-racial-discipline-quotas-create-chaos-in-st-paul-schools/> [<https://perma.cc/K45X-TVZU>]; Katherine Kersten, *Mayhem in the Classroom*, WEEKLY STANDARD (Apr. 18, 2016), <http://www.weeklystandard.com/mayhem-in-the-classroom/article/2001892> [<https://perma.cc/4L7D-U5LB>].

to a recent report, Mayor Bill de Blasio's restrictions on principals' discretion to suspend students in New York City public schools have had detrimental effects on school atmosphere and order, especially in schools that serve less advantaged populations.¹⁵⁴ The Obama administration's enhanced scrutiny of public school disciplinary practices, based on racially disparate effects of standard penalties (such as suspensions) and hard-to-assess accusations that minority students are singled out for harsher treatment, has put additional pressure on schools to equalize rates of discipline by race and class, and to reduce the use of conventional penalties like school suspensions.¹⁵⁵

154. See EDEN, *supra* note 151, at 48. The report found that, although Mayor Michael Bloomberg's policy of eliminating suspensions for minor infractions like dress code violations had little measurable detrimental effect, school discipline reforms implemented under Mayor de Blasio, which require principals to obtain permission from administrators to suspend students, resulted in measurably greater reported disorder in the New York City public schools. As Eden notes in his summary of the report:

Specifically, teachers report less order and discipline, and students report less mutual respect among their peers, as well as more violence, drug and alcohol use, and gang activity. There was also a significant differential racial impact: non-elementary schools where more than 90% of students were minorities experienced the worst shift in school climate under the de Blasio reform.

Id.

155. Claims surrounding racial bias in school discipline may involve allegations of unjustified disparate impact as well as discriminatory disparate treatment, whether intentional or inadvertent. See Catherine E. Lhamon & Jocelyn Samuels, U.S. Dep't of Justice & U.S. Dep't of Educ., Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline 7 (2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf> [<https://perma.cc/CY23-KPRG>] ("The administration of student discipline can result in unlawful discrimination based on race in two ways: first, if a student is subjected to *different treatment* based on the student's race, and second, if a policy is neutral on its face—meaning that the policy itself does not mention race—and is administered in an evenhanded manner but has a *disparate impact*, that is, a disproportionate and unjustified *effect* on students of a particular race."). On disparate impact, see *id.* at 11 (warning of disparate impact when a neutral, evenhanded "discipline policy resulted in an adverse impact on students of a particular race as compared with students of other races"); Richard A. Epstein, *Civil Rights Enforcement Gone Haywire*, EDUC. NEXT, Fall 2014, at 29, 31–32, http://educationnext.org/files/ednext_XIV_4_epstein.pdf [<https://perma.cc/X7GT-TLW8>] (discussing the 2014 "Dear Colleague" letter's disparate impact test). On disparate treatment, see U.S. DEP'T OF EDUC., 2013–2014 CIVIL RIGHTS DATA COLLECTION 3–5 (2016), <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf> [<https://perma.cc/2AZ6-G623>] (giving examples).

Given the behavioral and demographic realities, schools can either equalize disciplinary sanctions by race and class, or achieve safety and order, but not both. This means that, whether justified by fairness concerns or not (and that question is hotly disputed),¹⁵⁶ recent disciplinary reforms often translate, at least initially, into more disruptive, disrespectful, and violent students remaining in classrooms with a socioeconomically mixed student population.¹⁵⁷ Not only do these situations threaten to upset and alienate teachers,¹⁵⁸ but they also pose the danger that well-off parents, who are keenly interested in and sensitive to school safety, order, and decorum, will abandon or avoid schools where disciplinary standards are relaxed. The

156. The literature on the controversy surrounding racial bias is complex and growing. Although the facts do reveal that blacks and lower income students are disciplined more often, scholars disagree on whether those disparities evince racial bias or can be accounted for by neutral factors such as actual differences in disruptive behavior or other pertinent variables. Whether conventional sanctions such as suspension are necessary to maintaining order in schools, and whether alternative approaches can be effectively substituted, are also in dispute.

For overviews of evidence on racial bias and the effectiveness of alternative sanctions, see, for example, Rachel L. Cohen, *Rethinking School Discipline*, AM. PROSPECT (Nov. 2, 2016), <http://prospect.org/article/rethinking-school-discipline> [<https://perma.cc/4TE4-QVY4>] (discussing alternatives to conventional penalties such as suspension); Josh Kinsler, *Understanding the Black-White School Discipline*, 30 ECON. EDUC. REV. 1370, 1382 (2011) (asserting that racial disparities in school discipline are “largely generated by cross-school variation in punishment”); Russell R. Skiba et al., *Reforming School Discipline and Reducing Disproportionality in Suspension and Expulsion*, in HANDBOOK OF SCHOOL VIOLENCE AND SCHOOL SAFETY 515, 523–25 (Shane R. Jimerson et al. eds., 2d ed. 2011); Matthew P. Steinberg & Johanna Lacoë, *What Do We Know about School Discipline Reform*, EDUC. NEXT, Winter 2017, at 46, http://educationnext.org/files/ednext_xvii_1_steinberg.pdf [<https://perma.cc/5UAX-8SE8>] (“While disparities in school discipline by race and disability status have been well documented, the evidence is inconclusive as to whether or not these disparate practices involve racial bias and discrimination.”); John P. Wright, et al., *Prior Problem Behavior Accounts for the Racial Gap in School Suspensions*, 42 J. CRIM. JUST. 257, 263–64 (2014) (finding that students’ behavioral history, not bias, accounts for racial disparities in discipline); Shi-Chang Wu et al., *Student Suspension: A Critical Reappraisal*, 14 URBAN REV. 245, 245 (1982) (noting that the incidence of suspensions is “the result of a complex of factors grounded in the ways schools operate”).

157. See EDEN, *supra* note 151, at 20–23.

158. See Katherine Kersten, *No Thug Left Behind*, CITY J. (Feb. 6, 2017), <https://www.city-journal.org/html/no-thug-left-behind-14951.html> [<https://perma.cc/QE7S-SBBZ>] (reporting on teacher complaints about relaxed disciplinary standards); Steinberg & Lacoë, *supra* note 156, at 47 (“More than one third of teachers in 2012 reported that student behavior problems and tardiness interfered with their teaching.”); *supra* notes 152–53 and accompanying text.

departure of such parents from the public school system would make it harder to maintain the middle class demography essential to income mixing's success.

Finally, the alternatives proposed for dealing with student infractions also threaten to undermine school quality by siphoning away time, attention, and resources that could be devoted to academic pursuits and extracurricular activities. In an effort to address disparities in rates of school discipline, St. Paul, Minnesota, has spent millions of dollars and countless personnel hours on "cultural competency" initiatives, "white privilege" training, and "restorative justice" programs.¹⁵⁹ These strategies have upset and alienated good teachers and white parents, who are critical to maintaining schools' middle class character.¹⁶⁰ A recent *New York Times Magazine* article on school discipline alternatives such as mediation, counseling, and restorative justice programs describes them as time-consuming and "exhausting," and makes clear that many teachers are ill-equipped to deal with their demands.¹⁶¹ Specifically, teachers are uneasy with the therapeutic and social work roles into which they are cast and resentful of the burdens these programs impose, which distract from the preferred, core missions of teaching and learning.¹⁶² Moreover, there is currently no reliable evidence that introducing these disciplinary innovations reduces the incidence of school misbehavior or alleviates any claimed short or long term harms from stricter or more conventional sanctions.¹⁶³ Indeed, despite the paucity of reliable data

159. Huber, *supra* note 153.

160. *See id.*

161. *See* Susan Dominus, *An Effective but Exhausting Alternative to High School Suspension*, N.Y. TIMES MAG. (Sept. 7, 2016), https://www.nytimes.com/2016/09/11/magazine/an-effective-ut-exhausting-alternative-to-high-school-suspensions.html?smid=pl-share&_r=0 [<https://perma.cc/52Y3-Q884>].

162. For a teacher's reaction, see Barry Rehfeld, Letter to the Editor, *Re: The Education Issue*, N.Y. TIMES MAG. (Sept. 23, 2016), <https://www.nytimes.com/2016/09/25/magazine/the-9-11-16-issue.html?smid=pl-share> [<https://perma.cc/QQJ6-RTPZ>] ("As a former high-school teacher, count me among those who think 'restorative justice' is another burden piled on overworked teachers . . . Teachers [of unruly students] are likely to first have to speak to students during and after class, meet with the student and an administrator, have the student serve after-school detention, keep a paper and electronic trail and meet with the student and parent.").

163. *See* Max Eden, *In Defense of Suspensions*, MANHATTAN INST. (Aug. 4, 2016), <http://www.manhattan-institute.org/html/defense-suspensions-9129.html> [<https://perma.cc/9XCX-D8KF>] ("We simply don't have enough data to evaluate the ef-

on the consequences of these reforms—which have only recently been implemented by school districts on a wide scale—there is some evidence of negative effects.¹⁶⁴ Certainly, there is no basis for thinking that these changes support the objectives of income integration or comport with the understandings behind that model. And there are good reasons to believe that experimenting with untried methods for maintaining order in schools will undermine the models' goals.

These observations illustrate a critical shortcoming of the income mixing approach. Shifting more low income students to higher status schools forces students, parents, and teachers to daily face the unpleasant reality that, when students across lines of race and class attend the same school, stratification inevitably follows. Average racial differences in academic capabilities and outcomes within and across schools are a stubborn fact, and not much progress has been made in disrupting these patterns over many decades.¹⁶⁵ The same holds for class, with achievement differences by family income now matching or exceeding those by race.¹⁶⁶ Widening gulfs by socioeconomic status in family structure and other sources of social capital suggest these patterns will continue for the foreseeable future.¹⁶⁷ Shifting poor students to better schools can, at best, al-

fects of discipline changes in most American school districts. That means that the policy-makers are quite literally ignorant of the consequences . . . for poor and minority students who are just trying to behave, learn, and have a fair opportunity at life.”); Steinberg & Lacoë, *supra* note 156, at 50 (reviewing innovative alternatives to conventional disciplinary practices, and stating, based on the lack of rigorous evaluations, that “reform efforts” have “outpace[d] research evidence”).

164. See EDEN, *supra* note 151, at 5–6.

165. See *supra* note 2.

166. See *supra* notes 2–3.

167. See *supra* notes 2–3; see also Robert I. Lerman & W. Bradford Wilcox, *For Richer, for Poorer: How Family Structures Economic Success in America*, AM. ENTERPRISE INST. (Oct. 28, 2014), <https://www.aei.org/publication/for-richer-for-poorer-how-family-structures-economic-success-in-america> [<https://perma.cc/3TW8-RQLN>] (“The retreat from marriage—a retreat that has been concentrated among lower-income Americans—plays a key role in the changing economic fortunes of American family life . . . Growing up with both parents (in an intact family) is strongly associated with more education, work, and income among today’s young men and women . . . These two trends reinforce each other. Growing up with both parents increases your odds of becoming highly educated, which in turn leads to higher odds of being married as an adult. Both the added education and marriage result in higher income levels . . . The advantages of growing up in an

leviate observed gaps in academic achievement. There is no evidence the strategy can close them.

That fact does not prevent participants from feeling frustrated and disappointed, which in turn generates pressure to change the ways schools operate. Because this pressure threatens to alter the very character of the schools themselves, income integration is necessarily an unstable project. The enormous social-engineering effort required to create and maintain diverse schools where they would not otherwise exist through private choice, and the turmoil, tension, and conflict these initiatives can generate, argue against a large-scale push to manipulate public school demography. Although income mixing will occasionally occur spontaneously, attempting to impose that condition on a wide scale is not worth the effort and is likely to backfire.

The “no excuses” alternative, in contrast, is better equipped to negotiate the tensions between uplift models and progressive commitments, and to deal constructively with persistent race and class differences. These schools currently educate mainly low income students, which renders socioeconomic disparities less salient. Tracking and special honors classes are absent or, when introduced, include students from similar racial and economic backgrounds who tend to start out at comparable educational level.¹⁶⁸ The important comparisons are not to better-off students, but to low-income children educated in ordinary public schools or in other less demanding settings. The goal is maximum feasible improvement rather than impossible equalization. Because students and teachers need not constantly confront inequalities that are the product of larger social forces, the embrace of active acculturation can proceed without apology to beneficiaries or benefactors. In sum, in the current ideologically charged climate, separate and unequal is superior to, and more effective than, diverse and unequal. While “no excuses” schools and income integration have their respective strengths and weaknesses, the former emerges as a better approach to educating the disadvantaged.

intact family and being married extend across the population. They apply about as much to blacks and Hispanics as they do to whites.”).

168. See WHITMAN, *supra* note 7, at 111 (“Since 98 percent of the students are black or Hispanic, skill groupings at the school do not have the same political freight that tracking minority students might have in a predominantly white school.”).

BOOK REVIEW

WHY THE RIGHT EMBRACED RIGHTS

THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND
THE REMAKING OF AMERICAN GOVERNMENT. JEFFERSON
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INTRODUCTION

Justice Scalia's untimely death prompted an outpouring of popular and academic comment on his remarkable contributions, both to the law and to the conservative movement in American politics. Newspaper obituaries, magazines, and special editions of scholarly journals analyzed the Justice's contribution to reshaping theories of constitutional and statutory interpretation, changing central doctrines of constitutional law, and altering norms of Supreme Court oral advocacy and opinion writing.¹ They also regularly emphasized how both his votes and his voice helped advance conservative causes.²

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1. See, e.g., Robert Barnes, *Supreme Court Justice Antonin Scalia dies at 79*, WASH. POST (Feb. 13, 2016), https://www.washingtonpost.com/politics/supreme-court-justice-antonin-scalia-dies-at-79/2016/02/13/effe8184-a62f-11e3-a5fa-55f0c77bf39c_story.html [<https://perma.cc/E576-A7WW>]; Adam Liptak, *Justice Scalia, Who Led Court's Conservative Renaissance, Dies At 79*, N.Y. TIMES, Feb. 14, 2016, at A1; Jonathan H. Adler, *The Passing of a Legal Giant—Antonin Scalia, R.I.P.*, WASH. POST: VOLOKH CONSPIRACY (Feb. 13, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/13/the-passing-of-a-legal-giant-antonin-scalia-rip> [<https://perma.cc/7GTC-8UX6>]; Jack Balkin, *Antonin Scalia, Rest in Peace*, BALKINIZATION (Feb. 13, 2016, 6:01 PM), <http://balkin.blogspot.com/2016/02/antonin-scalia-rest-in-peace.html>, [<https://perma.cc/N8YP-5Z66>]; David Cole, *Scalia: The Constitution in Politics*, N.Y. REV. BOOKS: NYR DAILY (Feb. 15, 2016), <http://www.nybooks.com/daily/2016/02/15/justice-antonin-scalia-constitution-in-politics> [<https://perma.cc/N2G6-288L>].

2. See Barnes, *supra* note 1; Liptak, *supra* note 1; Adler, *supra* note 1; Balkin, *supra* note 1; Cole, *supra* note 1.

That recognition is undoubtedly deserved, but the credit—or blame, depending on one’s perspective—ought to be shared, as the Justice himself undoubtedly would have recognized.³ As a Supreme Court Justice, Scalia’s voice and vote had considerable influence on American law and politics.⁴ But, like all judges, that influence depended on the opportunity to hear new arguments and decide new cases. And many of the arguments and cases most important to Scalia’s legacy were produced by a loose but effective network of conservative litigators, lower court judges, law clerks, and academics.⁵ Consider that *United States v. Lopez*,⁶ *Citizens United v. FEC*,⁷ *District of Columbia v. Heller*,⁸ and *NIFB v. Sebelius*⁹ were all cases supported by conservative public interest law firms that deployed arguments developed by academics associated with the Federalist Society.¹⁰

3. See, e.g., Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983) (noting that the Court can make no ruling “when there are no adverse parties with personal interest in the matter” who bring the case before it).

4. For just a few of his seminal works, see, for example, ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

5. For the assertion that such “support structures” are required in order to allow a court to focus attention on a particular set of issues, see Charles R. Epp, *The Support Structure as a Necessary Condition for Sustained Judicial Attention to Rights: A Response*, 73 J. POL. 406 (2011). For a description of the workings of the modern American conservative support structure, see AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (2015).

6. 514 U.S. 549 (1995); see also HOLLIS-BRUSKY, *supra* note 5, at 108 (noting that “Federalist Society participant” Carter Phillips litigated this case).

7. 558 U.S. 310 (2010); see also HOLLIS-BRUSKY, *supra* note 5, at 82–83 (noting that one member of the three-judge District Court panel, the appellate counsel for Citizens United, and thirteen separate amici curiae for this case were all members of the Federalist Society).

8. 554 U.S. 570 (2008); see also HOLLIS-BRUSKY, *supra* note 5, at 45 (noting that in this case, “[s]ix-time Federalist Society National Conference presenter Judge Laurence Silberman wrote the Circuit Court decision,” “three of the lawyers involved in masterminding the litigation strategy . . . ha[d] active ties to the Federalist Society network,” and “an impressive 21 members of the Federalist Society network signed on to eight different *amicus curiae* briefs . . .”).

9. 567 U.S. 519 (2012); see also HOLLIS-BRUSKY, *supra* note 5, at 135–136 (noting that eight of the litigators and twenty-four of the amici curiae in this case were members of the Federal Society network).

10. See, e.g., HOLLIS-BRUSKY, *supra* note 5, at 46–48.

Remarkably, when Scalia entered public service in 1971,¹¹ that network of conservative lawyers did not exist. At that time, public interest law firms were nearly universally dedicated to advancing liberal or progressive policies.¹² There was no Federalist Society.¹³ Many of the ideas that are today associated with the conservative movement—like law and economics and originalism—had no meaningful support in legal academia.¹⁴ By 2015, however, the landscape had been transformed. A remarkable array of public interest law firms pursued conservative goals, including the Pacific Legal Foundation, the Capital Legal Foundation, and the Institute for Justice, to name only a few.¹⁵ In fact, by the 1990s, conservative public interest firms were filing more Supreme Court amicus briefs than their liberal and progressive counterparts.¹⁶ The academy was different as well. With the support of the Olin Foundation and other conservative nonprofit groups, it became common for scholars to use economic analysis to justify conservative policy goals.¹⁷ Academics with similar support used textualist and originalist

11. Though he did not completely leave academia until 1974, Scalia began serving as General Counsel for the Office of Telecommunications Policy in 1971. See Brian P. Smentkowski, *Scalia, Antonin*, in BRITANNICA BIOGRAPHIES (2012).

12. See STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 23, 267 (2008) (noting that “liberal public interest law exploded in the early 1970s” and that “for almost twenty years conservative public interest law was treated as an oxymoron”).

13. See *id.* at 138 (noting that the Federalist Society was founded in 1982).

14. See JOHNATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS 5, 10 (2005) (noting that originalism has been “present in American constitutional law and thought since the country’s founding, but by the 1930s its conceptions of constitutional authority and legitimate interpretation had been marginalized” and would not again “set the terms of the jurisprudential debate” until the 1980s); TELES, *supra* note 12, at 307 n.1 (noting that the academy was “nonreceptive” to law and economics “from the 1930s to the 1960s”).

15. For an argument that firms with a conservative agenda can still be “public interest” organizations, see Ann Southworth, *Conservative Lawyers and the Meaning of “Public Interest Law”*, 52 UCLA L. REV. 1223 (2005).

16. See Ann Southworth, *What is Public Interest Law: Empirical Perspectives on an Old Question*, 62 DEPAUL L. REV. 493, 506 fig. 1 (2013).

17. See TELES, *supra* note 12, at 182 (noting that the Olin Foundation promoted law and economics because Olin saw it was “a rare crack in the liberal legal network, a beachhead for conservatives otherwise locked out of the elite legal academy” and that this discipline owes much of the credit for its becoming a “dominant presence in legal academia” to the “strategic patronage” of organizations like the Olin Foundation).

arguments to the same effect.¹⁸ All of those efforts were loosely coordinated by a network of conservative lawyers centered primarily, but not exclusively, on the Federalist Society.¹⁹ In multiple high profile cases, including those listed above, Federalist Society academics generated theories that were presented in court by Federalist Society litigators, analyzed by Federalist Society law clerks, and adopted by Federalist Society judges and Justices.²⁰ By 2005, that network had developed enough political muscle to sink President Bush's nomination of Harriet Miers to the Supreme Court and help push one of its own, Justice Alito, onto the Court.²¹

This network, commonly called the conservative legal movement, has recently received the sustained attention of scholars in a variety of fields. Political scientists,²² historians,²³ and academic lawyers²⁴ have sought to explain how this network has advanced conservative policies in the law so successfully. Jefferson Decker's *The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government*²⁵ makes an original and important contribution to this literature by asking a new question. Rather than asking how a relatively small number of lawyers helped conservatives alter legal and constitutional norms, as have most scholars, he asked how the constitutional and legal norms developed by that network went on to alter the political ideology of conservatives.

18. See Erin Cady, *The John M. Olin Fellowships and the Advancement of Conservatism in Legal Academia*, 39 HARV. J.L. & PUB. POL'Y 917 (2016).

19. See HOLLIS-BRUSKY, *supra* note 5, at 9–10. Hollis-Brusky observes that the Federalist Society is not a public interest law firm, an interest group, or a think tank, but is instead a network that “educate[s] and train[s] its members through sponsored events and conferences, to shape and socialize them intellectually and professionally in a particular way, and to encourage them to draw on this training as they carry out their work as legal professionals, academics, judges, government officials, and civic leaders,” and “[t]here are thousands of ‘untold ways’ in which these individuals go on to shape legal doctrine and policy in accord with organizational principles and priorities.” *Id.*; see also Southworth, *supra* note 15; Southworth, *supra* note 16.

20. See *supra* notes 6–9 and accompanying text.

21. See JAN CRAWFORD GREENBURG, SUPREME CONFLICT 282–84 (2007) (noting that a “conservative revolt” sabotaged Bush’s nomination of Miers).

22. See, e.g., HOLLIS-BRUSKY, *supra* note 5; TELES, *supra* note 12.

23. See, e.g., O’NEILL, *supra* note 14.

24. See, e.g., Southworth, *supra* note 15; Southworth, *supra* note 16.

25. JEFFERSON DECKER, THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT (2016).

Conservatives in the 1970s and 80s, Decker argues, believed in the effective use of government authority when exercised by democratically elected branches, but were dubious about judicial policy-making. In particular, they opposed the legal and constitutional “rights revolution” that allowed liberal and progressive public interest lawyers to push courts to extend judicial authority over contested social and economic issues.²⁶ Things are different today. Conservative lawyers, politicians, activists, and voters have made “rights talk” and an associated suspicion of government authority core tenants of contemporary conservatism.²⁷ Decker’s most striking claim is that this transition was led by lawyers. He thus suggests that the recent scholarship on the conservative legal movement may have missed its most important impact: its redefinition of what it means to be conservative.

Decker makes this claim as a historian. That is, he emphasizes attention to archival evidence and narrative coherence over theory and commentary. But Scalia’s passing invites us to consider how his insights might be both generalized and extended. This review turns to those questions after it summarizes Decker’s arguments in Section I. Section II identifies some of the limits of his argument, and places his claims in context of our existing understanding of the conservative legal movement. Section III supports Decker’s insight by explaining how legal arguments can alter not just what political movements think is possible, but what they think is desirable. To elucidate that explanation, Section III examines how the contemporary conservative movement has been shaped by the legal campaign against the Affordable Care Act.²⁸ Through their efforts, conservative lawyers transformed the debate over the ACA from one that emphasized policy consequences to one that emphasized liberty and individual rights. By doing so, they both inspired and legitimated the Tea Party movement, which, in turn helped transform the contemporary Republican Party. Section IV asserts that it is not just Decker’s argument, but his broader approach that ought to be extended. By tying Decker’s work to a broader set of studies it calls for more attention to the role

26. *Id.* at 2–5.

27. *Id.* at 3–5.

28. *Id.* at 211–13.

that lawyers have played in defining and re-defining conservatism. That greater focus on the influence of lawyers is particularly needed today, as convulsions in contemporary politics offer new opportunities to define conservatism for the next generation. Lawyers need to know how much influence they have had in the past so they can recognize how many responsibilities they have in the present.

I. *THE OTHER RIGHTS REVOLUTION*

Decker organizes his argument as historical narrative. After an introduction outlining his argument, he turns to the origins of the contemporary network of conservative public interest law firms. Those firms were not started, as one might expect today, to enlist the judiciary in the fight against excessive government regulation. Rather, they hoped to do the opposite: to free government from such legal entanglements.

Business leaders and other conservatives were concerned that the aggressive enforcement of new rights by liberal and progressive lawyers was interfering with orderly, democratic government. Their concern grew from the explosion of new rights of actions created by Lyndon Johnson's Great Society programs,²⁹ which combined with looser standing rules³⁰ and the explosion of fee shifting statutes to encourage liberal and progressive public interest lawyers and law firms³¹—including consumer advocates like Ralph Nader and environmental organizations like the Sierra Club—to bring suit against the government in hopes of advancing their preferred policies.³²

Conservatives in general, and the business community in particular, responded by funding and organizing their own lawyers to fight back. Future Supreme Court Justice Lewis Powell, acting as a consultant for the Chamber of Commerce, urged business leaders to learn from the success of liberal public interest litigation. "Other organizations and groups have been far more astute in exploiting judicial action than Ameri-

29. *Id.* at 17–25.

30. *Id.* at 31–32.

31. *Id.* at 32–33.

32. *Id.* at 13–15, 25–30.

can business," he wrote.³³ This was, Powell wrote, "a vast area of opportunity for the Chamber."³⁴

The result of those efforts was the early conservative public interest firms, like the Pacific Legal Foundation and the Mountain States Legal Foundation, which looked for opportunities to defend government authority from interference from the liberal legal network. As the President of the PLF complained to his board of directors in 1973: "Faced with the dilemma of countering numerous lawsuits for temporary restraining orders, injunctions and damages, public attorneys have become hopelessly outmanned."³⁵ Without an effective conservative legal counter-mobilization, he continued, "governmental functions may well be without adequate defense."³⁶

Decker then turns to the lawyers who formed that counter-mobilization and the lessons they drew from their experiences, first in the American West, and then in the Reagan Administration. At a time when most political and legal conservatives were calling for judicial deference that would help re-establish "law and order" and protect the interests of the "silent majority," those conservative public interest firms, working primarily in the West, began to see how courts, litigation, and rights claims could advance conservative interests.³⁷ The Pacific Legal Foundation, for example, quickly learned it could use the tools liberal public interest lawyers had developed to protect property owners.³⁸ It used the same environmental statutes that it had formerly opposed, for instance, as a way to slow or stop expensive government infrastructure projects.³⁹ Property rights and litigation surrounding the Takings Clause, they also found, could be useful.⁴⁰

Similar developments occurred in Colorado, where Lewis Powell's memorandum to the Chamber of Commerce inspired

33. *Id.* at 45 (quoting Memorandum from Lewis F. Powell to Eugene B. Snyder, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce (Aug. 23, 1971), <https://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf> [<https://perma.cc/8ATY-572C>] [hereinafter Powell Memo]).

34. *Id.* (quoting Powell Memo, *supra* note 33).

35. *Id.* at 1.

36. *Id.*

37. *Id.* at 55–57.

38. *Id.* at 61.

39. *Id.* at 61–63.

40. *Id.* at 63–71.

beer magnate Joseph Coors to create the Mountain States Legal Foundation.⁴¹ Mountain States developed a version of conservatism heavily influenced by the concerns of the West, where the federal government was the largest landowner. It sought to protect Western businesses from the excesses of the growing environmental movement.⁴² By the end of the decade, this campaign led Mountain States's controversial leader James Watt to proudly call himself an activist who used the courtroom as a tool to protect individual rights. "It is there," he told an audience at the University of Wyoming, "that I practice my profession as a public-interest lawyer championing individual rights and economic freedom."⁴³

That turn to rights claims and litigation, however, did not fit easily with the dominant conservative view of the courts in the 1970s, which still strongly opposed "judicial activism."⁴⁴ Conservative public interest lawyers originally papered over the conflict by arguing that the rights revolution they were pursuing differed from its liberal counterpart because it advanced the interests of a silent majority of Americans, rather than special interests.⁴⁵ These lawyers argued they were thus fighting for the same goal as the supporters of judicial deference: majoritarian democracy.⁴⁶ These arguments were unconvincing to some conservatives,⁴⁷ but they were enough to allow conservative public interest firms to retain their alliances with conservative political interests while they slowly expanded their campaigns for judicial protection of individual rights.⁴⁸ The Great Plains Legal Foundation and the Washington Legal Foundation's attention to matters of religious liberty in the 1970s, particularly under the Free Exercise Clause, were important new extensions.⁴⁹

The lawyers that made up the conservative legal movement abandoned that uneasy compromise in response to a surprising cause: the Reagan Revolution. Hopeful that Reagan's election

41. *Id.* at 74.

42. *Id.* at 75, 79–80.

43. *Id.* at 92.

44. *Id.* at 96–97.

45. *Id.* at 97–104, 114.

46. *Id.* at 97.

47. *Id.* at 109–111, 121.

48. *Id.* at 121–22.

49. *Id.* at 104–106.

would allow them to advance conservative policies, many members of these firms eagerly took positions in the administration, some that were quite important.⁵⁰ Leading members of conservative public interest law firms became the Secretary of the Interior⁵¹ and the Solicitor General,⁵² and others took important White House posts. They hoped to use their new authority to increase cooperation between business and government by, for example, opening more federal lands to mining and drilling,⁵³ and by undermining the government programs and statutes that funded a large portion of liberal public interest litigation.⁵⁴ But Democratic strength in the House of Representatives, astute political maneuvering by members of the liberal legal network, missteps by conservative leaders, and conflict between lawyers from the conservative public interest firms and more traditional conservatives limited their accomplishments.⁵⁵ Efforts to cap attorneys' fees in fee-shifting suits failed in Congress,⁵⁶ for example, and litigation by the Sierra Club and other liberal litigation firms slowed the opening of western lands until after the Reagan's term ended.⁵⁷

The opportunities presented by the Reagan Administration did not end litigation by the public interest right, but it did curtail and narrow it in ways that pushed its lawyers even closer to a full embrace of individual rights.⁵⁸ Reagan's victory lured talented lawyers from conservative public interest firms into the administration and turned donors' attention from litigation to more traditional methods of shaping public policy.⁵⁹ With fewer resources, the public interest right narrowed its agenda. Its only real successes were in lawsuits that used rights based claims to call on judicial protection for property interests. The highest profile example produced Justice Scalia's 1987 majority opinion in *Nollan v. California Coastal Commission*,⁶⁰ which pro-

50. *Id.* at 124–25.

51. *Id.* at 126.

52. *Id.* at 147.

53. *Id.* at 128.

54. *Id.* at 138–47.

55. *Id.* at 152.

56. *Id.* at 143–46.

57. *Id.* at 131–38.

58. *Id.* at 154–55.

59. *Id.* at 153–54.

60. 483 U.S. 825 (1987).

tected private property by expanding the category of regulatory takings.⁶¹ Those successes further encouraged conservative lawyers to see rights and courts as an important way to advance conservative policies.⁶²

Those lessons combined with continued frustrations in Reagan's second term to push conservative public interest lawyers to fully embrace the turn from traditional politics to courts and rights. Here, Decker focuses on what conservative attorneys inside the Reagan administration learned from efforts to expand takings jurisprudence. Former Mountain States Legal Foundation attorneys, for example, hoped to support the efforts of private litigants to expand the reach of the Takings Clause in both *Nollan* and in *First English Evangelical Lutheran Church v. County of Los Angeles*,⁶³ where they saw an opportunity to establish that landowners should be compensated for regulatory takings even if such takings were temporary.⁶⁴ But moderates within the administration provided mixed support. Solicitor General Charles Fried opposed compensation for temporary regulatory takings so strenuously that the administration declined to fully support the argument at the Supreme Court.⁶⁵ When the Court ruled in favor of compensation for temporary regulatory takings anyway, the lesson for many conservative lawyers was clear: rights arguments and courts could advance their interests more effectively than traditional politics.⁶⁶

As a result, leading members of the conservative public interest network fully embraced a new rights- and court-based strategy for political change, a strategy that was close to, if not identical to, the approach conservative public interest firms were created to challenge. A particularly poignant example—which also demonstrates Decker's careful archival research—is the handwritten notes Decker found scrawled on a copy of the *Slaughter-House Cases*⁶⁷ by Clint Bolick, later a founder of the Institute for Justice, but at the time a lawyer in the Civil Rights

61. DECKER, *supra* note 25, at 174–82.

62. *Id.* at 181–82.

63. 482 U.S. 304 (1987).

64. DECKER, *supra* note 25, at 191–94.

65. *Id.* at 194–95.

66. *Id.* at 195–97.

67. 83 U.S. 36 (1873).

Division at the Department of Justice.⁶⁸ Those notes anticipate Bolick and I.J.'s litigation campaign to re-establish judicial protection for economic liberty⁶⁹ and help confirm the transition Bolick and other conservative lawyers made between the 1970s and the 1990s. A network of lawyers that was created to free government from meddling lawyers, judges, and individual rights claims had come to embrace those tools as the defining characteristic of their movement.⁷⁰

Decker's suggestive epilogue connects these changes to contemporary politics. He traces links between the history of the conservative legal movement and the embrace of rights claims, rights talk, and judicial power by political conservatives. He points to *Kelo v. City of New London*,⁷¹ the political backlash it created,⁷² the challenges to the Affordable Care Act,⁷³ and other examples. By embracing rights talk and judicial action, Decker argues, the conservative legal movement helped make questions of regulatory policy deeply, and unnecessarily, ideological issues.⁷⁴ Our political debate, he indicates, could emphasize policy rather than rights, and practical implications rather than political ideology.⁷⁵ That it does not, he argues, demonstrates the remarkable influence of lawyers and legal argument on twenty-first century American politics.

II. *THE OTHER RIGHTS REVOLUTION* AND THE CONSERVATIVE LEGAL MOVEMENT

This is an important story, well told. It explains how a set of lawyers organized to free government from legal entanglements came to dedicate themselves to creating very similar kinds of entanglements. In doing so, Decker recognizes that this transition was not easy, even if it seems a pragmatic choice in retrospect. He confirms previous work by Steve Teles and others when he shows conservative lawyers embraced rights claims

68. DECKER, *supra* note 25, at 202–09.

69. *Id.* at 208–09.

70. *Id.* at 210.

71. 545 U.S. 469 (2005).

72. DECKER, *supra* note 25, at 215–20.

73. *Id.* at 211–13.

74. *Id.* at 220–24.

75. *Id.* at 223–27.

and judicial authority to achieve particular policy goals.⁷⁶ But, Decker also recognizes that he has described not just a tactical shift, but an intellectual transformation. His study, he writes, is of an “intellectual revolution and the legal activism that inspired it.”⁷⁷ In that context, his emphasis on the lessons conservative lawyers learned from the West and the Reagan Administration is an important insight. Those twin experiences provided the raw materials conservative lawyers used to generate a new conservative approach to governing, an approach that is more focused on first principles and individual rights, more welcoming of judicial action, less concerned with legislative compromise, and that has helped produced our deeply ideological contemporary disputes over the regulatory state.

But more important than identifying those raw materials is Decker’s claim that this ideological vision radiated out from those lawyers to the define the modern conservative movement. In the last half of the twentieth century, being conservative meant opposing rights claims and interference with effective government. Consider the position of conservatives on *Roe v. Wade*,⁷⁸ *Miranda v. Arizona*,⁷⁹ and *Brown v. Board of Education*,⁸⁰ or their approach to prayer in public schools, judicially-enforced busing to achieve racial integration in schools, and the extension of civil and voting rights acts. In each area, conservatives opposed judicial interference with policy-making by more democratic bodies. Conservatives embraced originalism in the 1980s because it encouraged judicial deference to the elected branches of government.⁸¹ Even in the 1990s, conservatives opposed the health care reform led by Hillary Clinton not because it interfered with individual rights or violated constitutional norms, but for policy reasons. In the early twenty-first century, however, conservatism has changed. The conservative challenge to the Affordable Care Act in court and outside it focused

76. See ERWIN CHERMERSKY, *THE CONSERVATIVE ASSAULT ON THE CONSTITUTION* (2010); MARK W. SMITH, *DISROBED: THE NEW BATTLE PLAN TO BREAK THE LEFT’S STRANGLEHOLD ON THE COURTS* (2006); ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (2008); TELES, *supra* note 12.

77. DECKER, *supra*, note 25, at 9.

78. 410 U.S. 113 (1973).

79. 384 U.S. 436 (1966).

80. 347 U.S. 483 (1954).

81. O’NEILL, *supra* note 14.

on constitutional and individual rights. Conservatives celebrated the decision in *Hobby Lobby* and rebelled when rights claims failed in *Kelo*.⁸² Leading advocates of originalism now call for “judicial engagement” rather than “judicial deference.”⁸³

Scholars have recognized that there are disagreements between the conservative legal movement and the broader conservative movement.⁸⁴ But Decker pushes farther. He claims that conservative lawyers have been more than a tool of conservative interests, they have been leaders in defining conservatism.⁸⁵ With this claim, Decker turns our understanding of the conservative legal movement on its head. Before Decker, scholars looked to the conservative legal movement with one core question: how did conservative political interests build a network of lawyers that so successfully altered legal and constitutional norms?⁸⁶ Decker urges us to consider also how that network has shaped the larger conservative movement.

This is an important contribution, but no book is perfect, and this one, too, has weaknesses. One is that Decker’s investigation heavily emphasizes the libertarian-leaning wing of the conservative legal movement. The first half of his book, for example, focuses on Lewis Powell’s 1971 memorandum to the Chamber of Commerce, the Pacific Legal Foundation, and the Mountain States Legal Foundation.⁸⁷ Each of those organizations were primarily concerned with economic policy. They hoped to counter declining trust in the free market, the growth of the regulatory state, and the expansion of environmental

82. Hillel Y. Levin, *Rethinking Religious Minorities’ Political Power*, 48 U.C. DAVIS L. REV. 1617, 1677 (2015); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2109–11 (2009).

83. Randy E. Barnett, *The Wages of Crying Judicial Restraint*, 36 HARV. J.L. & PUB. POL’Y 925, 930–31 (2013).

84. SMITH, *supra* note 76, at 234; TELES, *supra* note 12, at 221; William E. Nelson et al., *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?*, 62 VAND. L. REV. 1749, 1772 n.79 (2009). It has also been disputed. See, e.g., Reva Siegel & Robert Post, *Originalism as Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545 (2006) (arguing that originalism as practiced by conservative judges connects them with, and helps mobilize, the broader conservative political movement).

85. SMITH *supra* note 76, at 10–15; TELES *supra* note 12, at 221.

86. HOLLIS-BRUSKY, *supra* note 5; TELES, *supra* note 12; Comment, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 201–36 (2008).

87. DECKER, *supra* note 25, at 39–94.

regulation. They were undoubtedly important to the birth of the public interest right,⁸⁸ and continue to have considerable influence on the movement.⁸⁹ But they are not the only conservative lawyers. Gun rights advocates have achieved remarkable success and visibility in *District of Columbia v. Heller*⁹⁰ and *McDonald v. Chicago*.⁹¹ Lawyers associated with the Christian Right in the 1990s spent millions of dollars, employed hundreds of lawyers, and aggressively filed myriad lawsuits and amicus briefs.⁹²

In the end, Decker may be correct that lawyers concerned with economic liberty have had the greatest impact the right's embrace of rights, but the issue is not without doubt.⁹³ To provide a confident answer, we need to know more about how religious conservatives shifted from opposing judicial power in school prayer decisions and *Roe v. Wade* to embracing judicial action in *Hobby Lobby*, and what effect that shift had.⁹⁴ We also need to know more about the links between Second Amendment activism, the Republican Party, and the litigation campaign that led to *Heller*.⁹⁵ Decker has made a prima facie case, but more work needs to be done.

A second weakness in Decker's work is that its most creative insight is its least well documented. *The Other Rights Revolution* demonstrates the importance of the West and the Reagan Administration with a careful, largely continuous narrative of people, ideas, politics, and policy, but its claims about the spread of this new conservatism from lawyers to politicians are primarily made in his epilogue, which jumps forward from the late 1980s to well into the twenty-first century. There, Decker argues *NFIB* and *Kelo* demonstrate that the contemporary conservative movement has followed the public interest right into an embrace of rights claims.⁹⁶ That shift undoubtedly occurred, but Decker does not

88. TELES, *supra* note 12, at 7–11.

89. *Id.* at 211–12, 225–27.

90. 554 U.S. 570 (2008).

91. 561 U.S. 742 (2010).

92. STEVEN P. BROWN, TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT, THE FREE SPEECH CLAUSE, AND THE COURTS 5–10 (2002).

93. DECKER, *supra* note 25, at 5.

94. Compare *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), with *Roe v. Wade*, 410 U.S. 113 (1973), and *Engel v. Vitale*, 370 U.S. 421 (1962).

95. 544 U.S. 570 (2008).

96. DECKER, *supra* note 25, at 211–27.

explain how legal arguments can shape political debate or trace the shift of rights talk from conservative lawyers to mainstream conservative discourse. Some readers may thus rush too quickly past what is potentially his most important contribution.

III. FROM CONSERVATIVE LAWYERS TO CONSERVATIVE POLITICS

Any reader tempted to do so should resist, because there are good reasons to believe Decker got it right. True to his historical training, Decker does not provide a generalized theory to explain how legal activism can shape a political movement. But social scientists have catalogued a variety of ways that the law—and the lawyers who are experts at manipulating it—can influence the political and social movements they ostensibly serve.⁹⁷ Litigation, those social scientists have noted, can shape political debate by attracting public attention.⁹⁸ *Roe v. Wade* transformed the political debate over abortion, for example.⁹⁹ Litigation can also inspire political action when it convinces activists that change is possible.¹⁰⁰ *Brown v. Board of Education* was surely unnecessary to convince African Americans that the Jim Crow regime was unjust.¹⁰¹ But that victory showed change was possible, which helped inspire protests that forced Congress to pass the 1964 Civil Rights Act and other critical civil rights legislation.¹⁰² Litigation and legal argument can also legitimate a political movement and its claims.¹⁰³ Court victories make it harder for opponents to dismiss calls for change. And even without litigation, legal arguments made by the right

97. Michael McCann, *Law and Social Movements*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 506, 510–11 (Austin Sarat ed. 2004).

98. *Id.* at 515–16.

99. Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 *YALE L.J.* 2028 (2011); Mary Ziegler, *The Possibility of Compromise: Antiabortion Moderates After Roe v. Wade, 1973–1980*, 87 *CHI.-KENT L. REV.* 571 (2012).

100. See Michael McCann, *Law and Social Movements*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY*, *supra* note 97, at 506.

101. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 363–84 (2004); GERALD N. ROSENBERG, *HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 64–65 (2008).

102. See Michael McCann, *Law and Social Movements*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY*, *supra* note 97, at 506.

103. *Id.* at 513–15.

people can legitimate political claims.¹⁰⁴ When law professors from prestigious universities or other legal leaders support a claim, it becomes more difficult to dismiss.¹⁰⁵

Ken Kersch has pointed out another way law can shape political movements. Politics, he notes, is not a simple exercise of splitting the difference between conflicting interests or picking a winner when compromise is impossible.¹⁰⁶ Which compromises are arranged and which winners are chosen depends on the relative power of the political coalitions that take part in the negotiations. And creating an effective political coalition out of a diffuse set of interests is no easy matter, particularly in a complex and layered political system like the United States. Political entrepreneurs try to solve these problems with institutional structures like political parties and congressional caucuses, but political ideology is also an effective tool. Political ideology can produce and protect effective coalitions by making some alliances seem natural and others illegitimate. Before the 1980s, the alliance between white Southern conservatives and the other parts of the Democratic coalition seemed a natural alliance. By the 1990s, it no longer seemed so. Intellectual entrepreneurs, who reformulated various strands of the American political tradition, caused that change.¹⁰⁷ One of the most important resources for that kind of ideology building, Kersch points out, was constitutional argument.¹⁰⁸ The conservative lawyers Decker examines have influenced politics in all these ways: they have won litigation victories that have generated attention, inspired political action, legitimated their policy goals, and provided an ideological framework that has helped produce and maintain a new conservative coalition. Consider the vignette that opens Decker's epilogue, the litigation campaign against the Affordable Care Act, and the emergence, spread, and impact of

104. JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 181 (2011)

105. *Id.* at 178; GARRET EPPS, *AMERICAN EPIC: READING THE U.S. CONSTITUTION* (2013); TELES, *supra* note 12.

106. Ken I. Kersch, *The Talking Cure: How Constitutional Argument Drives Constitutional Development*, 94 B.U. L. REV. 1083 (2014).

107. *Id.* at 1091.

108. *Id.* at 1090–92; *see also* Victoria Hattam & Joseph Lowndes, *The Ground Beneath Our Feet: Language, Culture, and Political Change*, in *FORMATIVE ACTS: AMERICAN POLITICS IN THE MAKING* 199 (Stephen Skowronek & Matthew Glassmen eds., 2007).

what became known as the “broccoli horrible.”¹⁰⁹ The broccoli horrible highlighted concerns that the ACA marked a sharp break with a longstanding American political tradition that valued individual liberty by suggesting that a government that could mandate the purchase of health insurance could also require private individuals to purchase healthy, green vegetables.¹¹⁰ That hypothetical provides a case study of the influence of the conservative legal movement on contemporary conservatism. It originated with lawyers associated with the conservative legal movement, spread to supporters of the Tea Party, was adopted by judges at the urging of conservative lawyers and academics, legitimated and inspired the Tea Party, and ultimately helped reform contemporary conservative politics.¹¹¹

Diet-based hypotheticals were first used to critique healthcare reform by Federalist Society expert David B. Rivkin in an attack on President Clinton’s proposals.¹¹² Rivkin revived those arguments in 2009 to attack the constitutionality of the ACA.¹¹³ The hypothetical was then refined by Terence Jeffrey, the editor of a conservative news outlet, who focused it on broccoli.¹¹⁴ It was then picked up by Reason TV, part of a conservative public interest organization that has received large donations from the David H. Koch Charitable Foundation and the Sarah Scaife Foundation. Reason TV saw the opportunity to spread their libertarian perspective. “Part of the idea for Reason is we’re ideological and we’re trying to articulate and popularize our worldview and have some influence,” said a

109. James B. Stewart, *How Broccoli Landed on Supreme Court Menu*, N.Y. TIMES, (June 13, 2012), <http://www.nytimes.com/2012/06/14/business/how-broccoli-became-a-symbol-in-the-health-care-debate.html> [https://perma.cc/4PND-T63N].

110. Christopher Schmidt & Mark Rosen, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66 (2013); see also Ilya Somin, *A Mandate for Mandates: Is the Individual Health Insurance Case a Slippery Slope?* 75 L. & CONTEMP. PROBS. 75 (2012).

111. Schmidt & Rosen, *supra* note 110, at 114; Adam Gopnik, “The Broccoli Horrible”: A Culinary-Legal Dissent, NEW YORKER (June 28, 2012), <http://www.newyorker.com/news/news-desk/the-broccoli-horrible-a-culinary-legal-dissent> [https://perma.cc/VC3S-YPDW].

112. David B. Rivkin Jr., *Health Care Reform v. the Founders*, WALL ST. J., Sept. 29, 1993, at A19, quoted in Schmidt & Rosen, *supra* note 110, at 101.

113. See *infra* notes 123–24.

114. Stewart, *supra* note 109; Terence P. Jeffrey, *Can Obama and Congress Order You to Buy Broccoli?*, CNS NEWS (Oct. 21, 2009, 4:43 AM), <http://www.cnsnews.com/blog/terence-p-jeffrey/can-obama-and-congress-order-you-buy-broccoli> [https://perma.cc/XL3B-8CNW].

spokesman.¹¹⁵ Their video featured Professor John Eastman, another expert for of the Federalist Society, criticizing the constitutionality of the law.¹¹⁶

That video resonated with conservative voters, and particularly Tea Party activists, but it remained largely within those circles until Judge Roger Vinson of the Northern District of Florida mentioned the hypothetical in his 2011 opinion invalidating the law. His opinion, called by some a “Tea Party Manifesto,”¹¹⁷ emphasized that the hypothetical was “not an irrelevant and fanciful ‘parade of horrors,’” but was rather a matter of “serious concern[]” that was being “debated by legal scholars.”¹¹⁸ Randy Barnett, Ilya Somin, and other prominent academics associated with the Federalist Society continued to defend the broccoli hypothetical in public and professional publications.¹¹⁹ Soon thereafter, the hypothetical “quickly became the defining symbol for the debate,” wrote Chris Schmidt, a leading expert on the Tea Party and its constitutional arguments.¹²⁰ “The image of government forcing individuals to purchase, and perhaps even eat, their vegetables,” he argued, “served as a politically and culturally resonant way in

115. ReasonTV, *Wheat, Weed, and ObamaCare: How the Commerce Clause Made Congress All-Powerful*, YOUTUBE (Aug. 25, 2010), https://www.youtube.com/watch?v=6SDF5_Thqsk&feature=youtu.be [<https://perma.cc/7H6L-SPJB>].

116. Stewart, *supra* note 109; ReasonTV, *supra* note 115.

117. Mark Hall, *Judge Vinson’s Tea Party Manifesto*, CONCURRING OPINIONS (Jan. 31, 2011), <https://concurringopinions.com/archives/2011/01/judge-vinsons-tea-party-manifesto.html> [<https://perma.cc/3GK5-PY26>]; see also Timothy Jost, *Analyzing Judge Vinson’s Opinion Invalidating the ACA*, HEALTH AFFS. BLOG (Feb. 1, 2011), <http://healthaffairs.org/blog/2011/02/01/analyzing-judge-vinsons-opinion-invalidating-the-aca> [<https://perma.cc/VY73-TWWW>] (“This is a radical decision. Judge Vinson has a clear vision of the limited federal government the founders intended that is very much in line with that espoused by the Tea Party Movement.”). Judge Vinson specifically mentioned the broccoli hypothetical, *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1289 (N.D. Fla. 2011), the first time a court had embraced the so-called broccoli horrible, see Schmidt & Rosen, *supra* note 110, at 106.

118. *Bondi*, 780 F. Supp. 2d at 1289.

119. Randy E. Barnett, *Congress Has No Power to Mandate Purchases*, BOS. GLOBE (Apr. 3, 2011), http://archive.boston.com/bostonglobe/editorial_opinion/oped/articles/2011/04/03/congress_has_no_power_to_mandate_purchases/?page=full [<https://perma.cc/2V7P-JYPE>]; Ilya Somin, *Why the Individual Health Care Mandate is Unconstitutional*, JURIST (May 4, 2011, 8:00 AM), <http://www.jurist.org/forum/2011/05/ilya-somin-mandate-is-unconstitutional.php> [<https://perma.cc/Q5E9-5NDA>]. See generally Somin, *supra* note 109.

120. Schmidt & Rosen, *supra* note 110, at 109 (quoting Stewart, *supra* note 109).

which to ensure that concerns with personal liberty remained at the forefront of the debate.”¹²¹ It helped “convince broad swaths of the American public, in breathtakingly short order, that the law’s individual mandate posed a fundamental assault on personal liberty.”¹²²

The broccoli horrible’s journey from conservative lawyers to conservative politics exemplifies both the influence of the conservative legal movement over the litigation against the ACA and the impact of that litigation on contemporary conservative politics. The lawsuits against the ACA were conceived, executed, and supported by members of the conservative legal movement. The constitutional argument against the bill originated with David Rivkin and Lee Casey, who are both experts for the Federalist Society and served in important legal roles in Republican administrations.¹²³ They wrote editorials in the *Washington Post* and the *Wall Street Journal* in the fall of 2009, months before the bill passed, criticizing the bill on constitutional grounds.¹²⁴ Soon after, leading academics associated with the conservative movement began to debate the constitutionality of the bill and craft legal arguments against it.¹²⁵ By December, those arguments were sufficiently developed for law professors Ilya Somin and Jonathan Adler to deny Senator Max Baucus’s claim that there was a consensus among experts that the ACA was constitutional.¹²⁶ By the time the bill

121. *Id.* at 114.

122. *Id.*

123. See David B. Rivkin Jr., FEDERALIST SOC’Y, <http://www.fed-soc.org/experts/detail/david-b-rivkin-jr> [https://perma.cc/K9BL-GEBP] (last accessed May 19, 2017); Lee A. Casey, FEDERALIST SOC’Y, <http://www.fed-soc.org/experts/detail/lee-a-casey> [https://perma.cc/2B8W-DNMY] (last accessed May 19, 2017).

124. See David B. Rivkin, Jr. & Lee A. Casey, *Illegal Health Reform*, WASH. POST, Aug. 22, 2009, at A15; David B. Rivkin, Jr. & Lee A. Casey, *Mandatory Insurance is Unconstitutional*, WALL ST. J., Sept. 18, 2009, at A23.

125. See Randy Barnett, *Healthcare: Is “Mandatory Insurance” Unconstitutional?*, POLITICO (Sept. 18, 2009), http://www.politico.com/arena/perm/Randy_Barnett_8256A4EF-01E6-4207-B4E8-C761F2FDB5BF.html [https://perma.cc/2QAL-87V3]; Stephen B. Presser, *Law Prof.: Expect SCOTUS to Kill Obamacare*, NEWSMAX (Oct. 5, 2011), <http://www.newsmax.com/US/SCOTUS-Obamacare-unconstitutional-mandate/2011/10/05/id/413429> [https://perma.cc/6PTK-LKQ2].

126. Jonathan H. Adler, *The Constitutionality of an Individual Mandate: A Reply to Senator Baucus*, VOLOKH CONSPIRACY (Dec. 23, 2009), reprinted in *A CONSPIRACY AGAINST OBAMACARE: THE VOLOKH CONSPIRACY AND THE HEALTH CARE CASE 20* (Trevon Burrus ed., 2013); Ilya Somin, *The Myth of an Expert Consensus on the Constitutionality of an Individual Health Insurance Mandate*, VOLOKH CONSPIRACY (Dec. 23, 2009), reprinted in *A CONSPIRACY AGAINST OBAMACARE*, *supra*, at 22. For post-

was ready for the President's signature, those arguments were strong enough for the Attorneys General from Florida, Virginia, and South Carolina to pledge to bring a constitutional challenge to the bill.¹²⁷

Some of the same conservative lawyers who helped generate the arguments against the law, including Randy Barnett, Ilya Somin, and David Rivkin, then took part in litigation which was much more successful than many expected. By October of 2010, two district court judges had denied motions to dismiss those constitutional challenges,¹²⁸ one of which would reach the Supreme Court as *NFIB v. Sebelius*.¹²⁹ There, Rivkin, Somin, Barnett, and others associated with the Federalist Society and the conservative legal network participated in drafting briefs for the parties and amici.¹³⁰ That first suit, of course, upheld the law,¹³¹ but legal challenges continued, again supported by lawyers associated with the Federalist Society and the conservative legal movement.

That litigation both inspired Tea Party activists and legitimated the Tea Party for mainstream conservatives. The litigation against the ACA and the support it received from respected academic commentators were constant companions to the Tea Party, as it grew from a small, grass-roots protest move-

enactment analysis of the ACA's constitutionality, see Ilya Somin, *Why The Health Care Reform Law is Unconstitutional*, CNN (Mar. 26, 2012, 3:56 PM), <http://www.cnn.com/2012/03/26/opinion/somin-health-supremes> [<https://perma.cc/M8FW-VX2P>].

127. See Randy E. Barnett, *Is Health-Care Reform Constitutional?*, WASH. POST (Mar. 21, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/19/AR2010031901470.html> [<https://perma.cc/7ZUA-R7JA>].

128. See *Florida ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120 (N. D. Fla. 2010) (Vinson, J.); *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010) (Hudson, J.).

129. *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011), *order clarified*, 780 F. Supp. 2d 1307 (N.D. Fla. 2011), and *aff'd in part, rev'd in part sub nom. Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *aff'd in part, rev'd in part sub nom. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

130. Brief of the Washington Legal Foundation and Constitutional Law Scholars as Amici Curiae in Support of Respondents (Individual Mandate Issue), *U.S. Dep't of Health & Human Servs. v. Florida*, 567 U.S. 519 (2012) (No. 11-398), 2012 WL 1680857; Brief for Private Respondents on the Individual Mandate, *U.S. Dep't of Health & Human Servs. v. Florida*, 567 U.S. 519 (2012) (No. 11-398), 2012 WL 379586; Reply Brief for State Petitioners On Severability, *NFIB*, 567 U.S. 519 (2012) (Nos. 11-393 & 11-400) 2012 WL 888995.

131. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

ment to an important and institutionalized part of the Republican Party. To be sure, the Tea Party emerged before the ACA passed,¹³² but the contest over the law's constitutionality was a central concern of the Tea Party. A core motivating story for Tea Party members was Speaker Nancy Pelosi's dismissal of a question about the constitutionality of the act.¹³³ Her response, "Are you serious? Are you serious?" was woven into a Tea Party narrative, along with an assumption that the legislation was clearly unconstitutional¹³⁴ and that President Obama had a particular irreverence for the Constitution.¹³⁵ "Of the many issues around which the Tea Party has mobilized," Chris Schmidt wrote, "none has been so effective a rallying cry as opposition to the health care law that President Obama signed into law."¹³⁶

As the litigation continued, the Tea Party's claim that the ACA was unconstitutional came to be embraced by mainstream Republicans. When the bill was being considered in Congress, policy arguments were the core ground of opposition.¹³⁷ Congress held forty-four hearings on the ACA, none of which were aimed at its constitutionality.¹³⁸ But by the time the President was preparing to sign the bill, the GOP had begun to embrace what had been a fringe argument. Since its passage, opposition to the ACA on constitutional grounds has been a core Republican commitment. Not only did the GOP-led house vote more than 50 times to eliminate or mortally damage the law,¹³⁹ "Repeal and Replace" is currently a top legislative priority of both the current President and the Republican Party more broadly.¹⁴⁰ Throughout this period of intense opposition,

132. See generally Christopher W. Schmidt, *The Tea Party and the Constitution*, 39 HASTINGS CONST. L.Q. 193 (2011).

133. *Id.* at 233–34.

134. THEDA SKOCPOL & VANESSA WILLIAMSON, *THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM* 61 (2012).

135. *Id.* at 52–53.

136. Schmidt, *supra* note 132, at 237.

137. *Id.*

138. Neal Devins, *Party Polarization and Judicial Review: Lessons from the Affordable Care Act*, 106 NW. U. L. REV. 1821, 1828 (2012).

139. Jennifer Steinhauer, *House Bill Undoing Health Law Makes It To Obama*, N.Y. TIMES (Jan. 7, 2016), https://www.nytimes.com/2016/01/07/us/politics/house-votes-to-send-bill-to-repeal-health-law-to-obamas-desk.html?_r=0 [https://perma.cc/M3MU-PEVU].

140. See, e.g., Thomas Kaplan & Robert Pear, *House Passes Measure to Repeal and Replace the Affordable Care Act*, N.Y. TIMES (May 4, 2017), <https://www.nytimes.com/2017/05/04/us/politics/house-passes-measure-to-repeal-and-replace-the-affordable-care-act.html>.

constitutional arguments have been cited regularly by GOP leaders as grounds for opposition.¹⁴¹ The Party's response to the outcome in *NFIB* is further evidence of the Party's embrace of those constitutional arguments.¹⁴²

By legitimating the Tea Party and its arguments to the larger GOP, the lawsuits against the ACA have helped reshape the party itself. The Tea Party originated as a fringe grassroots movement, but quickly came to transform the contemporary GOP. The Tea Party began with a call by a CNBC television reporter for a series of protests to oppose bailouts of the auto and banking industries, the economic stimulus bill, and other efforts to stem the tide of the recession.¹⁴³ That call led to a large rally in Washington, D.C., in September of 2009, by which time the grassroots organizations had won the support of conservative media sources like Fox News,¹⁴⁴ and major conservative public policy organizations, including FreedomWorks and Americans for Prosperity, hoped the Tea Party would advance their agenda of limited government and lower taxes.¹⁴⁵ Together, that network aimed to push the Republican Party in a more conservative direction through electoral mobilization and legislative action. They were especially active in the 2010 elections,¹⁴⁶ for example, and the Congressional Tea Party Caucus has worked hard to push their colleagues to the right.¹⁴⁷

These actions helped bring the GOP back to power and pushed it to the right. When the Tea Party arose, the Republican Party was in a poor position. Following Barack Obama's

com/2017/05/04/us/politics/health-care-bill-vote.html [https://perma.cc/ZPX3-4AHQ].

141. Jesse J. Holland & Mark Sherman, *Supreme Court Will Hear Health Care Case*, MPR NEWS (Nov. 14, 2011), <http://www.mprnews.org/story/2011/11/14/supreme-court-health-care-case> [https://perma.cc/7W2Q-WUA9].

142. See Rachel Roubein & Caitlin Owens, *How the Obamacare Decision Reinforces the GOP's 2016 Calculus*, ATLANTIC (June 25, 2015), <https://www.theatlantic.com/politics/archive/2015/06/how-the-obamacare-decision-reinforces-the-gops-2016-calculus/452058> [https://perma.cc/B8HG-SCWA].

143. See SKOCPOL & WILLIAMSON, *supra* note 134, at 156.

144. *Id.* at 8.

145. *Id.* at 9–10.

146. Schmidt, *supra* note 132, at 227–28.

147. SKOCPOL & WILLIAMSON, *supra* note 134, at 9. The Freedom Caucus in the House is the primary group responsible for pushing forward what once were identified as Tea Party issues. Katy O'Donnell, *The Right Recalibrates*, ROLL CALL (Mar. 9, 2015, 6:15 AM), <http://www.rollcall.com/news/The-Right-Recalibrates-240566-1.html> [https://perma.cc/65PN-U5RL].

election in 2008, Democratic control of both houses of Congress and the presidency had led pundits to ask if there would be a permanent Democratic majority.¹⁴⁸ The Republican Party's brand was heavily tainted. The President's stimulus plan produced some opposition by Republicans, but this opposition was hardly an effective long-term tool to rebuild the party. Tea Party conservatism, however, provided a "perfect rallying point," wrote Tea Party experts Theda Skocpol and Vanessa Williamson.¹⁴⁹ Following its warm embrace of the Tea Party movement, the GOP had roared back to life. In the 2010 election, it took 63 seats in the House and six seats in the Senate.¹⁵⁰ Although it is unclear how much those electoral victories were driven by Tea Party supporters going to the polls, or by Tea Party endorsements of particular candidates,¹⁵¹ the movement, at the very least, provided a marketing opportunity for conservatives that neither President Bush nor Senator John McCain could provide. As Skocpol and Williamson wrote, "tea parties and their adoring media surely helped to re-inspire grassroots conservatives, set a national agenda for the election, and claim a Republican wave election as a vindication for a particular, extreme conservative ideology."¹⁵²

Those electoral victories were not immediately followed by further victories in 2012, but Tea Party organizations continue to have important influence. Their efforts may have cost the Republican Party seats in 2012 by producing the nominations of Christine O'Donnell in Delaware, Sharron Angle in Nevada, and Ken Buck in Colorado.¹⁵³ But those nominations pushed Republican politicians rightward to ward off primary challenges by more conservative candidates. The Freedom Caucus, which is heavily influenced by the network of voters, donors,

148. Nate Cohn, *The 'Emerging Democratic Majority' Isn't Assured—Unless the GOP Refuses to Change*, NEW REPUBLIC (Apr. 10, 2013), <https://newrepublic.com/article/112870/emerging-democratic-majority-isnt-certainty-gop-change> [https://perma.cc/67LU-RYTT].

149. SKOCPOL & WILLIAMSON, *supra* note 134, at 7.

150. Steve Peoples, *Final House Race Decided; GOP Net Gain: 63 Seats*, ROLL CALL (Dec. 8, 2010, 4:05 AM), <http://www.rollcall.com/news/-201279-1.html> [https://perma.cc/ML4N-HKYR]; *Barack Obama: Campaigns and Elections*, MILLER CTR., <https://millercenter.org/president/obama/campaigns-and-elections> [https://perma.cc/Q8K6-R592] (last accessed May 19, 2017).

151. SKOCPOL & WILLIAMSON, *supra* note 134, at 159.

152. *Id.* at 163.

153. *Id.* at 167.

and public policy organizations that were brought together by the Tea Party, has also pushed the Republican House and Senate leadership to the right.¹⁵⁴ Although it is hard to know with certainty, there do seem to be important continuities between the Tea Party movement and the campaign of the current President. Certainly, the tone of the Tea Party, their deep suspicion of President Obama, their opposition to immigration, and even their calls to “take our country back” echoed in his campaign.¹⁵⁵ The Tea Party name has fallen out of favor, but the movement has had an important influence on American politics.¹⁵⁶

That influence was, in important ways, possible because of the conservative legal movement.¹⁵⁷ Lawyers closely associated with the conservative legal movement helped produce and execute the lawsuits against the ACA. That lawsuit generated hope among Tea Party advocates that change was possible and helped legitimate not just legal arguments but an approach to governing that had begun as off-the-wall claims of a fringe political movement. When the lawsuit found success in the courts, first at the district court level,¹⁵⁸ then at the circuit court,¹⁵⁹ then at the Supreme Court,¹⁶⁰ both the legal arguments and that approach to governing gained even broader appeal, ultimately reshaping the GOP. Without David Rivkin, Randy Barnett, Ilya Somin, and others, the contemporary conservative movement and recent political history would have been quite different.

IV. BEYOND RIGHTS ON THE RIGHT

Turning the history of the conservative legal movement on its head by showing that lawyers in the conservative legal movement

154. O'Donnell, *supra* note 147.

155. See SKOCPOL & WILLIAMSON, *supra* note 134, at 209, 216; Elizabeth A. Yates, *How the Tea Party Learned to Love Donald Trump*, WASH. POST (Dec. 1, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/01/how-the-tea-party-learned-to-love-donald-trump/?utm_term=.25fe710cd880 [<https://perma.cc/RRE9-7VZ9>].

156. SKOCPOL & WILLIAMSON, *supra* note 134, at 208.

157. DECKER, *supra* note 25, at 211–17.

158. See *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1295 (N.D. Fla. 2011).

159. See *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1285–86 (11th Cir. 2011).

160. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012).

not only responded to the larger conservative coalition, but also pushed it towards an approach to governing that emphasized rights claims and judicial action, is an important insight. This most arresting of Decker's claims may not yet be fully proven, but it is full of promise, and not just because of how it contributes to our understanding of conservatives' embrace of rights. Decker's approach might also help revise our understanding of the conservative movement as a whole. The best pathway towards that broader revision might combine Decker's emphasis on the agency of lawyers with two other research projects: one which has elucidated how lawyers can leverage their legal expertise into political influence, and another which has considered how law and legal institutions have contributed to the emergence and success of the modern conservative movement.

While Decker's focus on the agency of conservative lawyers is new, he is not alone in arguing that law can shape, as well as respond to, political and social structures. Leading scholars have shown how litigation and legal argument has shaped liberal and progressive politics.¹⁶¹ More recently, some scholars have begun to argue that law and legal argument has provided resources to create and support the contemporary conservative coalition. One example is Ken Kersch's claim that a common commitment to constitutionalism helped forge the post-war conservative movement.¹⁶² The conservative movement was and remains an alliance between once scattered groups of traditionalists, libertarians, neo-conservatives, free-marketers, religious voters, and anti-communist hawks.¹⁶³ Those groups disagreed over fundamental issues like America's proper role in the world, the state's authority to enforce morality, and a host of other questions.¹⁶⁴ Such disagreements did not, however, prevent them from forming a unified movement in part, Kersch claims, because they all believed

161. See, e.g., TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011); RISA GOLUBOFF, *VAGRANT NATION* (2016); KLARMAN, *supra* note 101; JOHN D. SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* (2004).

162. See Ken I. Kersch, *Beyond Originalism: Constitutional Declarationism and Constitutional Redemption*, 71 MD. L. REV. 229 (2011); Ken I. Kersch, *Ecumenicalism Through Constitutionalism: The Discursive Development of Constitutional Conservatism in National Review, 1955–1980*, 25 STUD. AM. POL. DEV. 86 (2011).

163. See generally GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945* (2006).

164. Kersch, *Ecumenicalism through Constitutionalism*, *supra* note 162, at 89–93.

the American constitutional tradition should play a central role in contemporary politics.¹⁶⁵ They did not agree on the implications of that tradition, but their commitment to its central role in our politics helped a diverse group of interests and ideologies forged a powerful political movement.¹⁶⁶

Reuel Schiller has shown how law paved the way for the rise of that conservative coalition by weakening its primary rival, the Democratic New Deal coalition. The law, Schiller argues, exacerbated divisions within two core parts of that coalition: African Americans and the labor movement.¹⁶⁷ A wide variety of economic, institutional, and intellectual developments caused those divisions.¹⁶⁸ But law, he insists, also was central.¹⁶⁹ Schiller showed that the legal regime that protected the interests of unions, labor law, and the regime that came to protect African Americans, employment law and other anti-discrimination law, were opposed in both ideology and institutional structure.¹⁷⁰ While labor law was pluralist, majoritarian, and supportive of bureaucratic governance, anti-discrimination law was anti-majoritarian, critical of pluralism, and supportive of judicial involvement.¹⁷¹ As African Americans, frustrated by the failure of labor to include them and address their concerns, turned away from labor law, white workers grew increasingly frustrated with what they saw as African Americans undermining the strength of the labor movement.¹⁷² By exacerbating that conflict, law helped weaken the New Deal coalition in ways that opened the door for the rise of conservatism.¹⁷³

Schiller, and Kersch do not deny the important impact of political concerns on the law, but together with Decker, they show how legal arguments and ideas have shaped the growth and success of conservative movement. What Decker adds is an emphasis on the lawyers themselves. By focusing on the ways lawyers can parley that legal expertise into political influence

165. *Id.* at 87.

166. *Id.* at 87, 89–93.

167. REUEL SCHILLER, FORGING RIVALS: RACE, CLASS, LAW, AND THE COLLAPSE OF POSTWAR LIBERALISM (2015).

168. *Id.* at 3–4.

169. *Id.* at 3.

170. *Id.*

171. *Id.* at 7–8.

172. *Id.* at 9–12.

173. *See id.* at 11–12.

outside the courts, Decker also builds on recent scholarship that has emphasized the influence lawyers have had on the emergence and development of the administrative state.

Exemplary is Dan Ernst's study of the central role lawyers played in shaping the modern administrative state at its origins.¹⁷⁴ The United States has an administrative state that is both largely free of judicial intervention, he notes, but still heavily governed by legalistic processes and norms.¹⁷⁵ It has that character, he claims, because lawyers inside the government generated political influence by leveraging the practical reality that the administrative state needed approval from courts.¹⁷⁶ Lawyers then used that influence to create an administrative state that receives largely deferential review from the judiciary, but which also follows a host of legalistic procedures and norms that lawyers themselves valued.¹⁷⁷ Sophia Lee, Karen Tani, and others have applied similar insights to show how lawyers leveraged their constitutional expertise into policy-making authority within those agencies after their legitimacy was established.¹⁷⁸

Decker's work offers a model of how these different approaches can be pulled together with our growing knowledge of the conservative legal movement to revise our understanding of the conservative movement more broadly. In helping us to see that lawyers can leverage their legal expertise into influence over political parties and other political institutions whose configurations do much to determine the outcome of political contests, Decker's work does not deny that political concerns influence the way lawyers develop and deploy legal arguments. But his work does suggest that conservative lawyers have had a special influence on American politics. Their agency, like that of politically involved lawyers more broadly, justifies—even requires—the kind of careful attention Decker has paid to understanding why those lawyers have made the choices they made. If we are to understand how the modern

174. DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2016).

175. *Id.* at 5.

176. *Id.* at 5–6.

177. *Id.* at 5.

178. SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* (2014); KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972* (2016).

conservative movement defined itself, achieved its successes, and found its limits, we need to understand its lawyers.

There are myriad areas that could benefit from such an investigation. We could certainly benefit from applying Decker's approach to the relationship between gun rights advocates, Second Amendment litigation, and the modern Republican Party. Originalism, too, might benefit from being seen as more than an academic enterprise or a tool of conservative political actors.¹⁷⁹ We might better understand the contemporary conservative movement if we consider how the Republican Party's embrace of originalism has not only advanced their interests,¹⁸⁰ but also shaped their goals. We know, for example, that many who are now conservatives were unwilling to fully embrace conservatism until it received the approval of Raoul Berger, Robert Bork, and other leading academics.¹⁸¹ We might consider whether a similar influence has been exercised by the conservative lawyers who have helped oversee originalism's development.

V. CONCLUSION

NFIB v. Sebelius was grounded in structural federalism, *King v. Burwell*¹⁸² focused on technical questions of statutory interpretation, and neither litigation succeeded in their primary goals. They nevertheless had an enormous impact on American politics. They produced a conservative critique of the Affordable Care Act in court, in Congress, in Tea Party rallies, and elsewhere that emphasized the Affordable Care Act's interference with the liberty of individual Americans and the necessity for judicial action to protect that liberty. Ubiquitous broccoli horrors highlighted the critique. That emphasis on individual rights and the need for an active judiciary surprised no one in a political and legal culture which had seen conservative lawyers, judges, and politicians follow similar scripts in the debates surrounding *Kelo v. City of New*

179. Logan E. Sawyer, III, *Principle and Politics in the New History of Originalism*, 57 AM. J. LEGAL HIST. (forthcoming 2017).

180. Post & Siegel, *supra* note 84.

181. O'NEILL, *supra* note 14; Kersch, *Ecumenicalism through Constitutionalism*, *supra* note 162.

182. 135 S. Ct. 2480 (2015).

London,¹⁸³ *Citizens United v. FEC*,¹⁸⁴ *District of Columbia v. Heller*,¹⁸⁵ and *Burwell v. Hobby Lobby Stores, Inc.*¹⁸⁶

Jefferson Decker's *The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government* first reminds us that not too long ago these conservative appeals to courts, litigation, and individual rights would have been surprising indeed.¹⁸⁷ It then offers a striking and original explanation for the transformation. While most scholars have seen the loose network of conservative lawyers, academics, and judges connected mainly through the Federalist Society as a tool of conservative political interests,¹⁸⁸ Decker argues it was those conservative lawyers who redefined conservatism for the twenty-first century. More than tools, the lawyers were leaders. Their experience in the American West and their frustrations with the Reagan administration pushed them to embrace a new understanding of what it means to be a conservative, an understanding that is now shared by the larger conservative movement and much of the Republican Party.

As with any claim so original, Decker will hardly have the final word, but he has illuminated the vital role lawyers played in shaping the modern conservative movement. That insight is a significant contribution to an already sophisticated literature. It is also remarkably timely. His work should impress upon contemporary lawyers the significant opportunity they have to influence the nation's political future. In doing so, it might also remind them of their corresponding duty to use that influence wisely. Given the convulsions conservatism is currently undergoing—convulsions that have included challenges to long established political, legal, and constitutional norms—now is a particularly appropriate time for such a reminder.

183. 545 U.S. 469 (2005).

184. 558 U.S. 310 (2010).

185. 554 U.S. 570 (2008).

186. 134 S. Ct. 2751 (2014).

187. DECKER, *supra* note 25.

188. HOLLIS-BRUSKY, *supra* note 5; TELES, *supra* note 12; Comment, *supra* note 86.

BUSINESS TRANSACTIONS AND PRESIDENT TRUMP'S "EMOLUMENTS" PROBLEM

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Recently, some have argued¹ that the term "emoluments," as used in the Constitution's Foreign Emoluments Clause² and Pres-

* Lecturer, Maynooth University Department of Law, Ireland. Roinn Dlí Ollscoil Mhá Nuad. I thank the student editors at the *Harvard Journal of Law & Public Policy* for their excellent editing, Professor Josh Blackman for his encouraging my developing the Washington-era precedents, and several other academics for reviewing drafts of this Essay. I note that an early version of this Essay was published on my group blog. See Seth Barrett Tillman, *Business Transactions for Value Are Not "Emoluments"*, NEW REFORM CLUB (Mar. 19, 2017, 3:15 AM), <http://reformclub.blogspot.com/2017/03/business-transactions-for-value-are-not.html> [<https://perma.cc/TEH6-4XGA>]. I have been asked to participate (in some fashion) in an amicus brief in *Citizens for Responsibility and Ethics in Wash. v. Trump*, Civ. A. No. 1:17-cv-00458-RA (S.D.N.Y. Jan. 23, 2017), 2017 WL 277603. No decision in regard to my participation has been made at this time.

1. See First Amended Complaint at 58, *Citizens for Responsibility and Ethics in Wash. ("CREW") v. Trump*, Civ. A. No. 1:17-cv-00458-RA (S.D.N.Y. Apr. 18, 2017), <https://perma.cc/UY2U-UZWS> (filed by, among others, Professors Richard W. Painter, Laurence H. Tribe, Erwin Chemerinsky, and Zephyr Teachout) ("Plaintiffs allege that . . . together, the phrases 'present' and 'Emolument . . . of any kind whatever' under the Foreign Emoluments Clause cover anything of value, including above- or below-market rates . . ." (emphasis added)); Norman L. Eisen, Richard Painter & Laurence H. Tribe, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, GOVERNANCE STUDIES AT BROOKINGS 11 (Dec. 16, 2016), https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf [<https://perma.cc/U73U-QG9Z>] ("[T]he best reading of the Clause covers even ordinary, fair market value transactions that result in any economic profit or benefit to the federal officeholder."); Laurence H. Tribe et al., *The Courts and the Foreign Emoluments Clause*, CASETEXT (Jan. 31, 2017), <https://casetext.com/posts/the-courts-and-the-foreign-emoluments-clause-1> [<https://perma.cc/G2LX-BD5B>] ("[The Foreign Emoluments Clause] does apply to fair market value transactions . . ."); Joshua Matz & Laurence H. Tribe, *President Trump Has No Defense Under the Foreign Emoluments Clause*, ACS BLOG (Jan. 24, 2017), <https://perma.cc/R4TA-BMSY>; John Mikhail, *A Note on the Original Meaning of "Emolument"*, BALKINIZATION (Jan. 18, 2017, 1:15 PM), <https://perma.cc/VT6Y-XL25> ("[T]here is ample evidence that 'emolument' was often used at the founding in a much wider sense, one that went beyond the duties of an office and encompassed the fruits of ordinary market transactions."). But see *infra* notes 22 & 29 (collecting counter-authority).

idential Emoluments Clause,³ reaches any pecuniary advantage, benefit, or profit arising in connection with business transactions for value.⁴ There is good reason to doubt the correctness of this position. Why? The Presidential Emoluments Clause states:

2. U.S. CONST. art. I, § 9, cl. 8 (“[N]o Person holding any Office of Profit or Trust under the[] [United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”). There is some substantial debate in regard to whether the President and other elected federal and state officials fall under the scope of the Constitution’s *office . . . under the United States*-language. See RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE *Titles of Nobility and the Foreign Emoluments Clause* § 9.18 n.12 (5th ed. Supp. 2017); William Baude, *Constitutional Officers: A Very Close Reading*, JOTWELL (July 28, 2016), <http://conlaw.jotwell.com/constitutional-officers-a-very-close-reading> [<https://perma.cc/W9CH-TRK5>]; see also JAY WEXLER, THE ODD CLAUSES: UNDERSTANDING THE CONSTITUTION THROUGH TEN OF ITS MOST CURIOUS PROVISIONS 7–8 (2011). Compare, e.g., Seth Barrett Tillman, Opening Statement, *Citizens United and the Scope of Professor Teachout’s Anti-Corruption Principle*, 107 NW. U. L. REV. 399 (2012), and Seth Barrett Tillman, Closing Statement, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180 (2013), with Zephyr Teachout, Rebuttal, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. COLLOQUY 30 (2012), and Zephyr Teachout, Closing Statement, *Constitutional Purpose and the Anti-Corruption Principle*, 108 NW. U. L. REV. ONLINE 200 (2014). See generally REPORT FROM THE SELECT COMMITTEE ON OFFICES OR PLACES OF PROFIT UNDER THE CROWN (1941); Luke Beck, *When Is an Office or Public Trust ‘Under the Commonwealth’ for the Purposes of the Religious Tests Clause of the Australian Constitution?*, 41 MONASH U. L. REV. 17 (2015).

3. U.S. CONST. art. II, § 1, cl. 7.

4. Business transactions for value are not “presents,” as the former involve an exchange, but the latter do not. The Presidential Emoluments Clause does not extend to “presents,” but only to “emoluments.” *Id.* Likewise, neither the Presidential Emoluments Clause nor the Foreign Emoluments Clause extends to bribes, which is expressly dealt with by the Impeachment Clause. See U.S. CONST. art. II, § 4. Professors Teachout and Tribe have made this precise point. See, e.g., ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED 28 (2014) (explaining that the Foreign Emoluments Clause “forbids presents—not bribes”); Matz & Tribe, *supra* note 1, at 2 (“[I]f a foreign power gives the President money or any other benefit ‘as a consequence of discharging the duties of [his] office’ . . . the applicable constitutional concept in that circumstance is ‘bribery’ (and, in some circumstances, ‘treason’).” (emphasis added)). Compare U.S. CONST. art. II, § 4 (extending scope of impeachment to “bribery” and “treason”), with U.S. CONST. art. II, § 1, cl. 7 (extending scope of Presidential Emoluments Clause *exclusively* to “emoluments,” but not to bribes or presents), and U.S. CONST. art. I, § 9, cl. 8 (extending scope of Foreign Emoluments Clause to “presents” and “emoluments,” but not to bribes). Allegations relating exclusively to bribery are simply not cognizable under either the Presidential Emoluments Clause or the Foreign Emoluments Clause.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period *any other Emolument from the United States*, or any of them.⁵

If the *emoluments-are-any-pecuniary-advantage* position were correct, if “emoluments” as used in the Constitution extended to any pecuniary advantage, then presidents are and would have been precluded from doing business with the United States government. However, George Washington, who had presided over the Philadelphia Convention,⁶ did business with the Federal Government on more than one occasion while he was president. He purchased several lots of land in the new federal capital at public auction. One such set of purchases took place on or about September 18, 1793.⁷

The public auction was run by three commissioners: David Stuart, Daniel Carroll, and Thomas Johnson. Who were they? David Stuart was a member of the Virginia convention that ratified the Federal Constitution. Stuart was also a federal elector in the first federal election for President and Vice President of the United States.⁸ Daniel Carroll was a member of the Federal Convention that drafted the Constitution and later a member of the First Congress.⁹ Thomas Johnson was the first Governor of Maryland fol-

5. U.S. CONST. art. II, § 1, cl. 7 (emphasis added).

6. See *Washington, George (1732–1799)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=W000178> [https://perma.cc/ZS6Q-8J37] (last accessed May 10, 2017). Furthermore, Washington was a member of the Continental Congress and a member of the Virginia House of Burgesses. *Id.* See generally 5 JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON* (Philadelphia, C. P. Wayne 1807).

7. See *Certificate for Lots Purchased in the District of Columbia, 18 September 1793*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-14-02-0074> [https://perma.cc/V84N-MF3B] (last accessed May 13, 2017).

8. See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 654 & 662 (Jonathan Elliot ed., Washington, 2d ed. 1836) (recording David Stuart’s votes in the Virginia convention on June 25 and 27, 1788); 3 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788–1790, at xvi (Gordon DenBoer ed., 1986).

9. See *Carroll, Daniel (1730–1796)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000187> [https://perma.cc/9THS-HHW6] (last accessed Feb. 14, 2017). Carroll also signed the Articles of Confederation and was a member of the Continental Congress and the Maryland State Senate. *Id.* Because Carroll was a member of the House when

lowing independence, a member of the Maryland convention that ratified the Federal Constitution, and afterwards he served as a Justice of the Supreme Court of the United States.¹⁰

So among the four participants (Washington and the three commissioners) were: three members of the Continental Congress;¹¹ three members of pre-independence colonial legislatures or post-independence state legislatures;¹² two members of state conventions that ratified the Constitution; two members of the Federal Convention (including the Convention's president); a member of the First Congress; a Justice of the Supreme Court of the United States; a governor; a federal elector for President and Vice President; and, our first President. Collectively these four are, undoubtedly, an accomplished group. Are we really to believe that not only did all four officials willingly, openly, and notoriously participate in a conspiracy to aid and abet the President in violating the Constitution's Presidential Emoluments Clause, but that they also left—for themselves and their posterity—a complete and signed documentary trail of their wrongdoing?¹³

first commissioned, Washington waited for his House term to end, and then issued a new commission, after which Carroll accepted the position. See CENTENNIAL HISTORY OF THE CITY OF WASHINGTON, D.C. 90, 129 (Dayton, United Brethren Publishing House 1892); *infra* note 20. This incident with Carroll is further substantial indication—as if any were needed—that President George Washington was a stickler for constitutional propriety.

10. See *Johnson, Thomas (1732–1819)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=J000175> [<https://perma.cc/4TAH-9EUJ>] (last accessed May 13, 2017). Johnson was also a member of the Continental Congress for Maryland, a state and territorial judge, and a member of the pre-independence colonial legislature as well as the post-independence state legislature. *Id.*

11. See *id.*; *Washington*, *supra* note 6; *Carroll*, *supra* note 9.

12. See *Washington*, *supra* note 6; *Carroll*, *supra* note 9; *Johnson*, *supra* note 10.

13. See, e.g., *Certificate for Lots Purchased in the District of Columbia, 18 September 1793*, *supra* note 7 (reproducing a certificate of purchase signed by Commissioners David Stuart and Daniel Carroll which stated: “At a Public Sale of Lots in the City of Washington, George Washington, President of the United States of America became purchaser of Lots No. twelve, No. thirteen & No. fourteen in Square No. six hundred & sixty seven . . .”). In addition to lots 12, 13, and 14, Washington also purchased lot 5, and he received a separate certificate confirming this additional purchase. See *id.*; see also Letter from President George Washington to the Commissioners (Mar. 14, 1794), in *The Writings of George Washington Relating to the National Capital*, 17 RECORDS OF THE COLUMBIA HIST. SOC'Y 3, 97 (1914) (indicating that Washington believed and intended that his purchases of public land were known to the public).

The *emoluments-are-any-pecuniary-advantage* position amounts to: (1) President Washington was at best grossly negligent, if not crooked; (2) Washington's allies openly supported obvious and profound constitutional lawlessness; and (3) Washington's political opponents were altogether and unaccountably silent—silent in Congress,¹⁴ silent in newspapers, and silent even in their private correspondence. The *emoluments-are-any-pecuniary-advantage* position amounts to a naked assertion by twenty-first century legal academics¹⁵ that they understand the Constitution's binding legal meaning better than those who drafted it, ratified it, and put it into effect during the Washington administration.

The alternative view is that linguistic and historical humility compel reasonable minds to recognize that much of the language within our more than two century-old Constitution is opaque. It follows that—in order for twenty-first century citizens to understand what the Constitution's opaque language meant when ratified (and what it continues to mean today) in regard to a specific (but otherwise obscure) legal term, namely, “emoluments”—reasonable persons must look to the actual conduct of the Framers, the Ratifiers, and the original practice of the three branches when they were squarely confronted with the need to determine the meaning of a particular legal term on concrete facts.¹⁶

14. In 1793, during the Third Congress, the year President Washington made these land purchases at public auctions, there were some 13 anti-administration Senators and some 40 anti-administration Representatives. See BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <http://bioguide.congress.gov/biosearch/biosearch.asp> [<https://perma.cc/N34W-PSGP>] (last accessed Feb. 14, 2017) (enter “Representative” or “Senator” for “Position:” and enter “1793” for “Year or Congress:”); see also Letter from President George Washington to Bushrod Washington (July 27, 1789), in 30 THE PAPERS OF GEORGE WASHINGTON 366, 366 (John C. Fitzpatrick ed., 1939) (“My political conduct . . . must be exceedingly circumspect and proof against just criticism, for the Eyes of Argus [the all-seeing, many-eyed giant of Greek mythology] are upon me, and no slip will pass unnoticed that can be improved into a supposed partiality for friends or relatives.”); Seth Barrett Tillman, *Who Can Be President of the United States?: Candidate Hillary Clinton and the Problem of Statutory Qualifications*, 5 BRIT. J. AM. LEGAL STUD. 95, 107–08 (2016) (“Washington both valued his reputation for probity and acted under the assumption that his conduct was closely monitored by political opponents and opportunists.”); *infra* note 17.

15. See *supra* note 1.

16. In regard to judicial dicta, Chief Justice Marshall explained the principle as follows:

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those

It is incontrovertible that President George Washington, in a private capacity, engaged in business transactions for value with the Federal Government, notwithstanding that he received or intended to receive a pecuniary advantage. Given Washington's very public conduct, a modern interpreter should be reluctant to conclude that such advantages, benefits, and profits amount to a constitutionally proscribed "emolument."¹⁷ Moreover, it stands to reason that if the benefits flow-

expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399–400 (1821).

17. See AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 309 (2012) ("Over the centuries, the constitutional understandings that crystallized during the Washington administration have enjoyed special authority on a wide range of issues . . ."); Martin S. Lederman, *If George Washington Did It, Does that Make It Constitutional?: History's Lessons for Wartime Military Tribunals*, 105 GEO. L.J. (forthcoming Aug. 2017) (manuscript at 11), https://ssrn.com/abstract_id=2840948 [<https://perma.cc/R6PN-LWWU>] ("Washington's example has long been a touchstone for constitutional understandings."); see also Tillman, *supra* note 14, at 105–08 ("Evidence arising in connection with the Washington administration is generally considered superior to that of later administrations. Why? First, Washington's administration was contemporaneous with the Constitution's ratification. Second, the President was a Framers and his cabinet (and administration) contained other prominent Framers and [R]atifiers. Indeed, between the President and his nine cabinet members (over the course of two terms), half of the group were either Framers or [R]atifiers or both. Third, the President saw himself above party or faction; indeed, active partisan federal electoral politics did not arise until after Washington announced that he would not run for a third term. Fourth, Washington both valued his reputation for probity and acted under the assumption that his conduct was closely monitored by political opponents and opportunists. Fifth, Washington understood that his personal and his administration's conduct were precedent-setting in regard not only to significant deeds, but even in regard to what might appear to be minor events and conduct." (footnotes omitted)); *supra* note 14.

Indeed, the attorneys for CREW, proponents of the *emoluments-are-any-pecuniary-advantage* position, see *supra* note 1, have relied on George Washington and Washington-era precedents in their own scholarly publications, see, e.g., Erwin Chemerinsky, *Civil Liberties and the War Terror*, 62 SMU L. REV. 3, 11 (2009) ("Going back to the days of George Washington, the United States government has always prided itself on humane treatment of detainees and prisoners of war. Even when the English army was treating American soldiers badly during the Revolutionary War, accounts of English soldiers indicate that George Washington

ing from business transactions for value (with the Federal Government) are not constitutionally proscribed “emoluments” for the purposes of the Presidential Emoluments Clause, then the benefits flowing from similar transactions for value with foreign states, foreign agencies or instrumentalities, or with foreign state owned or state controlled commercial entities¹⁸ are

ordered the American troops to use what we now regard as the basis of human rights.” (footnote omitted)); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 356 (2009) (discussing “George Washington’s . . . contribution to the Constitutional Convention”).

18. In regard to the Presidential Emoluments Clause, where the Federal Government or a state government engages in a business transaction with a private commercial entity owned (in whole or in significant part) or controlled (in whole or in significant part) by the President of the United States in his private capacity, but not with the President himself, it is not clear that such a transaction falls under the aegis of the Presidential Emoluments Clause. See U.S. CONST. art. II, § 1, cl. 7. Indeed, no court of the United States has had occasion to resolve this novel threshold question of pure law. This issue must be resolved in any litigation seeking to assert that the Presidential Emoluments Clause applies to such business transactions with commercial entities having substantial connections to the President. Likewise, there is no case law establishing that transactions between the President and a state or federal municipal entity or a municipal agency or instrumentality or municipal owned or controlled commercial entity fall under the aegis of the Presidential Emoluments Clause.

Much the same can be said in regard to the Foreign Emoluments Clause. There is no case law establishing that transactions between the President and a foreign municipal entity or a foreign state (or municipal) agency or instrumentality or a foreign state (or municipal) owned or controlled commercial entity fall under the aegis of the Foreign Emoluments Clause. This is a novel threshold question of pure law which must be resolved in any litigation seeking to assert that the Foreign Emoluments Clause applies to business transactions between a constitutionally proscribed federal officeholder, that is, an *officer . . . under the United States*, *id.* art. I, § 9, cl. 8, and a foreign municipal entity or a foreign state (or municipal) agency or instrumentality or a foreign state (or municipal) owned or controlled commercial entity. Similarly, where a foreign state engages in a business transaction with a private commercial entity owned or controlled in whole or in significant part by a constitutionally proscribed federal officeholder in his private capacity, but not with the officeholder, it is not clear that such a transaction falls under the aegis of the Foreign Emoluments Clause. Indeed, no court of the United States has had occasion to resolve this novel threshold question of pure law. This too must be resolved in any litigation seeking to assert that the Foreign Emoluments Clause applies to business transactions between private commercial entities owned or controlled by a constitutionally proscribed federal officeholder and a foreign state. Finally, where a transaction has a commercial entity on both sides, as opposed to an *actual* foreign state and an *actual* constitutionally proscribed federal officeholder, the policy concerns animating the Foreign Emoluments Clause must be much attenuated. See David B. Rivkin Jr. & Lee A. Casey, *Trump doesn't need a blind trust*, WASH. POST, Nov. 23, 2016, at A17; David B. Rivkin Jr. & Lee A.

not constitutionally proscribed “emoluments” for the purposes of the Foreign Emoluments Clause or any other clause. Both the Presidential Emoluments Clause and the Foreign Emoluments Clause use precisely the same term: “emolument.”¹⁹

Indeed, from the perspective of modern, as opposed to eighteenth century, governance norms, President Washington’s business transactions posed a nonfrivolous risk of moral hazard, conflicts, and corruption. Unlike transactions struck between genuinely adverse profit-maximizing parties at arms-length, President Washington was speculating on land in public auctions—that is, *public auctions managed by commissioners whom he had personally appointed*.²⁰ As a result, Washington was on both sides of each and every one of these transactions;²¹ yet, no one then, or

Casey, *It’s unrealistic and unfair to make Trump use a blind trust*, WASH. POST (Nov. 22, 2016, 6:37 PM), https://www.washingtonpost.com/opinions/its-unrealistic-and-unfair-to-make-trump-use-a-blind-trust/2016/11/22/a71aa1d4-b0c0-11e6-8616-52b15787add0_story.html?utm_term=.24e4566f09da [https://perma.cc/R2DN-U2XK]. To put it another way, American law has a rich tradition recognizing the independent or separate legal personality of corporations and other commercial entities. See *infra* note 34 (discussing *Yeoman v. Commonwealth*, 983 S.W.2d 459 (Ky. 1998)).

19. See *supra* notes 2–3 and accompanying text. See generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (“In deploying this technique [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.”); Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1172 (2003) (“It is far better to use two different words in a sentence when we mean to convey two different meanings.”).

20. See Letter from George Washington, President of the United States of America, to All Who Shall See These Presents (Jan. 22, 1791), in *The Writings of George Washington Relating to the National Capital*, *supra* note 13, at 3 (appointing Johnson, Carroll, and Stuart commissioners); *supra* note 9 (describing Daniel Carroll’s appointment in further detail); see also An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, ch. 28, § 2, 1 Stat. 130, 130 (1790) (granting the President the power to appoint commissioners).

21. Oliver Evans held U.S. Patent #3: a patent for an automated grain milling system. This patent was issued by Executive Branch officers responsible to President Washington during his first term in office. Indeed, President Washington personally reviewed and signed the patent application. See *The Magnificent Millworks of Oliver Evans*, GEORGE WASHINGTON’S MOUNT VERNON, <http://www.mountvernon.org/the-estate-gardens/gristmill/oliver-evans> [https://perma.cc/PRK4-HCH6] (last accessed May 10, 2017). Subsequently, circa 1791, “Washington purchased a license under the patent” and then had the milling system installed in his Mount Vernon gristmill. *Overview of the Gristmill*, GEORGE WASHINGTON’S MOUNT VERNON,

since, has ever impugned the propriety of his conduct, much less the legal validity or constitutionality of his purchases.²²

So what is an “emolument”? That question has been squarely addressed by the Supreme Court of the United States and state supreme courts.

encyclopedia/article/overview-of-the-gristmill [https://perma.cc/FB6N-82L5] (last accessed May 13, 2017). Just like his land purchases, here too, President Washington was on both sides of the transaction at issue. This is another good example indicating that *modern* and *expansive* fiduciary governance standards have little or nothing to do with the *original* and *limited* legally binding meaning of the Constitution’s Presidential Emoluments Clause and Foreign Emoluments Clause. See, e.g., Martin H. Redish & Elana Nightingale Dawson, “Worse than the Disease”: *The Anti-Corruption Principle, Free Expression, and the Democratic Process*, 20 WM. & MARY BILL RTS. J. 1053, 1068 (2012) (explaining the “Framers’ limited prophylactic approach”); Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 COLUM. L. REV. 501, 510 (2001) (characterizing the Presidential Emoluments Clause and Foreign Emoluments Clause as “limited anticorruption provisions”); see also Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (“[D]irectors can neither appear on *both sides* of a transaction nor expect to derive any personal financial benefit from [a director-approved transaction] in the sense of self-dealing . . .” (emphasis added)), *overruled on other grounds sub nom.* Brehm v. Eisner, 746 A.2d 244 (Del. 2000). See generally Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006); Eric Enlow, *The Corporate Conception of the State and the Origins of Limited Constitutional Government*, 6 WASH. U. J.L. & POL’Y 1 (2001); Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, in *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 144 (Gary Lawson et al. eds., 2010); Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243 (2004).

22. One sincerely wonders if CREW’s attorneys can come forward with even *one* historian—living or dead—who will support their views: (1) that the term “emolument,” as used in the Constitution, extends to business transactions for value; and (2) that President Washington violated the Constitution in engaging in such transactions with the Federal Government’s Executive Branch. See Lawrence A. Peskin, *Can Donald Trump Profit from Businesses with Connections to Foreign Governments Once He’s President?*, HISTORY NEWS NETWORK (Dec. 18, 2016), <http://historynewsnetwork.org/article/164660> [https://perma.cc/K5NN-78UP] (explaining that “any broad interpretation of the [Foreign] [E]moluments [C]lause to prohibit doing *business* with foreign governments or their representatives would appear to contradict the intent of the founders as demonstrated by their actions” (emphasis added)); *supra* notes 1, 7, 13, 20–21 and accompanying text. Indeed, no one has yet asserted the broad interpretation of “emoluments” in a formal—prior, current, or forthcoming—academic publication. For recent authority affirming the traditional, narrow view of emoluments, see Andy S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. (forthcoming 2017), <https://ssrn.com/abstract=2902391> [https://perma.cc/63B9-ET8X]; Robert G. Natelson, *The Original Meaning of “Emoluments” in the Constitution*, 52 GA. L. REV. (forthcoming Oct. 2017), <https://ssrn.com/abstract=2911871> [https://perma.cc/U5B4-8VKF].

Supreme Court Case Law

In *Hoyt v. United States*,²³ Justice Nelson, for a unanimous Supreme Court, explained:

These terms [“fees” and “commissions”] denote a compensation for a particular kind of service to be performed by the officer, and are distinguishable from each other . . . they are also distinguishable from the term emoluments, that [term] being more comprehensive, and embracing every species of compensation or pecuniary profit *derived from a discharge of the duties of the office*.²⁴

The *Hoyt* Court’s definition of emolument is not “obscure;”²⁵ indeed, the *Hoyt* Court’s definition has been cited approvingly

23. 51 U.S. (10 How.) 109 (1850).

24. *Id.* at 135 (emphasis added). *Hoyt* expounded on how “emolument” was used in a 1799 act of Congress, and in a subsequent 1802 act amending the 1799 act. See An Act to Establish the Compensations of the Officers Employed in the Collection of the Duties on Imports and Tonnage, and for Other Purposes, ch. 23, § 2, 1 Stat. 704, 706–08 (1799), amended by An Act to Amend “An Act to Establish the Compensations of the Officers Employed in the Collection of the Duties on Imports and Tonnage; and for Other Purposes”, ch. 37, § 3, 2 Stat. 172, 172–73 (1802). Indeed, early congressional statutes expressly distinguished “emoluments” associated with government office from “carry[ing] on the business of trade or commerce.” See, e.g., An Act to establish the Treasury Department, ch. 12, § 8, 1 Stat. 65, 67 (1789) (“[N]o person appointed to any office instituted by this [A]ct, shall directly or indirectly be concerned or interested in *carrying on the business of trade or commerce* . . . or take or apply to his own use, any *emolument* or gain for negotiating or transacting any business in the said department . . .” (emphasis added)). It is also noteworthy that the Treasury Act does not extend to the President or to any other elected positions.

25. Professor Tribe and his co-authors have, on more than one occasion, described *Hoyt* as an “obscure Supreme Court decision from 1850.” Tribe et al., *supra* note 1 (denominating *Hoyt* as an “obscure Supreme Court decision from 1850,” but failing to discuss, quote, cite, or even expressly name this counter-authority); see Matz & Tribe, *supra* note 1, at 5 (again, denominating *Hoyt* as an “obscure Supreme Court decision from 1850,” but failing to discuss, quote, cite, or even expressly name this counter-authority). But see Laurence Tribe, *Civil Liberties after 9/11: A Response to David Cole*, BOS. REV. FORUM (Dec. 1, 2002), <http://bostonreview.net/forum/civil-liberties-after-911/laurence-tribe-liberty-all> [<https://perma.cc/YNL8-AJPM>] (discussing *Railway Express Agency v. New York*, 336 U.S. 106 (1949), notwithstanding expressly identifying *Railway Express* as an “obscure case”). Obscure or not, Professor Tribe and his co-authors make no substantial effort to explain how *Hoyt*, a unanimous decision of the Supreme Court of the United States, fails to conclusively settle the issue at hand, particularly with regard to the Presidential Emoluments Clause. See David E. Weisberg, *The Foreign Emoluments Clause: Will President Trump be in Violation by Virtue of Taking the Oath?* 7 n.11 (Jan. 20, 2017) (unpublished manuscript),

by the Executive Branch²⁶ and Legislative Branch.²⁷ It follows that President Washington may very well have derived pecuniary advantages, benefits, and profits from his business transactions with the Federal Government, but the benefits flowing from those business transactions were not “derived from [his] discharg[ing] the duties of [his] office.”²⁸ Hence, no constitutionally proscribed “emoluments” were involved. It seems this is the consensus position.²⁹

<https://ssrn.com/abstract=2888201> [<https://perma.cc/Q5GK-8TCU>] (quoting an email from Professor Tribe stating that the Constitution’s *emoluments*-language has a “broader” scope in the Foreign Emoluments Clause than in the Presidential Emoluments Clause); *see also* Tribe et al., *supra* note 1 (putting forward “a broader definition” for “emoluments” in the Foreign Emoluments Clause specifically because that clause—unlike the Presidential Emoluments Clause—uses “any present, Emolument, Office, or Title, of any kind whatever”-language); Matz & Tribe, *supra* note 1, at 7 (same).

26. *See, e.g.*, Memorandum from Samuel A. Alito, Jr., Dep’y Asst. Att’y Gen., Office of Legal Counsel, for H. Gerald Staub, Office of the Chief Counsel, Nat’l Aeronautics & Space Admin., Re: Emoluments Clause Questions Raised by NASA Scientist’s Proposed Consulting Arrangement with the University of New South Wales, 1986 WL 1239553, at *1 n.4 (1986).

27. *See, e.g.*, Memorandum from Milton J. Socolar, on behalf of the Comptroller Gen. of the U.S., to Sen. George J. Mitchell, B-207467, 1983 WL 27823, at *2 (1983). The Supreme Court has identified the Comptroller General with the Legislative Branch. *See* *Bowsher v. Synar*, 478 U.S. 714, 727–34 (1986).

28. *Hout*, 51 U.S. (10 How.) at 135. The Ineligibility Clause also uses the term “emoluments.” U.S. CONST. art. I, § 6, cl. 2 (“No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been [i]ncreased during such time . . .”). “Emoluments” here seems structurally tied to compensation provided for by Congress, as opposed to other compensation supplied by external entities. *See* *United States v. Hartwell*, 73 U.S. 385, 393 (1867) (“An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.”); *see also* *Satrucharla Chandrasekhar Raju v. Vyricherla Pradeep Kumar Dev*, AIR 1992 SC 1959, ¶ 7 (India) (explaining that in determining whether a position is an office under the government of India, the court examines, among other factors, if the post is “paid out of the revenues of [the] Government of India”), <https://indiankanoon.org/doc/1633748> [<https://perma.cc/AJV8-QXCD>]. *See generally* Robert French, Chief Justice of the High Court of Australia, Seventh Annual St. Thomas More Forum Lecture: Public Office and Public Trust 3 (June 22, 2011), <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj22jun11.pdf> [<https://perma.cc/FU6G-24EZ>].

29. *See* Grewal, *supra* note 22; Natelson, *supra* note 22; Eugene Kontorovich, *Did George Washington Take ‘Emoluments’?*, WALL ST. J. (Apr. 13, 2017), <https://www.wsj.com/articles/did-george-washington-take-emoluments->

Modern State Case Law

In 1975, the Supreme Court of New Mexico explained that the term emolument “does not refer to the fixed salary alone that is attached to the office, but includes such fees and compensation as the incumbent of the office is *by law entitled to receive*.”³⁰ This is also the view of judicial authority from other state supreme courts, including, for example, the Supreme Court of Washington³¹ and the Supreme Court of Minnesota,³² of state executive branch officers,³³ and of persuasive domestic³⁴ and foreign³⁵ scholarly authority. Again, an “emolument”

1492123033; Ronald D. Rotunda, *Everything, Anything, Is an Emolument*, VERDICT (Jan. 30, 2017), <https://verdict.justia.com/2017/01/30/everything-anything-emolument> [<https://perma.cc/5J8F-4EYX>]; Rivkin & Casey, *Trump doesn't need a blind trust*, *supra* note 18; Rivkin & Casey, *It's unrealistic and unfair to make Trump use a blind trust*, *supra* note 18; Sheri Dillon et al., Morgan, Lewis & Bockius LLP White Paper, Conflicts of Interest and the President (Jan. 11, 2017), <https://assets.documentcloud.org/documents/3280261/MLB-White-Paper-1-10-Pm.pdf> [<https://perma.cc/B8BU-X4U3>] (supporting a narrow meaning for “emoluments”); Peskin, *supra* note 22. *But see supra* note 1 (collecting counter-authority).

30. *State ex rel. Anaya v. McBride*, 539 P.2d 1006, 1012 (N.M. 1975) (emphasis added) (citing 63 AM. JUR. 2D *Public Officers and Employees* § 71 (1972)).

31. *See, e.g., State ex rel. Todd v. Reeves*, 82 P.2d 173, 176 (Wash. 1938) (Blake, J., dissenting) (citing *Hoyt*, 51 U.S. (10 How.) 109); *State ex rel. McAulay v. Reeves*, 81 P.2d 860, 863 (Wash. 1938) (Blake, J., dissenting).

32. *See, e.g., State ex rel. Benson v. Schmah*, 145 N.W. 794, 795 (Minn. 1914).

33. *See, e.g., Memorandum from Wayne Stenehjem, Att’y Gen., to Gov. John Hoeven*, 2005 N.D. Op. Att’y. Gen. No. 2005-L-15, 2005 WL 1129466, at *2 n.3 (2005).

34. *See, e.g., 63C AM. JUR. 2D Public Officers and Employees* § 272 n.5 (2017); *see also id.* & n.13 (discussing *Yeoman v. Commonwealth*, 983 S.W.2d 459 (Ky. 1998), and characterizing *Yeoman*’s holding as: “A foundation’s grant of money to a state to fund a health care program does not constitute payment of salaries of governmental officials by a private party.”). *See generally Construction and application of constitutional or statutory provision that member of Congress or state legislature shall not, during term for which he is elected, be appointed or elected to any civil office which shall have been created or the emoluments of which shall have been increased during the term for which he was elected*, 118 A.L.R. 182 (1939).

35. *See, e.g.,* FREDERICO B. MORENO, PHILIPPINE LAW DICTIONARY 311 (2007) (defining “emolument” as “[f]ees, fixed salary, and compensation which the incumbent of an office is by law entitled to receive because he holds such office”); Richard Krever, *Taming Complexity in Australian Income Tax*, 25 SYDNEY L. REV. 467, 474 (2003) (“[A]n English court [may] find that a particular type of payment was not an emolument from office as required by UK income tax law”); *cf.* Income and Corporation Taxes Act, 1988, pt. V, ch. IV, c. 1, § 192(1) (U.K.), <https://perma.cc/77C8-6FMR> (defining “foreign emoluments” as extending to emoluments associated with foreign “offices” and “employments”).

extends to what an officeholder is “by law entitled to receive.” No one is legally entitled to a “present.” So a mere present cannot fall under the aegis of the Presidential Emoluments Clause, which uses only *emoluments*-language. Bribes are illegal; by contrast, emoluments are legal entitlements. It follows that the two categories are mutually exclusive. Thus a plaintiff alleging a bribe cannot seek relief under the Presidential Emoluments Clause (using only *emoluments*-language) or the Foreign Emoluments Clause (using *emoluments*-language and *presents*-language). Finally, business transactions for value are *voluntary* and *private*; emoluments, by contrast, are legal entitlements *mandated* by *public* laws or regulations. The terms of business transactions are *negotiated* (or, at least, potentially negotiable); by contrast, emoluments are *fixed* by law. Even applying the most free-form³⁶ living constitutionalism,³⁷ there is simply no principled way to squeeze or translate³⁸ business transactions for value into the language of “emoluments,” nor is that plain result changed by recharacterizing a business transaction for value as a present or bribe.

For the reasons elaborated above, it is fair to conclude that business transactions for value are not encompassed by the term “emolument” as used in the Constitution.³⁹

36. See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995). Compare First Amended Complaint, *CREW v. Trump*, *supra* note 1, at 58 (filed by Laurence H. Tribe et al.) (“Plaintiffs allege that . . . together, the phrases ‘present’ and ‘Emolument . . . of any kind whatever’ under the Foreign Emoluments Clause cover *anything* of value, including above- or below-market rates . . .” (emphasis added)), with LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 14 & n.23 (1991) (quoting Justice Joseph Story as stating: “How easily men satisfy themselves that the Constitution is exactly what they wish it to be.”).

37. See Tribe et al., *supra* note 1 (advocating a “living constitutional[ism]” methodology); Matz & Tribe, *supra* note 1, at 9 (same).

38. Cf. Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125.

39. Indeed, given the definition for “emoluments” adopted by the Supreme Court in *Hoyt* and used by state courts, a federal officer’s application for and receipt of a regulatory, licensing, or other foreign government granted benefits, do not convert such benefits into constitutionally proscribed “emoluments.” If a foreign government granted benefit is given in a *quid pro quo* exchange for official action by a federal officer, such a transaction is an obvious bribe, not a constitutionally forbidden “emolument.” See *supra* note 4.

DISCRIMINATORY LAWYERS IN A DISCRIMINATORY BAR: RULE 8.4(G) OF THE MODEL RULES OF PROFESSIONAL RESPONSIBILITY

Lady Justice is blindfolded; her servants are not. Instead, because they are human, their predilections and aversions abound. A central challenge of the legal system, then, is how to manage the inevitable tension between impartial justice and biased agents. In some situations, the response is a strict rule against bias. Judges, for example, must avoid even “the appearance of impropriety.”¹ Similarly, the Model Code of Judicial Conduct prohibits membership in organizations that “practice[] invidious discrimination.”² But in other situations, bias is allowed. For example, an attorney can escape court-appointed representation when “the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.”³ We doubt the ability of attorneys to advocate for people or positions they find morally repugnant, and we recognize that clients will suffer from the resulting deficient representation.⁴ More generally, attorneys need not volunteer to represent any particular client.⁵ Even though this means some clients might not receive the most skilled attorney, it also means that lawyers have considerable ability to avoid clients of whom they disapprove.

1. ABA MODEL CODE OF JUDICIAL CONDUCT r. 1.2 (AM. BAR ASS’N 2011). This extends to a ban on manifesting bias and prejudice. *Id.* at r. 2.3(B).

2. *Id.* at r. 3.6(A). See generally Andrew L. Kaufman, *Judicial Correctness Meets Constitutional Correctness: Section 2C of the Code of Judicial Conduct*, 32 HOFSTRA L. REV. 1293 (2004) (discussing, and noting problems with, this rule).

3. MODEL RULES OF PROF’L RESPONSIBILITY r. 6.2(c) (AM. BAR ASS’N 2016) [hereinafter MODEL RULES].

4. But see David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1030–31 (1995) (discussing an NAACP lawyer’s representation of the Klan on a First Amendment issue).

5. MODEL RULES, *supra* note 3, at r. 6.2 cmt. 1.

The American Bar Association's most recent attempt to deal with the tension between bias and justice is Model Rule 8.4(g).⁶ The Rule bans both "harassment" and "discrimination" by lawyers against eleven protected classes. It applies to essentially every aspect of an attorney's professional life—to "conduct related to the practice of law."⁷

There are two opposing reactions to this Rule. Some argue it is needed to prevent sexual harassment, invidious discrimination, and other evils.⁸ Others criticize the Rule, claiming it will suffocate vigorous advocacy and exclude unpopular views from the legal profession.⁹

This Note ventures into that debate. Part I explores the two positions on Rule 8.4(g). Those who favor it desire to promote

6. The ABA's Model Rules of Professional Responsibility are not themselves binding on attorneys. They are nevertheless extremely influential; many states follow the ABA's guidance.

7. MODEL RULES, *supra* note 3, at r. 8.4(g). In this sense, Rule 8.4(g) is similar to the Model Code of Judicial Conduct's prohibition on judicial membership in organizations that "practice invidious discrimination." *See supra* note 2 and accompanying text.

8. *See, e.g.,* Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS (forthcoming 2017), <https://ssrn.com/abstract=2870053> [<https://perma.cc/2MRG-TJKP>]; Elizabeth Olsen, *Goodbye to 'Honeys' in Court, by Vote of American Bar Association*, N.Y. TIMES, Aug. 10, 2016, at B3; Noah Feldman, *Lawyers Can Be Zealous Without Being Nasty*, BLOOMBERG VIEW (Aug. 7, 2016 10:30 AM), <https://www.bloomberg.com/view/articles/2016-08-07/lawyers-can-be-zealous-without-being-nasty> [<http://perma.cc/EL9X-CE5J>]; The Federalist Society, *Debate: ABA Model Rule 8.4*, YOUTUBE (Mar. 4, 2017), <https://youtu.be/cOivGxOUx4g> [<https://perma.cc/Q77N-HT8L>] [hereinafter Weiner, *Debate*] (remarks from Robert Weiner).

9. *See, e.g.,* Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g): The First Amendment and "Conduct Related to the Practice of Law"*, 30 GEO. J. LEGAL ETHICS (forthcoming 2017), <https://ssrn.com/abstract=2888204> [<https://perma.cc/SJ5N-QNVL>]; Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, HERITAGE FOUND. (Oct. 6, 2016) (Legal Memo. No. 191), <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf> [<https://perma.cc/ECK9-9MVZ>]; Edwin Meese III & Kelly J. Shackelford, *How the lawyers plan to stifle speech and faith*, WASH. TIMES (Aug. 17, 2016), <http://www.washingtontimes.com/news/2016/aug/17/how-the-lawyers-plan-to-stifle-speech-and-faith> [<https://perma.cc/2NFD-SE9Z>]; Eugene Volokh, *A speech code for lawyers, banning viewpoints that express 'bias,' including in law-related social activities*, WASH. POST (Aug. 10, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2> [<https://perma.cc/82CF-V7V4>].

professional decorum, create an inclusive profession, and protect minority clients. Those opposed are concerned about chilling First Amendment activities and depriving clients with discriminatory views of effective representation. Part II then discusses how the Rule might be interpreted or amended so as to vindicate many of the Rule's objectives while satisfying many of the legitimate concerns about over-broad regulations. These amendments would narrow the definition of "discrimination," interpret broadly the existing protection for "legitimate advocacy," and restrict the scope of regulated activity. Finally, Part III addresses concerns that the proposed amended rule leaves too much room for discrimination. It argues that preventing harassment through informal means avoids concerns about establishing a "speech code" while still distancing the profession from discriminatory actions. At the same time, it allows the Bar to protect freedom of expression and the institutional diversity needed for meaningful discourse.

I. ARGUMENTS FOR AND AGAINST THE RULE

The debate over Rule 8.4(g) occurs on two levels. One is interpretive: how far does the Rule actually reach? That is the focus of Part I.A. The other is substantive: should the Rule reach as far as it does? Parts I.B and I.C consider substantive arguments for and against the Rule.

A. *Rule 8.4(g) is susceptible to multiple interpretations*

We begin with the interpretive debate. Rule 8.4(g) states:

It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.¹⁰

10. MODEL RULES, *supra* note 3, at r. 8.4(g).

Unfortunately, the Rule itself does not define its key terms: “harassment,” “discrimination,” and “conduct related to the practice of law.” For that, one must look to the comments. Comment 3 discusses what is meant by “harassment” and “discrimination,” stating that:

[D]iscrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).¹¹

Comment 4 defines “conduct related to the practice of law” to include “representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.”¹²

Yet even with this commentary, substantial ambiguity remains about what the Rule actually prohibits. Under a narrow interpretation, the Rule mirrors existing non-discrimination and anti-harassment laws.¹³ For example, sexual harassment is only actionable under Title VII of the Civil Rights Act of 1964 if it is “sufficiently severe or pervasive,”¹⁴ and the Rule may simply be an internal means of preventing what existing laws

11. *Id.* at r. 8.4(g) cmt. 3. According to Comment 4, the ban on discrimination does not reach “diversity and inclusion” initiatives, so affirmative action hiring policies are allowed. *Id.* at r. 8.4(g) cmt. 4. However, this creates concerns about viewpoint discrimination. See *infra* notes 33–38 and accompanying text. It also indicates that the Rule is capacious. Otherwise, no exception for “diversity and inclusion” initiatives would be needed.

12. *Id.* at r. 8.4(g) cmt. 4.

13. For example, some of the Rule’s supporters argue that the Rule targets conduct, not speech. See Weiner, *Debate*, *supra* note 8 (beginning at 29:20). But see *infra* note 53 and accompanying text.

14. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986); see also *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999); V. Blair Druhan, Note, *Severe or Pervasive: An Analysis of Who, What, and Where Matters When Determining Sexual Harassment*, 66 VAND. L. REV. 355, 356 (2013).

already proscribe.¹⁵ Comment 3's reference to the "substantive law of antidiscrimination and anti-harassment statutes and case law"¹⁶ supports this reading. Similarly, situating the Rule in the Model Rules of Professional *Conduct*, in a provision entitled *Misconduct*, one might conclude that the Rule focuses on *conduct*, not speech.¹⁷

The narrow reading is not the only permissible one, however. Comment 3 says statutes and case law "may" guide the Rule's application—not that they "must."¹⁸ And terms like "harmful," "bias," "prejudice," "derogatory," and "demeaning" are expansive. Under a sufficiently broad reading, "bias or prejudice" could extend to mere disapproval or criticism, and "conduct related to the practice of law" could include what is said between friends over lunch in the law firm cafeteria.

Thus, the text is susceptible to multiple interpretations. Some who oppose the Rule tend to rely on a sweeping interpretation. By contrast, many who support it adhere to a narrower reading. (Of course, some could support even the most expansive reading of the Rule.) How one interprets the Rule's text influences how they view its substance. And those substantive discussions must take place—the task to which this Note now turns.

15. For example, in one jurisdiction an ethics violation had to be predicated on a criminal conviction. See Lorelei Laird, *Discrimination and harassment will be legal ethics violations under ABA model rule*, ABA J. (Aug. 8, 2016 6:36 PM), http://www.abajournal.com/news/article/house_of_delegates_strongly_agrees_to_rule_making_discrimination_and_harass [https://perma.cc/W3CG-XSSZ]. Rule 8.4(g) might simply be a more efficient means of reaching the same result by allowing the Bar to determine for itself whether wrongdoing had occurred.

16. MODEL RULES, *supra* note 3, at r. 8.4(g) cmt. 3.

17. This was a central argument raised by one of the Rule's supporters, Robert Weiner, at the Federalist Society's 2017 National Student Symposium at Columbia Law School. See Weiner, *Debate*, *supra* note 8 (beginning at 29:15).

18. In fairness, the ABA notes that Rule 8.4(g) might permit what substantive law prohibits. MYLES V. LYNK, ABA STANDING COMM. ON ETHICS AND PROF'L RESPONSIBILITY, REPORT TO THE HOUSE OF DELEGATES 1, 7 (Aug. 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf [https://perma.cc/3XY9-UP7R] [hereinafter LYNK REPORT]. But that is only because "substantive law . . . is not necessarily dispositive in the disciplinary context." *Id.* The mismatch can go both ways.

B. *The legal profession has a strong interest in preventing harassment and discrimination*

Substantively, there are at least three reasons for supporting Rule 8.4(g)—regardless of whether it is broad or narrow in scope. A central motivation appears to be protecting those who experience discrimination and harassment. The government already bans discrimination and harassment in some aspects of life, and “exclusion” is a cardinal sin to most in modern society. Codifying that moral judgment is quite understandable. Those who support the rule point out instances where attorneys have been sexually harassed or otherwise subject to odious discrimination.¹⁹

A second reason is that discrimination and harassment may “undermine confidence in the legal profession and the legal system.”²⁰ If attorneys make offensive remarks or treat others as inferiors, yet suffer no consequences, then those in protected classes will begin to doubt whether the legal system truly protects their interests. Just as institutions that failed to speak out against Jim Crow entrenched segregation, the Bar’s failure to address discrimination supports discrimination.²¹ Thus, if a lawyer turns away a would-be client based on race or religion, that individual would reasonably conclude that the legal system did not protect his interests.

A third reason for the Rule is that lawyers have long been viewed as a quasi-aristocracy.²² That means lawyers have obligations beyond those that apply to the broader community,

19. See, e.g., Gillers, *supra* note 8, at 5 n.21, 46–48; see also Blackman, *supra* note 9, at 4.

20. MODEL RULES, *supra* note 3, at r. 8.4(g) cmt. 3.

21. Cf. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 627 (1991) (“The selection of jurors [in a civil case] represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race.”); *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding that enforcing racially discriminatory housing covenants was state action for Fourteenth Amendment purposes).

22. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 254–58 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000).

and they ought to model acceptable conduct.²³ Therefore, the ABA House of Delegates adopted Rule 8.4(g). It is not alone: 25 jurisdictions already have rules restricting discrimination and harassment in some fashion, even if most do not go as far as Rule 8.4(g).²⁴

C. *There are concerns about chilling First Amendment activities and legal representation*

As applied to the “harassment” aspect of the Rule, the above rationales are generally accepted. This might be because the term “harassment” conjures up legal standards about severity and pervasiveness, thus narrowing the zone of possible ambiguity. Laws against harassment have been applied, tested, and upheld over the years, so similar rules of professional responsibility ruffle few feathers.²⁵

Rule 8.4(g) is opposed so strongly, however, because of concerns about nondiscrimination. “Discrimination” is, by itself, nothing more than choosing between options.²⁶ The legal system only cares about discrimination when that choice turns on

23. See LYNK REPORT, *supra* note 18, at 1 (“Our rules of professional conduct require more than mere compliance with the law.” (quoting ABA President Paulette Brown)).

24. *Id.* at 5 n.11. Thirteen other jurisdictions have restrictions on employment in their comments. *Id.* at 6 n.12. However, most states do not go as far as the ABA. See *infra* Part II; cf. Gillers, *supra* note 8, at 13 (“Although courts in twenty-five American jurisdictions . . . have adopted anti-bias rules in some form, those rules differ widely.” (footnote omitted)).

25. I recognize that “unwelcome conduct” is a potentially broad term and that “harassment” is but a subset of “discrimination” more broadly. If harassment means more under the Rule than it does under Title VII, the concerns discussed below also apply to harassment. This is also not to say that there have never been unconstitutional applications of Title VII. See Volokh, *supra* note 9 (briefly noting one recent, possibly unconstitutional application).

26. See, e.g., *Discrimination*, 1 THE WOLTERS KLUWER BOUVIER LAW DICTIONARY: DESK EDITION 847 (2012) (“Perceiving or treating people, or things, differently from one another.”); *Discriminate*, 4 THE OXFORD ENGLISH DICTIONARY 757–58 (2d ed. 1989) (“To make or constitute a difference in or between; to distinguish, differentiate.”); *Discriminate*, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 564 (2d ed. 1987) (“to make or constitute a distinction”); *Discriminate*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 648 (1981) (“distinguish between or among”); see also *Discrimination*, BLACK’S LAW DICTIONARY 566 (10th ed. 2014) (“The intellectual faculty of noting differences and similarities.”).

an impermissible basis; that is, when it is morally wrong.²⁷ So as society modifies the definition of what is morally wrong to include new behaviors, the Rule's prohibitions also change. Although this is a concern under a narrow interpretation of Rule 8.4(g), it is most prominent under the broad reading.

Consider the example of a hypothetical public interest firm (call it "Attorneys for Marriage") that disagrees with *Obergefell v. Hodges*²⁸ on both religious and constitutional grounds.²⁹ If an AFM lawyer publicly criticizes *Obergefell*, she could easily violate Rule 8.4(g). Under a broad reading of the Rule, she "manifests bias or prejudice" against the LGBTQ community when she expresses her belief that marriage should be between one man and one woman. As a practicing attorney speaking on behalf of a public interest law firm, her conduct is "related to the practice of law" (but may not, depending on the circumstances, constitute "advocacy" on a particular client's behalf).

Comment 3's statement that the attorney's words or deeds must be "harmful" does not quell these fears. Although one might read "harmful" to require an immediate victim (such as those created by a face-to-face confrontation), the text does not compel that reading. In fact, it makes little sense to require an immediate victim given that one of the Rule's purposes is protecting the profession's reputation. What is said behind closed doors might not harm the intended audience, but it has the potential to do so.³⁰ There are also more fundamental concerns about what is harmful (and who decides). Is it subjective offense, or is it an objective injury more concerned with *how* something was said, as opposed to *what* was said?³¹

27. See Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, in MATTERS OF FAITH: RELIGIOUS EXPERIENCE AND LEGAL RESPONSE 194, 197 (Austin Sarat ed., 2012) ("It is not 'discrimination' that is wrong; instead, it is *wrongful* discrimination that is wrong.").

28. 135 S. Ct. 2584 (2015).

29. *Obergefell* held that under the Fourteenth Amendment, same-sex couples could not be deprived of the "fundamental right" to a civil marriage. *Id.* at 2604–05.

30. See Gillers, *supra* note 8, at 30 ("Cases have not required proof of an effect on the individual who is the target of biased or harassing conduct. Rather, they talk about the harm to the legal profession or the system or goals of justice.").

31. Professor Gillers argues that "the question should be whether the words or comments harm the justice system because they create the impression that the rule of law can be distorted by name calling grounded in identity." Gillers, *supra*

Reading the Rule this expansively creates free speech concerns of both the legal and political varieties. On the legal front, the Supreme Court has repeatedly held that rules of professional responsibility can violate the First Amendment.³² And as the Court held in *R.A.V. v. City of St. Paul*³³ and elsewhere, viewpoint discrimination is unconstitutional.³⁴ If Rule 8.4(g) is used to discipline lawyers with unpopular views, it implicates the Constitution.³⁵

The Rule's defenders might reply that *R.A.V.* stated (in dicta) that Title VII's ban on sex discrimination could be justified under the "secondary effects" doctrine.³⁶ Moreover, they might point out, several lower courts have squarely upheld nondiscrimination rules against free speech challenges.³⁷ This reply would be well-founded. To the extent Rule 8.4(g) mimics Title VII, it may well survive constitutional scrutiny. But that ignores the full weight of

note 8, at 30–31. Thus, "some comments will be mild enough that they should not be seen as harmful," but other comments will violate the Rule even if the immediate target of the comment did not object. *Id.* at 31. However, this limitation cannot be found in the plain text of Rule 8.4(g)—it is imported into the rule. *See id.* at 31 (looking at Title VII even though "the parallel is not exact" (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998))). Because the Rule's mens rea requirement is negligence, *see* MODEL RULES, *supra* note 3, at r. 8.4(g) ("knows or reasonably should know"), it is a malleable standard. This gives no real protection against expansive definitions of harm.

32. *See, e.g.,* *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1054 (1991) (plurality opinion) (articulating this rule); *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (invalidating a rule of judicial ethics).

33. 505 U.S. 377 (1992).

34. *Id.* at 391.

35. *See* TEX. ATT'Y GEN. OP. No. KP-0123, at 3–5 (Dec. 20, 2016) (concluding that Rule 8.4(g) is likely unconstitutional on free speech, freedom of religion, and freedom of association grounds); Lindsey Keiser, *Lawyers Lack Liberty: State Codifications of Comment 3 of Rule 8.4 Impinge on Lawyers' First Amendment Rights*, 28 GEO. J. LEGAL ETHICS 629, 638 (2015) (arguing this type of rule is unconstitutional).

36. 505 U.S. at 389. The secondary effects doctrine "provides that a regulation will be treated as content-neutral and subject to intermediate scrutiny, despite its content-discriminatory form, if the primary purpose of the regulation is to control the secondary effects rather than the primary effects of speech." John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 292 (2009).

37. *See, e.g.,* *Booth v. Pasco Cnty.*, 757 F.3d 1198, 1212 (11th Cir. 2014); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1534 (M.D. Fla. 1991). *But see* *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (Alito, J.) ("When laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications."); *id.* at 206–10 (discussing cases that question anti-harassment laws); Blackman, *supra* note 9, at 5 n.10 (same).

the objection. By requiring severity or pervasiveness, Title VII is more about conduct than words. Rule 8.4(g) seemingly goes beyond that, perhaps restricting the offhand comment made to a coworker or the remark muttered in presumed confidence at a law firm happy hour.³⁸ As the Rule's critics interpret things, all that is needed under the Rule is that an attorney demonstrate bias or prejudice; mere words are enough. And the lower the disciplinary bar, the closer the Constitution looms.

These First Amendment concerns exist for all lawyers, but they are especially high for "cause lawyers." Such lawyers place a high premium on "political ideology, public policy, and moral commitment," and they often represent minority interests.³⁹ Consider again the hypothetical cause lawyer from Attorneys for Marriage. She holds views that will likely be deemed biased or prejudiced. To be sure, the Rule would protect AFM's right to represent clients.⁴⁰ But lawyers do more than represent clients. They talk to coworkers, go out to dinner, hire new associates, and more. Comment 4 reflects this reality when it defines "conduct related to the practice of law" to include "interacting with . . . coworkers" and "participating in . . . social activities in connection with the practice of law."⁴¹ But regulating internal conduct at AFM (whether it be lunch conversations or hiring practices) generates freedom of association concerns.⁴²

38. See MODEL RULES, *supra* note 3, at r. 8.4(g) cmt. 4 (defining "conduct related to the practice of law" to include "interacting with . . . coworkers" and "participating in . . . social activities in connection with the practice of law"). They also admit that as-applied challenges can be raised. See Weiner, *Debate*, *supra* note 8, at (beginning at 30:45).

39. Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in CAUSE LAWYERING 3, 4 (Austin Sarat & Stuart Scheingold eds., 1998).

40. MODEL RULES, *supra* note 3, at r. 8.4(g) & cmt. 5.

41. *Id.* at r. 8.4(g) cmt. 4.

42. Imagine a law firm existed solely to represent Christians on religious liberty matters (a so-called "legal ministry"). The "legal ministry" could understandably wish to hire only Christians, an act that is arguably protected under Title VII. See 42 U.S.C. § 2000e-1(a) (2012); *cf.* Spencer v. World Vision, Inc., 570 F. Supp. 2d 1279, 1283 (W.D. Wash. 2008), *aff'd*, 619 F.3d 1109 (9th Cir. 2010), and *aff'd*, 633 F.3d 723 (9th Cir. 2011). Yet under Rule 8.4(g), the group could not so limit its hiring practices because it excludes other religions. This reading is confirmed by the fact that Comment 4 protects "diversity and inclusion initiatives," which includes "implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees." MODEL RULES, *supra* note 3, at r. 8.4(g) cmt. 4. If the

The Rule's supporters will argue that 8.4(g) does not restrain "legitimate advice or advocacy." That is true. But what is "illegitimate" advocacy?⁴³ Does that refer to the issues being litigated, or the manner in which they are litigated? And who decides what is "illegitimate"? Because litigation can be a form of expression,⁴⁴ a broad reading of the Rule creates constitutional problems.

Moving beyond the legal objections, there are policy objections. Because America is a nation of 320 million people, its legal profession is a mosaic: attorneys are black and white, Muslim and Christian, male and female, gay and straight, married and single. Some came to America recently; others can trace their ancestry back to the *Mayflower*—or earlier. And as much as the ABA thinks these distinctions are morally irrelevant, many people disagree. For instance, it appears that many who criticize Rule 8.4(g) believe that sexual orientation, gender identity, and religion are morally acceptable grounds for deci-

Rule did not regulate hiring and firing, then the specific protection for affirmative action programs is superfluous.

Professor Gillers argues that lawyers could not turn away *clients* because of the client's religion or other protected category. See Gillers, *supra* note 8, at 33 (writing that Rule 8.4(g) "limits a lawyer's right to decline or withdraw from a representation . . . where the lawyer's reason is the client's membership in a protected group"); *id.* at 39 (writing that "Rule 8.4(g) would indeed restrict lawyers" who, for example, refused on religious grounds to draft a prenuptial agreement for a same-sex couple in response to a hypothetical raised by the United States Conference of Catholic Bishops). Of course, he concedes that a First Amendment defense is available. See *id.* at 37–39.

43. "Legitimate" modifies "advocacy" as well as "advice." This is because the "series-qualifier canon" instructs that unless there is "some other indication, the modifier reaches the entire enumeration." ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 147 (2012) (citing cases). For example, in interpreting the Fourth Amendment's protection "against unreasonable searches and seizures," "the adjective *unreasonable* qualif[ies] the noun *seizures* as well as the noun *searches*." *Id.* (quoting U.S. CONST. amend. IV); see also *Lockhart v. United States*, 136 S. Ct. 958, 970–72 (2016) (Kagan, J., dissenting) (discussing the series-qualifier canon). At the Federalist Society debate on the Rule, the Rule's supporter could not give a definition of "illegitimate" advocacy. See Weiner, *Debate*, *supra* note 8 (beginning at 1:06:15).

44. See *NAACP v. Button*, 371 U.S. 415, 429 (1963) (stating that for the NAACP, litigation is "a form of political expression" protected by the First Amendment); *id.* at 431 ("For [a group such as the NAACP], association for litigation may be the most effective form of political association.").

sionmaking. Those views, though controversial, are deeply held and contribute to diversity.⁴⁵

II. THREE PROPOSED AMENDMENTS

As Part I demonstrated, Rule 8.4(g) has its supporters and detractors. But because the Rule is susceptible to multiple interpretations, it is hard to know who is right. This Part therefore proposes three amendments in hopes of quelling some of the concerns while still vindicating some of the objectives.

A. *Narrowly define "harassment" and "discrimination"*

Rule 8.4(g)'s substantive standards should mirror those in existing anti-harassment and nondiscrimination laws.⁴⁶ Several states already do this by prohibiting only "unlawful" discrimination.⁴⁷ This does not mean disciplinary proceedings must come after criminal or civil proceedings; it only means the substantive standards should be the same.⁴⁸

Mirroring existing laws has several components. In part, it requires a narrow definition of what is a "harmful" word or deed. As debates about campus speech codes demonstrate, some believe that merely expressing disagreement is harmful.⁴⁹ Given our "profound national commitment" to the free exchange of ideas,⁵⁰ that cannot be the rule for lawyers. Instead, harm should be judged by an objective standard: would a reasonably sensitive individual consider it "hostile or abusive"?⁵¹

45. Of course, discrimination is often unambiguously evil. And as I argue below, certain forms of discrimination should be disciplined. An important question, though, is how severe or pervasive the discrimination must be before discipline is involved.

46. Professor Blackman makes the same suggestion. See Blackman, *supra* note 9, at 23–24.

47. See, e.g., CAL. RULES OF PROF'L CONDUCT r. 2-400(B); ILL. RULES OF PROF'L CONDUCT r. 8.4(j); N.Y. RULES OF PROF'L CONDUCT r. 8.4(g); WASH. RULES OF PROF'L CONDUCT r. 8.4(g).

48. See *Cincinnati Bar Assn. v. Young*, 731 N.E.2d 631, 638–39 (Ohio 2000).

49. See, e.g., KIRSTEN POWERS, *THE SILENCING: HOW THE LEFT IS KILLING FREE SPEECH* 14 (2015) ("Sometimes, the mere suggestion of holding a debate is cast as an offense.").

50. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

51. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environ-

Is the prohibited conduct sufficiently pervasive or severe? This approach means that what is “harmful” must look far more like physical action than “mere” words. This is because unless “mere” words are so harmful that they constitute fighting words (or some other class of unprotected speech), they are protected against content-based regulation.⁵²

In addition to avoiding many of the constitutional issues, mirroring existing laws provides attorneys with (relatively) clear guidance about what is acceptable behavior. It permits reliance on decades of precedent, thus avoiding the uncertainty that always accompanies new rules. That clarity benefits those who might otherwise discriminate against or harass others, and it also makes it easier to identify where conduct crosses the line.

This amendment would not render the Rule irrelevant. One of the reasons for the Rule is a belief that disciplinary proceedings should not depend on a court or agency’s finding of discrimination.⁵³ Narrowly defining “harassment” and “discrimination” does not compromise that goal. Moreover, the Rule holds attorneys to a higher standard than the rest of the population when it protects more classes of individuals than do many existing laws.⁵⁴

ment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.”); *see id.* at 23 (“[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance. The effect on the employee’s psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.”).

52. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 409 (1989) (citing, *inter alia*, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942)) (discussing categories of unprotected speech); *cf.* Alexander Tsesis, *Inflammatory Speech: Offense Versus Incitement*, 97 MINN. L. REV. 1145, 1148 (2013) (“Hurt feelings are not legally cognizable harms. On the other hand, speech that poses a threat is beyond the ambit of free speech protections.”).

53. *See supra* note 15. Illinois, for instance, predicates professional misconduct on a finding of discrimination by “a court or administrative agency.” ILL. RULES OF PROF’L CONDUCT r. 8.4(j).

54. *See, e.g., Rotunda, supra* note 9, at 6 (“Many states have no law banning gender identification discrimination.”). This Note does not address whether Rule 8.4(g) *should* protect the eleven categories that it does. That is a discussion for an-

B. Broadly construe “legitimate advocacy”

One particularly confusing aspect of Rule 8.4(g) is its promise that it would not affect “legitimate advice or advocacy.” Under one possible interpretation, “legitimate” is a moral judgment of overall ends. For instance, Attorneys for Marriage might be considered to engage in illegitimate advocacy because it wants to undo *Obergefell*. But this reading runs contrary to the professional ideal of being permitted to represent *any* client and the goals that client might have. Thus, “legitimate” must refer to something involved in the process of advocacy, not the overall objective. Yet even then, a controversial discussion of a protected class might be relevant to the legal issue: even if that discussion is not identical to the end goal. For example, a federal prosecutor’s closing argument might criticize an accused terrorist’s religious motivations as being un-American and oppressive. More controversially, an attorney litigating an affirmative action case might invoke the widely-criticized “mismatch theory,” which says that affirmative action admits minorities to schools they are not qualified to attend.⁵⁵

At the same time, however, there are legitimate concerns about how attorneys do their jobs. For example, even though Comment 5 states that a discriminatory peremptory challenge does not automatically violate Rule 8.4(g),⁵⁶ it is easy to see why such a challenge might violate the Rule in certain cases.⁵⁷ Moreover, attacking a witness because she is black,

other day. Cf. LOUIS ARMSTRONG, *So Little Time (So Much To Do)*, on COMPLETE LOUIS ARMSTRONG DECCA SESSIONS 1935–1946 (Mosaic Records 2009) (1938).

55. Justice Scalia once referenced the “mismatch theory” in oral arguments. See Transcript of Oral Argument at 67–68, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981). He then faced a sharply negative reaction. See, e.g., Dorothy Brown, *Scalia and the misguided ‘mismatch’ theory*, CNN (Dec. 14, 2015 10:35 AM), <http://www.cnn.com/2015/12/13/opinions/brown-scalia-mismatch-theory> [<https://perma.cc/NSD8-39X6>]; Anemona Hartocollis, *Fresh Fuel in a Long Academic Debate*, N.Y. TIMES, Dec. 11, 2015, at A22.

56. MODEL RULES, *supra* note 3, at r. 8.4(g) cmt. 5.

57. See, e.g., FLA. RULES OF PROF’L CONDUCT r. 4-8.4(d); NEB. RULES OF PROF’L CONDUCT § 3-508.4(d). One possible example of an impermissible challenge is an unconstitutional one. Cf. *Georgia v. McCollum*, 505 U.S. 42, 59 (1992). For an in-depth discussion of this issue, see Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209 (2003).

transgender, or a member of any other protected class turns the courtroom into a hostile environment.

The adjective “legitimate” is not capable of resolving this dilemma. A better approach is to follow states that seem to define legitimate advocacy almost as a matter of *relevance*: if the protected class is an issue in the case, then arguments about that class are immune from disciplinary proceedings.⁵⁸ From that baseline, I would add that irrelevant arguments are still protected if they are not sufficiently harmful and unreasonable to warrant discipline. Defining “legitimate” in this way protects witnesses (and the legal system’s overall reputation) while still permitting vigorous advocacy. Moreover, it tracks what judges already do when they enforce civility⁵⁹ and exclude irrelevant or unduly prejudicial evidence.⁶⁰

C. Restrict the scope of regulated activity

Rule 8.4(g) regulates more conduct than many state rules.⁶¹ For example, Massachusetts only governs what attorneys do when “appearing in a professional capacity before a tribunal.”⁶² Texas has a broader rule, but it still requires a “connection to an adjudicatory proceeding.”⁶³ These rules make sense as part of maintaining decorum.⁶⁴ But Rule 8.4(g) goes further when it covers “interacting with . . . coworkers,” “operating or managing a law firm or

58. See N.D. RULES OF PROF’L CONDUCT r. 8.4(f); MASS. RULES OF PROF’L CONDUCT r. 3.4(i); NEB. RULES OF PROF’L CONDUCT § 3-508.4(d); N.M. RULES OF PROF’L CONDUCT r. 16-300; *In re Thomsen*, 837 N.E.2d 1011, 1012 (Ind. 2005) (per curiam). This approach could be read into rules against appealing to bias: assuming bias is irrelevant, relevant arguments are protected. See COLO. RULES OF PROF’L CONDUCT r. 8.4(g); IDAHO RULES OF PROF’L CONDUCT r. 4.4(a)(1).

59. See, e.g., FED. R. EVID. 611(a)(3) (instructing judges to “protect witnesses [on cross-examination] from harassment or undue embarrassment”); *Paramount Commc’ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 52 (Del. 1994) (considering an attorney’s “astonishing lack of professionalism and civility”).

60. See FED. R. EVID. 401–403.

61. See Blackman, *supra* note 9, at 13–15 (overviewing and categorizing state rules).

62. MASS. RULES OF PROF’L CONDUCT r. 3.4(i); see also N.M. RULES OF PROF’L CONDUCT r. 16-300.

63. TEX. RULES OF PROF’L CONDUCT r. 5.08(a); see also R.I. RULES OF PROF’L CONDUCT r. 8.4(d).

64. See, e.g., FED. R. EVID. 611(a)(3); *Paramount*, 637 A.2d at 52.

law practice; and participating in bar association, business or social activities in connection with the practice of law.”⁶⁵

This expansive scope is less problematic if harassment and discrimination are narrowly defined. But if the Rule is easily broken, then the aspects of life regulated by the Rule should be narrow.⁶⁶ Otherwise, the Rule will be worse than the problem it addresses. Biased comments do more damage to the legal profession when said in a courtroom than when said over drinks at a firm-sponsored happy hour. There may still be consequences, of course, but profession-wide concerns are not significantly implicated. And when “cause law firms” are subject to the Rule, concerns about the profession’s reputation are almost non-existent: if the firm publicly advocates for discriminatory laws, it should be irrelevant that similarly discriminatory statements are uttered inside the firm.

Similarly, Rule 8.4(g) is motivated in part by a desire to ensure that minorities know that the legal profession and the courts will safeguard minority interests. But referring to a monolithic “legal profession” lacks nuance. Legal institutions are interconnected, but an array of disconnected professionals work in that system. What one attorney says or does is not *automatically* imputed to others. Yes, imputations are sometimes warranted. This is particularly true if the court is directly involved, like when an attorney lies to a judge or breaks the law. But a lawyer who simply holds unpopular and biased beliefs does not inevitably reflect on other lawyers. Indeed, other attorneys can criticize his conduct. Assuming that discriminatory words or deeds always reflect on others fails to appreciate the subtleties of reality.

III. TWO FORMS OF DIVERSITY

Admittedly, the amendments just proposed restrict the Rule’s reach. But formal rules should not seek to prevent all

65. MODEL RULES, *supra* note 3, at r. 8.4(g) cmt. 4. A few other states have rules like Model Rule 8.4(g). *See, e.g.*, IND. RULES OF PROF’L CONDUCT r. 8.4(g); MD. RULES OF PROF’L CONDUCT r. 8.4(e); N.J. RULES OF PROF’L CONDUCT r. 8.4(g).

66. A similar point is also true. *See* Blackman, *supra* note 9, at 18 (“As speech bears a weaker and weaker connection to the delivery of legal services, the bar’s justification in regulating it becomes less and less compelling.”).

discriminatory words and deeds. Instead, the ABA should tolerate different beliefs even if it means individual lawyers will be intolerant. Moreover, the ABA is not without other options. Stated differently, there are two forms of diversity at play: *institutional* (referring to an organization's openness to intolerant and offensive views) and *interpersonal* (referring to how individual attorneys and firms interact with the public, other attorneys, and other firms). Rule 8.4(g) focuses on interpersonal diversity because it wants individual lawyers to not discriminate in various ways. It largely ignores institutional diversity because it risks excluding lawyers who disagree from the majority of the legal profession. This blend of institutional and interpersonal diversity is the wrong one, however.

If the ABA is committed to institutional diversity, it will not encourage jurisdictions to formally discipline those who disagree with certain moral judgments.⁶⁷ This matters if the ABA is to avoid becoming just another special interest group. Moreover, it is rooted in the American ideal of freedom to differ. As the Supreme Court wrote in a different context, "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."⁶⁸ Put differently, a tolerant and inclusive society includes "intolerant" people. It allows individuals to make their own moral judgments. That type of diversity means lawyers should not be subject to professional discipline—up to and including disbarment—for expressing uncouth or unpopular views.

If the Rule excludes (in the name of diversity) those with unpopular views, the legal profession ironically experiences a *decrease* in diversity. This affects non-lawyers because it makes it difficult for "biased" citizens to find like-minded attorneys. This, in turn, affects the quality of representation those clients receive. As Lincoln once wrote, "when you lack interest in the case the job

67. See JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE 87 (2016) ("Tolerance is the most important civic aspiration. It means a willingness to accept genuine difference, including profound moral disagreement."); see also *supra* Part I.C.

68. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

will very likely lack skill and diligence in the performance.”⁶⁹ This truth is even more potent when the lawyer actively disagrees with the position she must advocate. Even if one believes Rule 8.4(g) is a good idea, one must recognize that it will change how lawyers and clients deal with unpopular positions.⁷⁰

Protections for institutional diversity should affect how the ABA pursues interpersonal diversity. Rule 8.4(g) tries to mandate interpersonal diversity by disciplining noncompliant lawyers, but tolerance can also be promoted through informal means. Indeed, such methods are often more effective than formal rules. Through public proclamations and education campaigns, the ABA can demonstrate the conduct it wants lawyers to embrace.⁷¹ It can file amicus briefs⁷² and start initiatives to better represent minority

69. ABRAHAM LINCOLN, *Fragment: Notes for a Law Lecture* (July 1, 1850?), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 81, 82 (Roy P. Basler ed., 1953).

70. Cf. TOCQUEVILLE, *supra* note 22, at 500 (“If to save the life of a man one cuts off his arm, I understand it; but I do not want someone to assure me that he is going to show himself as adroit as if he were not one-armed.”).

71. See, e.g., ABA PRESIDENTIAL DIVERSITY INITIATIVE, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 17–40 (Apr. 2010), http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf [<https://perma.cc/S4QF-6KEJ>] (recommending diversity-enhancing steps for law schools, law firms, the government, and bar associations).

72. See, e.g., Brief of the American Bar Association as Amicus Curiae in Support of Respondents and Urging Affirmance at 1, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981) (supporting affirmative action); Brief of Amicus Curiae American Bar Association in Support of Petitioners at 1, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-571 & 14-574) (supporting same-sex marriage); Brief of Amicus Curiae The American Bar Association in Support of Respondent Edith Schlain Windsor on the Merits Question at 1, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (opposing the Defense of Marriage Act, which defined marriage as an exclusively heterosexual union); Brief of the American Bar Association as Amicus Curiae in Support of Respondents, *Christian Legal Society v. Martinez* at 1–4, 561 U.S. 661 (2010) (No. 08-1371) (supporting a nondiscrimination policy that kept a Christian student group from becoming a recognized student organization); Brief of Amicus Curiae American Bar Association in Support of Petitioners at 3, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (opposing laws against homosexual conduct); Brief of the American Bar Association as Amicus Curiae in Support of Respondent at 3, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (No. 99-699) (supporting non-discrimination laws that would require the Boy Scouts to retain a gay scoutmaster); Brief of the American Bar Association as Amicus Curiae in Support of Respondents at 2–3, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) (opposing a state law that restricted the ability to prevent sexual orientation discrimination).

communities.⁷³ It can also use reasoned discussion to reinforce norms of tolerance and inclusion, resorting to formal discipline only in rare cases.⁷⁴ This approach is not moral relativism—the majority still expresses its moral commitments. But it uses persuasion and personal influence, not the rules of professional responsibility. The unpersuaded and intolerant attorney remains a member of the legal community.

IV. CONCLUSION

Lawyers come from many backgrounds and perspectives. The American tradition respects that diversity by protecting freedom of association and expression. This is in tension with the ABA's desire to represent all persons equally, prevent harmful discrimination, and exemplify morality. Model Rule 8.4(g) attempts to resolve the tension, but it goes too far in one direction and fails to appreciate institutional diversity. It also implicates the First Amendment.

The ABA should therefore amend the Rule. It should encourage states to rely on informal regulation more than formal disciplinary procedures. Finally, it should commit itself to protecting institutional diversity by not excluding those who hold unpopular views.

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73. See, e.g., *Office of Diversity and Inclusion*, ABA, <http://www.americanbar.org/groups/diversity.html> [<https://perma.cc/BK7A-T4LQ>] (last accessed May 16, 2017).

74. That is, in the cases that violate the Rule as amended in Part II of this Note.

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**RIGHT BY PRECEDENT, WRONG BY RFRA: THE
“SUBSTANTIAL BURDEN” INQUIRY IN *OKLEVUEHA
NATIVE AMERICAN CHURCH OF HAWAII, INC. V.
LYNCH*, 828 F.3D 1012 (9TH CIR. 2016)**

Not long ago, the United States Supreme Court reaffirmed that the Religious Freedom Restoration Act (“RFRA”)¹ is a robust protection of religious freedom.² Still, some federal circuits remain devoted to a more restrictive teaching.³ Recently, in *Oklevueha Native American Church of Hawaii, Inc. v. Lynch*,⁴ the Ninth Circuit held that a church and church founder who used peyote, cannabis, and other substances, purportedly “to enhance spiritual awareness or even to occasion direct experience of the divine,” had no claim for an exemption from laws governing cannabis.⁵ According to the court, because the assertedly religious⁶ actors believed that equivalent alternatives to cannabis use exist, they faced no “choice between obedience to their religion and criminal sanction” and thus no substantial burden under RFRA.⁷ In so holding, the *Oklevueha* court did right by Ninth Circuit precedent,⁸ but wrong by RFRA, which presumptively shields a person from *any* considerable hindrance of *any* religious exercise. Until it recognizes as much, the Ninth Circuit will deny claimants legal protection that they deserve.

1. 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

2. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

3. See, e.g., *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 618 (7th Cir. 2015), *vacated*, 136 S. Ct. 2007 (2016); *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 808 F.3d 1 (D.C. Cir. 2015) (denying rehearing en banc of *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229, 235 (D.C. Cir. 2014), *vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016)).

4. 828 F.3d 1012 (9th Cir. 2016).

5. *Id.* at 1014, 1017.

6. *Cf. id.* at 1015 (noting district court’s finding that prohibited actions were not religious).

7. *Id.* at 1016.

8. See *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008).

I. THE OKLEVUEHA DECISION

The story of *Oklevueha* begins with Michael Rex “Raging Bear” Mooney, who founded and leads the Oklevueha Native American Church of Hawaii, Inc.⁹ Mooney and Oklevueha described their religion as “peyotism” and called peyote “the significant sacrament,”¹⁰ but they “honor[ed] and embrac[ed] all entheogenic naturally occurring substances.”¹¹ In particular, they consumed cannabis “in addition to and in the [sic] substitute for their primary entheogenic sacrament, Peyote.”¹² They claimed that the purpose of this cannabis use was “similar to the purpose of many other intensive religious practices—to enhance spiritual awareness or even to occasion direct experience of the divine.”¹³ Mooney and Oklevueha sought “a declaration of their right to possess and distribute cannabis, and an injunction preventing the Government from prosecuting Church members for their cannabis-related activities.”¹⁴ On the plaintiffs’ theory, they had a right to an exemption under RFRA, the American Indian Religious Freedom Act, the Free Exercise Clause, and the Equal Protection Clause.¹⁵

After dismissing all but the RFRA claim, the district court granted summary judgment in favor of the government.¹⁶ Under RFRA, the plaintiffs must show that their practice is religious and substantially burdened.¹⁷ According to the court, Oklevueha and Mooney had shown neither.¹⁸ That “[p]laintiffs call[ed] their practice religious, call[ed] themselves peyotists, ha[d] included ‘Native American Church’ in their name, . . . [were] led by Mooney, a Native American,” and “declare[d] that they [were] allowed by law to use peyote” was

9. *Oklevueha*, 828 F.3d at 1014.

10. *Id.*

11. *Id.* at 1016.

12. *Id.* at 1014.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 1015.

17. 42 U.S.C. § 2000bb-1(a) (2012).

18. *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, No. CIV. 09-00336 SOM, 2013 WL 6892914, at *6 (D. Haw. Dec. 31, 2013).

insufficient, in the court's view, to establish that their cannabis use was an "exercise of religion" under RFRA.¹⁹ Moreover, because nothing in the record indicated that "cannabis [was] unique or essential to the exercise of [the plaintiffs'] alleged religion," the court held that the prohibition of use and distribution of cannabis was a mere inconvenience, not a substantial burden, on plaintiffs who might use other drugs for religious purposes instead.²⁰ Finding neither an exercise of religion nor a substantial burden, the district court denied the plaintiffs' RFRA claim and closed the case.²¹

The Ninth Circuit affirmed. Writing for the panel, Judge O'Scannlain assumed that plaintiffs were engaged in an "exercise of religion" but upheld summary judgment for lack of a "substantial burden."²² Following Ninth Circuit precedent, the court held that government "substantially burdens a person's exercise of religion" only when it forces individuals to "choose between following the tenets of their religion and receiving a governmental benefit" or when it "coerce[s] [them] to act contrary to their religious beliefs by the threat of civil or criminal sanctions."²³ Applying the second test, the court found that Mooney and Oklevueha faced no choice "between obedience to . . . religion and criminal sanction" because they did not attribute any "unique religious function" to cannabis and because they did not claim to lack equivalent alternatives.²⁴ Absent such a dilemma, the plaintiffs were not "coerced to act contrary to their religious beliefs," and thus had no RFRA claim.²⁵

Judge O'Scannlain distinguished the case at hand from *Burwell v. Hobby Lobby*²⁶ and *Holt v. Hobbs*.²⁷ In those cases, the *Oklevueha* court stressed, the government had contradicted a

19. *Id.* at *11.

20. *Id.* at *12.

21. *Id.* at *12–13.

22. *Oklevueha Native Am. Church of Haw., Inc. v. Lynch*, 828 F.3d 1012, 1015–16 (9th Cir. 2016).

23. *Id.* at 1016 & n.1 (citing *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008)).

24. *Id.* at 1016.

25. *Id.* (quoting *Navajo Nation*, 535 F.3d at 1070).

26. 134 S. Ct. 2751 (2014).

27. 135 S. Ct. 853 (2015).

religious requirement. In *Hobby Lobby*, the government had “demand[ed] that the businesses and their owners ‘engage in conduct that seriously violates their religious beliefs’ by requiring them to provide abortifacients or face significant financial penalties.”²⁸ In *Holt*, a “prison’s refusal to allow [an] inmate to grow a beard [had] forced him to choose between ‘engag[ing] in conduct that seriously violates [his] religious beliefs’ or ‘fac[ing] serious disciplinary action.’”²⁹ In the present case, by contrast, the government required abstention from an activity that the plaintiffs’ religion did not require. Thus, compliance with the mandate entailed no serious violation of religious belief.³⁰ In the *Oklevueha* court’s judgment, that distinction is dispositive under RFRA.³¹

II. RFRA’S “SUBSTANTIAL BURDEN”

Not for the first time, however, a past decision distorted human judgment in this case. Here, blame belonged to *Navajo Nation v. U.S. Forest Service*,³² in which a Ninth Circuit en banc panel applied “substantially burden” as a term of art defined

28. *Oklevueha*, 828 F.3d at 1017 (quoting *Hobby Lobby*, 134 S. Ct. at 2775).

29. *Id.* (quoting *Holt*, 135 S. Ct. at 862).

30. *See id.* The court seems right that Mooney and *Oklevueha* had not been forced to act directly contrary to their religious beliefs. If the plaintiffs did not understand cannabis use to be necessary in the practice of their religion, then their non-use need not be an act contrary to their religious belief. The relevant belief is that cannabis use is a fitting or worthy means of relating oneself to the divine. *See id.* at 1014. Non-use of cannabis is compatible with this belief where one’s reason for non-use is to honor one’s obligation to the wellbeing of the political community, as established by its lawful authority. Given that this authority exists over a limited space and time, compliance with its lawful prohibition of cannabis use does not commit oneself to the proposition that cannabis use is never and nowhere a fitting or worthy means of relating to the divine. Accordingly, Mooney and *Oklevueha* may observe the federal government’s prohibition of cannabis use without violating their religious belief that cannabis use is, in general, good as a facilitator of the human-divine relationship.

31. The *Oklevueha* court affirmed the district court’s dismissal of the plaintiffs’ claim under the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2012), holding that it “does not create a cause of action or any judicially enforceable individual rights.” *Id.* at 1017 (quoting *United States v. Mitchell*, 502 F.3d 931, 949 (9th Cir. 2007)).

32. 535 F.3d 1058 (9th Cir. 2008).

by certain Supreme Court decisions.³³ The *Oklevueha* Court followed *Navajo Nation's* interpretation of RFRA, but that interpretation was mistaken. A close reading of RFRA reveals that “substantially burden” bears its ordinary meaning there. The Supreme Court implied as much in *Hobby Lobby* and *Holt* when it distinguished RFRA from Court precedent on religious liberty and relied instead on a plain reading of the text.

A. *The Navajo Nation Interpretation*

In general, under RFRA, “Government shall not substantially burden a person’s exercise of religion, even if the burden results from a rule of general applicability.”³⁴ According to the *Oklevueha* court, “the meaning of [‘substantially burden’] can be ascertained by looking to ‘a body of Supreme Court case law’ decided before *Employment Division v. Smith*.”³⁵ For this proposition, the court cited *Navajo Nation*,³⁶ in which the en banc panel held that “*Sherbert [v. Verner]*,³⁷ [*Wisconsin v. Yoder*],³⁸ and federal court rulings prior to *Smith* . . . control the ‘substantial burden’ inquiry.”³⁹ In both *Navajo Nation* and *Oklevueha*, the Ninth Circuit justified its claim by reference to RFRA’s statement of findings and purposes,⁴⁰ but only in the former case did the court explain its reasoning, which follows in reconstructed form.

33. See *id.* at 1069.

34. 42 U.S.C. § 2000bb-1(a) (2012).

35. *Oklevueha*, 828 F.3d at 1016 (internal quotation marks omitted). *Employment Division v. Smith*, 494 U.S. 872 (1990), is a landmark case in the constitutional law of religious liberty. “*Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.” *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997). *Smith* “largely repudiated the method of analyzing free-exercise claims that had been used in cases like *Sherbert v. Verner*, 374 U. S. 398 (1963), and *Wisconsin v. Yoder*, 406 U. S. 205 (1972).” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014). “Congress responded to *Smith* by enacting RFRA.” *Id.* at 2761.

36. 535 F.3d 1058 (9th Cir. 2008).

37. 374 U.S. 398 (1963).

38. 406 U.S. 205 (1972).

39. *Navajo Nation*, 535 F.3d at 1069 (footnotes added).

40. See *Oklevueha*, 828 F.3d at 1016; *Navajo Nation*, 535 F.3d at 1068–69.

In the *Navajo Nation* court's view, RFRA does not expressly define the meaning of "substantial burden,"⁴¹ and therefore, courts must infer that Congress meant to "incorporate" that term's "established meaning."⁴² The words "substantial burden" had a meaning established "in numerous Supreme Court cases in applying the Free Exercise Clause,"⁴³ all of which "found a substantial burden on the exercise of religion *only* when the burden fell within the *Sherbert/Yoder* framework."⁴⁴

Further, according to *Navajo Nation*, it is clear that Congress knew of this established meaning because it "expressly adopted and restored *Sherbert*, *Yoder*, and other pre-*Smith* cases."⁴⁵ That is, Congress made clear that the pre-*Smith* compelling interest test was "a workable test for striking sensible balances between religious liberty and competing prior governmental interests."⁴⁶ Moreover, Congress stated its purpose "to restore the compelling interest test as set forth in [*Sherbert*] and [*Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened."⁴⁷ Importantly, Congress defined its compelling interest test by reference both to *Sherbert* and to *Yoder*. This would have been unnecessary if Congress meant only to define "the content of what constitutes a compelling interest" because the content was the same in both cases.⁴⁸ Assuming that Congress did not act "redundant[ly] and superfluous[ly]," it must have cited *Sherbert* and *Yoder* to establish their "two separate and distinct substantial burden standards . . . to determine when the compelling interest test is invoked."⁴⁹ In other words, Congress invoked *Sherbert* and *Yoder* to limit application of the compelling interest test to situations similar to those two cases alone.

41. See 535 F.3d at 1074.

42. *Id.* at 1074 (citing *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995)).

43. *Id.* at 1074–75.

44. *Id.* at 1075 (emphasis in original).

45. See *id.* at 1069 (punctuation altered).

46. See *id.* (quoting 42 U.S.C. § 2000bb(b)(1) (2012)).

47. See *id.* (quoting 42 U.S.C. § 2000bb(a)(5)).

48. *Id.* at 1074 n.16.

49. *Id.*

B. Critiquing Navajo Nation

Unfortunately, the Ninth Circuit erred in *Navajo Nation*.⁵⁰ It mischaracterized the findings and purposes of RFRA. It overstated the degree to which pre-*Smith* decisions defined “substantial burden.” It gave insufficient attention to text and structure of RFRA’s actual norms, which indicate independence from *Sherbert* and *Yoder*. In short, the Ninth Circuit misinterpreted RFRA.

The *Navajo Nation* court’s account of RFRA’s findings is incomplete. In RFRA, Congress first recognizes “free exercise of religion” as an unalienable right “secured” —not created by— the First Amendment.⁵¹ So, “exercise of religion” indicates a natural category, existing prior to any law, and so too, whether such exercise is “free,” rather than “burden[ed],” for example, by “laws ‘neutral’ toward religion,”⁵² is also a question of nature, not of human law. RFRA continues by stating a general norm of moral-political philosophy, “governments should not substantially burden religious exercise without compelling justification,”⁵³ and reason to fear that this norm might be violated, namely the decision in *Smith*.⁵⁴ Finally, RFRA identifies a legal construct, “the compelling interest test as set forth in prior Federal court rulings,” as a fitting tool for resolving conflicts between religious liberty and other governmental interests.⁵⁵ From its findings alone, RFRA appears to have introduced the “compelling interest test” as an appropriate way to respond to situations where government has, as a matter of natural fact, substantially burdened religious exercise, which is itself a natural category of action.

RFRA’s statement of purposes corresponds with its statement of findings. Congress meant for RFRA “to restore the compelling interest test as set forth in [*Sherbert*] and [*Yoder*] and to guarantee its application in all cases where free exercise of

50. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2772 (2014).

51. *See* 42 U.S.C. § 2000bb(a)(1).

52. *See id.* § 2000bb(a)(2).

53. *Id.* § 2000bb(a)(3).

54. *See id.* § 2000bb(a)(2), (4).

55. *Id.* § 2000bb(a)(5).

religion is substantially burdened.”⁵⁶ In RFRA, then, Congress did not “adopt and restore[] *Sherbert* and *Yoder*, and federal court rulings prior to *Smith*.”⁵⁷ Rather, it adopted and restored a certain “compelling interest test.” Evidently, this test does not itself determine the situations to which it applies, for Congress must state separately and in addition that it means for the “compelling interest test” to apply “in all cases where free exercise of religion is substantially burdened.” Here again, whether free exercise of religion has been substantially burdened seems a question of natural fact, not a component of the legally-constructed “compelling interest test.”

Why, then, did Congress link the “compelling interest test” to both *Sherbert* and *Yoder*? To the *Navajo Nation* court, given that the “compelling interest test” is the same in both cases, it would be “redundant and superfluous” to cite *Yoder* simply to tie it to *Sherbert*’s test.⁵⁸ In general, however, reasonable institutions sometimes use two synonymous terms together to communicate a single meaning,⁵⁹ and here Congress might have had particular reason to do so. *Smith* (the “impetus for RFRA’s passage”)⁶⁰ had distinguished *Yoder* from *Sherbert* as a “hybrid situation,”⁶¹ and thus Congress might have wanted to ensure that its “compelling interest test” applied where religious liberty alone was at stake. Furthermore, Congress might have judged it expedient to connect the case that first articulated the “compelling interest test” with the politically popular Amish defendants in *Yoder*. Because any of these reasons might explain why Congress linked the “compelling interest test” to both *Sherbert* and *Yoder*, no explanation by way of congressional intention to define “substantial burden” exclusively according to the two cases is necessary.

More than that, such an intention is unlikely, not least because *Sherbert* and *Yoder* hardly establish a clear meaning of

56. *Id.* § 2000bb(b)(1); see also *id.* (“to provide a claim or defense to persons whose religious exercise is substantially burdened by government”).

57. *Contra Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069 (9th Cir. 2008).

58. See *id.* at 1074 n.16.

59. See *id.* (“redundant and superfluous”).

60. *Oklevueha Native Am. Church of Haw., Inc. v. Lynch*, 828 F.3d 1012, 1016 (9th Cir. 2016).

61. 494 U.S. 872, 881–82 (1990).

“substantial burden.” The term “substantial burden” appears in neither case. Rather, the *Sherbert* Court asked “whether the disqualification for benefits impose[d] *any* burden on the free exercise of appellant’s religion” and found it “clear that it [did].”⁶² The Court did not weigh the amount of benefits at stake, suggesting that any denial of governmental benefits would be a “substantial infringement of appellant’s First Amendment right.”⁶³ The *Yoder* Court was less precise about what is necessary to invoke the compelling interest test. In that case, the Court responded to an “objection . . . firmly grounded in . . . central religious concepts,”⁶⁴ “interfer[ence] with . . . freedom . . . to act in accordance with . . . sincere religious belief,”⁶⁵ “interfere[ence] with the practice of a legitimate religious belief,”⁶⁶ a “legitimate claim to the free exercise of religion,”⁶⁷ a claim “rooted in religious belief,”⁶⁸ a “substantial interfere[ence] with . . . religious development,”⁶⁹ and a “severe [and] inescapable” impact on religious practice.⁷⁰ These various terms do not clearly correspond to a single category, much less to the same category denoted by RFRA’s “substantial burden.” If there is any common threshold within *Yoder* that corresponds to *Sherbert*, it is that there must be some burden—any burden—in order to invoke the compelling interest test. *Navajo Nation’s* parapet is quite a construction atop whatever threshold *Sherbert* and *Yoder* established.

Moving beyond findings and purposes, what Congress actually instituted in RFRA are the general and exceptional norms set forth in 24 U.S.C. § 2000bb-1, using terms defined in § 2000bb-2. Those norms contain no textual reference to *Sherbert* and *Yoder*, even though Congress knows how to “link the meaning of a statutory provision to a body of [Supreme Court]

62. 374 U.S. 398, 403 (1963) (emphasis added).

63. *See id.* at 406.

64. 406 U.S. 205, 210 (1972).

65. *Id.* at 213.

66. *Id.* at 214.

67. *Id.* at 215.

68. *Id.*

69. *Id.* at 218.

70. *Id.*

case law.”⁷¹ Instead, they include a definite object of protection: “any exercise of religion, whether or not that exercise of religion is compelled by, or central to, a system of religious belief.”⁷² It would be very odd, if not contradictory, for “substantially burden” to imply another, different definition of the objects of RFRA’s protection (namely those of *Sherbert* and *Yoder*). There is no explicit or implicit place for *Sherbert* and *Yoder* in the norms that Congress instituted in RFRA.

Sherbert and *Yoder* were not nothing in the eyes of the Congress that enacted RFRA, but the *Navajo Nation* court made too much ado about those cases. By all appearances, Congress approved of *Sherbert* and *Yoder*, and it probably wanted to communicate as much to the public. In responding to *Smith*, however, Congress did not simply establish case law in statute; instead, it established an independent set of norms.

C. Getting Right by RFRA

What was the content of those norms, or at least of the substantial burden element of the general RFRA norm? The statute is not impenetrable on this matter. By a natural reading of the text, RFRA prohibits the government from hindering an action to a considerable degree, provided that the action is religious. The Supreme Court has applied such a reading in recent precedent.

To repeat the text of RFRA’s general norm: “Government shall not substantially burden a person’s exercise of religion, even if the burden results from a rule of general applicability.”⁷³ The subject is “government,” defined to “include[] a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity.”⁷⁴ This subject shall not do something, namely it “shall not . . . burden” the object.⁷⁵ That is, government shall not “hinder or oppress” the object⁷⁶—at least not “substantially.” Now, “substantial” might

71. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2772 (2014).

72. 42 U.S.C. § 2000bb-2(4) (2012).

73. *Id.* § 2000bb-1(a).

74. *Id.* § 2000bb-2(1).

75. *Id.* § 2000bb-1(a).

76. *See Burden*, BLACK’S LAW DICTIONARY (10th ed. 2014).

sometimes denote positive evaluation,⁷⁷ but why would RFRA prohibit government from doing something worthily and importantly? It would be more reasonable to read “substantially” as descriptive, not evaluative. So, government shall not hinder, to a “considerable degree,”⁷⁸ “[a] person’s exercise of religion.”⁷⁹ Of course, as a possessive noun, “person’s” denotes a relationship of ownership or belonging between “person” and what follows. That is, “exercise of religion,” defined as “any exercise of religion, whether or not that exercise of religion is compelled by, or central to, a system of religious belief.”⁸⁰ Now, an “exercise” is surely an act, and an act belongs to, or is owned by, any person who chooses or otherwise wills that action.⁸¹ Accordingly, “a person’s exercise of religion” means any exercise of religion chosen or willed by a person, whether or not that exercise of religion is compelled by, or central to, a system of religious belief.

The distinction between a particular exercise of religion and a whole system of religious belief is important for the substantial burden test. Some scholars would judge the substantiality of a burden according to the centrality of a belief burdened.⁸² If “exercise of religion” referred to a system of religious belief, such a reading would seem reasonable. In RFRA, however, an “exercise of religion” is not a religious system itself, but rather follows from (“compelled by”), or constitutes part of (“central to”), a religious system.⁸³ To ask whether government substan-

77. *Substantial*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“important, essential, and material; of real worth and importance”).

78. *See id.*; *see also* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1086 (9th Cir. 2008) (Fletcher, J., dissenting) (quoting AMERICAN HERITAGE DICTIONARY (4th ed. 2000) (defining “substantial” as “[c]onsiderable in importance, value, degree, amount, or extent” (alteration in original))).

79. 42 U.S.C. § 2000bb-1(a).

80. *Id.* § 2000bb-2(4).

81. *See generally* 2 JOHN FINNIS, *Human Acts*, in COLLECTED ESSAYS: INTENTION & IDENTITY 133 (2011).

82. *See, e.g.*, Marc O. DeGirolami, *Substantial Burdens Imply Central Beliefs*, 2016 U. ILL. L. REV. 19, 21 (“[A] burden on religious exercise is substantial if it interferes in a significant, important, or central way with the claimant’s religious system.”).

83. Professor DeGirolami recognizes that an exercise of religion is not a system, but nevertheless, he holds that the substantiality of a burden should be measured according to impact on the system. *Id.* (“[T]he substantiality of the burden is to be measured against the ‘system of religious belief’ of which the religious exercise at issue forms a part.”). But why should a burden on a part be judged, not by its

tially burdens an exercise of religion, then, is to ask whether it hinders a *particular* religious⁸⁴ action to a considerable degree.

What constitutes a considerable degree?⁸⁵ Except where law prohibits the act in question, judging the substantiality of a bur-

hindrance of that part, but rather by its effect on the whole? Furthermore, one acknowledged implication of DeGirolami's interpretation is that evaluating the substantiality of a burden requires "some understanding of the place . . . or comparative importance of the exercise at issue within a religious system." *Id.* RLUI-PA, however, (and by implication RFRA) includes a "prohibition on inquiries into centrality." *Id.* DeGirolami admits as much, and he does not resolve the resulting discord between his interpretation and the interpreted text. *See id.*

84. Notably, although RFRA provides (defeasible) protection of *any* exercise of religion, it shields only an exercise that is *religious*. As a distinct reason for action, religion is harmony with whatever is the transcendent source of universal order. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 89–90, 371–403, 477–79 (2d ed. 2011); *see also* GERMAIN GRISEZ, *GOD? A PHILOSOPHICAL PREFACE TO FAITH* (2d ed. 2005). *Contra* RONALD DWORKIN, *RELIGION WITHOUT GOD?* 10–43 (2013); Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 135 (2002). An otherwise non-religious act, such as giving money to the poor, becomes religious if and only if one intends by that act to live in harmony with the universe's transcendent source. If such harmony is a purpose of one's action, then that action is religious, no matter how insignificant, optional, or even, in the final analysis, unreasonable. *See* ROBERT P. GEORGE, *MAKING MEN MORAL* 222 (1993). A person with free will may or may not choose to act toward such a purpose; indeed, even a person choosing to act conscientiously, that is, to do what he judges he really must do here and now, *see* FINNIS, *supra*, at 125–26, 457, may or may not have the further purpose of honoring or relating to the divine. Accordingly, the *Oklevueha* district court correctly distinguished meaningful action from religious action. *See Oklevueha Native Am. Church of Haw., Inc. v. Holder*, No. CIV. 09-00336 SOM, 2013 WL 6892914, at *11 (D. Haw. Dec. 31, 2013) (distinguishing "a strongly held belief in the importance or benefits of marijuana" from a "belief [that] is religious in nature"). Meaningful action and religious actions are two distinct, if overlapping, categories, and whatever protections there are or should be for all meaningful action, RFRA protects only those actions chosen in order to live in harmony with the divine.

How far government should defer to the claims of persons that the purpose of their action is religious is a separate question, *see, e.g.,* *Yellowbear v. Lampert*, 741 F.3d 48, 53–54 (10th Cir. 2014), that the Tenth Circuit has well addressed, *see id.* at 54 ("When inquiring into a claimant's *sincerity*, then, our task is instead a more modest one, limited to asking whether the claimant is (in essence) seeking to perpetrate a fraud on the court—whether he actually holds the beliefs he claims to hold—a comparatively familiar task for secular courts that are regularly called on to make credibility assessments—and an important task, too, for ensuring the integrity of any judicial proceeding.").

85. Professor Gedicks wonders whether "religiously burdensome laws with insignificant penalties even exist," and suggests that they are rare. Frederick Mark Gedicks, "*Substantial*" *Burdens: How Courts May (and Why They Must) Judge Bur-*

den is fact-specific. Because the action that government must not burden is a particular “person’s,”⁸⁶ it would seem that, not merely the magnitude of a distinctive prohibition, but rather its weight on a reasonable person facing the circumstances in question, is central. By design, however, prohibitions weigh equally on all—and considerably so.⁸⁷ Beyond prohibitions, taxes,⁸⁸ fees, and regulations can all make it considerably harder to perform a given action,⁸⁹ and thus each or all might constitute a substantial burden on a particular person’s particular (religious) exercise.⁹⁰

dens on Religion under RFRA, 85 GEO. WASH. L. REV. 94, 113–14 (2017). An example of such laws might be traffic laws, which may burden travel to a house of worship, but barring extraordinary circumstances, the burden is insubstantial. Otherwise cognizable but insignificant burdens would be more prevalent if RFRA applied to state governments, as it was originally intended to. Still, similar laws in federal territories, as well as any other minor transportation impediment arising out of the implementation of federal law, *see* 42 U.S.C. § 2000bb-3 (“This chapter applies to all Federal law, and the implementation of that law . . .”), are likely to create insubstantial burdens.

86. 42 U.S.C. § 2000bb-1.

87. For government to deny that legal prohibitions are considerable hindrances to a reasonable person’s performance of prohibited actions, it would have to hold that the law fails to constitute even a considerable reason not to do something. Professor Helfand’s illuminating discussion of “substantial burden” seems to make a minor consequentialist deviation on the question of prohibitions, looking past the substantial burden of a prohibition in itself to the substantiality of the penalties. *See* Michael A. Helfand, *The Substantial Burden Puzzle*, 2016 U. ILL. L. REV. ONLINE 1; *see also* Gedicks, *supra* note 85, at 113 n.94 (“A violation that labels one a convicted criminal, creates a criminal record, and triggers collateral penalties would seem to be per se ‘substantial’ even if the violation is otherwise considered minor and the monetary fine trivial.”).

88. Whether a compelling governmental interest justifies a burdensome tax is a separate question. *See* *United States v. Lee*, 455 U.S. 252, 257 (1982).

89. If the government burdens one’s action by “secular costs,” it thereby burdens one’s religious exercise. Precisely how much “religious cost” a burden on any particular religious exercise imposes on one’s relationship with God is no part of the RFRA inquiry. *See id.* § 2000bb-2(4). *Contra* Gedicks, *supra* note 85, at 114 (“If a claimant suffers insubstantial religious costs in obeying a purportedly burdensome law, then his or her religious exercise has not been ‘substantially’ burdened, regardless of the substantiality of the secular cost of violating the law.”). It may be that Professor Gedicks has misinterpreted “religious exercise” as a reference to a *system* of religious belief.

90. If so, the next question is also particular: is the “compelling interest test . . . satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened”? *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) (quoting

Whether conditional taxes considerably hindered Hobby Lobby and Conestoga Wood Specialties in performing the action of running their business for a religious purpose was the decisive question in *Burwell v. Hobby Lobby Stores, Inc.*⁹¹ The Supreme Court refused to interpret “exercise of religion” according to the premise that “RFRA did no more than codify this Court’s pre-*Smith* Free Exercise Clause precedents.”⁹² Relying on a plain reading, it held that plaintiffs were engaged in an “exercise of religion” in running their businesses, including in providing health insurance to employees, because the plaintiffs intended to act in relationship with God.⁹³ The *Hobby Lobby* Court treated the Affordable Care Act’s conditional taxes as the central burden in the case,⁹⁴ and it deemed that burden “surely substantial,”⁹⁵ appealing to the common understanding of the term.

Again in *Holt v. Hobbs*,⁹⁶ the Supreme Court applied the ordinary meaning of statutory terms, finding a substantial burden under RFRA’s sister statute, the Religious Land Use and Institutionalized Persons Act (“RLUIPA”).⁹⁷ The Court identified the religious exercise as “the growing of a beard” and held that the prison’s grooming policy “substantially burden[ed] [the plaintiff’s] religious exercise.”⁹⁸ That is, requiring prisoners to

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006)).

91. 134 S. Ct. 2751 (2014).

92. *Id.* at 2772–73.

93. *See id.* at 2764–66 (noting the mission of Conestoga Wood Specialties to operate according to “Christian principles” and to avoid “sin[ning] against God” and Hobby Lobby’s purpose to “[h]onor the Lord in all [it] [does]”).

94. *See id.* at 2775–76. The Court found that the government had imposed a substantial burden, in the form of significant financial penalties, on the plaintiffs’ exercise of religion, running their business in accordance with religious principles that exclude provision of abortifacients. *But see* Oklevueha Native Am. Church of Haw., Inc. v. Lynch, 828 F.3d 1012, 1017 (9th Cir. 2016) (“[*Hobby Lobby*] concluded that the government had imposed a substantial burden by demanding the businesses and their owners ‘engage in conduct that seriously violates their religious beliefs’ by requiring them to provide abortifacients or face significant financial penalties.”).

95. *Hobby Lobby*, 134 S. Ct. at 2776.

96. 135 S. Ct. 853 (2015).

97. 42 U.S.C. § 2000cc (2012).

98. 135 S. Ct. at 862.

shave their beards, on pain of “serious disciplinary action,”⁹⁹ made it considerably more difficult for the plaintiff to grow a beard. The Court emphasized the harmfulness of this substantial burden by noting that a serious violation of religious belief was at stake,¹⁰⁰ but this was not to suggest that RLUIPA protected only exercises of religion the non-performance of which resulted in a serious violation of religious belief.¹⁰¹ As in *Hobby Lobby*, there was no reference to Supreme Court precedent, and judging whether there was a “substantial burden” was an exercise of common reason.¹⁰²

The substantial burden test that Congress established in RFRA and the norm that the Supreme Court applied in *Hobby Lobby* and *Holt* are the same. The Supreme Court applied “exercise of religion” before “substantially burdens,” following a different order of inquiry than the statutory text suggests.¹⁰³ Nevertheless, the content of the substantial burden test was the same: determine whether the government has made it considerably harder for RFRA claimants to perform the action in question.

III. CONCLUSION

If the *Oklevueha* court had applied the ordinary meaning of RFRA’s terms, as the Supreme Court did in *Hobby Lobby* and *Holt*, then it would have found that Mooney and Oklevueha faced a substantial burden. The particular action in question was cannabis use. Justifiably or not, the government did not leave Mooney and Oklevueha free to use cannabis. Instead, Uncle Sam prohibited Mooney’s and Oklevueha’s cannabis use altogether, on pain of criminal sanction strong enough to make

99. *Id.*

100. *Id.* (quoting *Hobby Lobby*, 134 S. Ct. at 2775).

101. *See id.* (“RLUIPA’s ‘substantial burden’ inquiry asks whether the government has substantially burdened religious exercise (here, the growing of a half-inch beard), not whether the RLUIPA claimant is able to engage in other forms of religious exercise.”); *id.* (“RLUIPA . . . applies to an exercise of religion regardless of whether it is ‘compelled.’” (citing 42 U.S.C. § 2000cc-5(7)(A))).

102. *See id.* at 862–63.

103. Compare 42 U.S.C. § 2000bb-1 (“Government shall not substantially burden a person’s exercise of religion . . .”), with *Hobby Lobby*, 134 S. Ct. at 2772–73, 2776, and *Holt*, 135 S. Ct. at 862.

a Holmesian bad man sweat.¹⁰⁴ If they were to remain law-abiding citizens, their cannabis use was impossible. Surely, they faced a substantial burden.

Of course, the substantial burden test is only one element of RFRA. The *Oklevueha* court assumed but did not decide that Mooney and Oklevueha used cannabis for religious reasons.¹⁰⁵ It did not consider at all whether government action against Mooney and Oklevueha would further a compelling governmental purpose by the least restrictive means.¹⁰⁶ Depending on the answers to these further questions, the Ninth Circuit's error may have been harmless in this case. Nevertheless, the court did err, and until the Ninth Circuit gets right by RFRA, harm will pend, if not recur.

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104. See Controlled Substances Act, Pub. L. 91-513, 84 Stat. 1242, 1260-70 (1970) (codified at 21 U.S.C. § 841 (2012)).

105. *Oklevueha Native Am. Church of Haw., Inc. v. Lynch*, 828 F.3d 1012, 1015-16 (9th Cir. 2016).

106. Cf. 42 U.S.C. § 2000bb-1 ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

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