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ARTICLES

LAW AND POLITICS: WHAT IS THEIR RELATION?

THE HERBERT W. VAUGHAN LECTURE—2017

NOTES

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PREFACE

Civilization is a fragile inheritance, built painstakingly over the course of generations but capable of being shattered in an instant. The Anglo-American common law is a similar bequest. This source of legal wisdom developed in Burkean fashion, treating similar cases similarly and slowly developing rules for right conduct. Justice Oliver Wendell Holmes, Jr. was right when he described the common law as "embod[ying] the story of a nation's development through many centuries." The magisterial heritage of the common law is woven into the very fabric of these United States.

Against this profoundly conservative tradition, however, is a legal progressivism that—to borrow a phrase from Evelyn Waugh—appears "ready to abandon the work of centuries for sentimental qualms." The dispute between these two competing visions has raged for almost a century. But the most recent election delivered a firm rebuff to that Jacobin faction of legal progressivism. Though that camp remains ascendant in the academy, new judicial appointments will ensconce textualism and revive originalism in the judiciary. Worthy of particular celebration is the nomination and confirmation of our former editor, Neil M. Gorsuch, as an Associate Justice of the United States Supreme Court. It appears to be the dawn of new opportunity for those who cherish the rule of law.

It is at this moment of cautious optimism that I present the first Issue of Volume 41 of the *Harvard Journal of Law & Public Policy*. This Issue contains ten essays drawn from the Thirty-Sixth Annual Federalist Society National Student Symposium on Law and Public Policy, which focused on the First Amendment in contemporary society. The eminent scholars selected for this Issue address religious liberty, campaign finance and free speech, privacy and freedom of the press, universities and the First Amendment, and the ABA's model anti-discrimination rule. Of particular note is Professor Richard Epstein's insightful analysis of the common law in relation to the First Amendment, adapted from his Keynote Address at the Symposium.

The Articles selected for this Issue are apropos of our current juncture in legal and political history. Paul J. Larkin, Jr. reconsiders the importance of the Congressional Review Act in light of its extensive use following the 2016 election. Professor Adam J. MacLeod develops a focal meaning for vested private rights, and attempts to revive the common law theory of vested private rights that the Legal Realists "brutally murdered." Dr. Ryan T. Anderson warns against the pitfalls of "gender identity" mandates. In particular, he argues that redefining Title IX to deal with the brave new world of gender ideology is both bad law and bad policy.

This Issue also contains a short series of essays by Professor Larry Alexander, Dr. Matthew Franck, and Professor James Stoner examining the relation between law and politics. These essays were originally presented at the 2016 Vaughan Lecture at Harvard Law School, and have been further developed for the readers of the *Journal*.

Finally, I am pleased to present two notes that dovetail nicely with the theme of this Issue. John Greil defends a two-step originalist method for analyzing regulatory takings. Stephen J. Hammer questions the proclivity of state courts to issue prospective rulings, and argues that the principle of retrospectivity (adhered to in the United Kingdom) is an important restraint on the judiciary. Both notes glean from the wisdom of the common law to help us resolve contemporary disputes.

The publication of the *Journal* is only possible through the hard work and dedication of its editorial staff. I would like to thank the editors and Symposium editors who have given of their time to make this Issue possible. Their commitment to excellence is a testament to the principles for which our *Journal* stands.

Joshua J. Craddock
Editor-in-Chief

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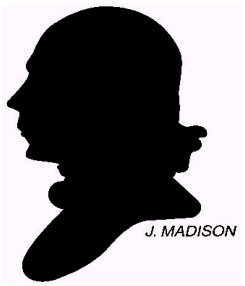

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A COMMON LAW FOR THE FIRST AMENDMENT

RICHARD A. EPSTEIN*

I have chosen a title for this article that looks, in some sense, to be innocence incarnate. On the one hand, the common law is an ancient and mostly honorable tradition. On the other hand, the First Amendment, with its protection of freedom of speech and the press, is one of the bulwarks of our current constitutional order. Taken together, the positive synergies between them should produce an intellectual structure that generates widespread political and social appeal. Nonetheless, on this score appearances are deceiving, and I shall try to explain the tension in the system. In Part I, I consider the tension between a generalized common law system of liability and the constitutional principles that underlie the First Amendment. For these purposes, I indulge in a bit of historical oversimplification by treating the common law as including both law and equity. I do so in order to consider the full range of remedies from damages to injunctions as part of a unified theory. In Part II, I explain how the tension between common law and constitutional methods results in serious breakdowns in legal doctrine. The central point should be clear. Constitutional law does not operate in an institutional and conceptual void. The successful articulation of First Amendment doctrine depends critically on understanding the private law rules that regulate speech and all forms of similar conduct.

I. THE GENERAL STATE OF PLAY BETWEEN COMMON AND CONSTITUTIONAL LAW

A. The Labor Law Analogy

The title of this essay is consciously patterned on the title of an article that I published in the *Yale Law Journal* some thirty-

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four years ago—*A Common Law for Labor Relations*.[1] That article carried with it this subtitle—A Critique of the New Deal Labor Legislation.[2] That article was, and was meant to be, heretical. I had received a personal invitation to attend the conference from Eugene Illovsky, a member of the Yale chapter of the then-nascent Federalist Society. The grandees at the Yale Law School had allocated the society a single slot at the two-day conference on the celebration [sic!] of the fiftieth anniversary of the New Deal, and Illovsky wondered if I would have enough temerity to fill it.

It was no secret that the other panelists would offer, in varying degrees, support for the New Deal enterprise. Without hesitation, I offered to pay my own airplane fare, if need be, to return to my alma mater. I wished to voice my deep disagreements with the reigning policy on American labor law. Labor law was a field in which I had done no systematic scholarship, but in which I had long sensed a deep, unbridgeable chasm between my own nascent views and the conventional wisdom on the subject, introduced to me as a student by my own Yale Law School professor, the late Harry H. Wellington. Wellington was an expert in legal process far more comfortable with the New Deal synthesis than was I. So for Wellington, it was important that the major premise—the desirability, if not necessity of collective bargaining—was taken more or less as a historical given. The hard work of scholarship and debate at the time was over the proper mode of implementing the National Labor Relations Act: were its objectives best achieved through rulemaking, through judicial decisions, by a board, through arbitration, through private contract, or some ideal combination of the above? I sat in the class often mumbling to myself, "You never ask the right question, which is whether you ought to blow up this entire system and start over."

When I returned to the Yale Law School in 1983, I decided to exact my revenge by defending the common law alternative to the NLRA in a not-so-subtle effort to blow up the entire edifice. Having done some research, my choice of the subtitle was taken, and was meant to be taken, as deeply subversive of the es-

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1. Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983).

2. *Id*.

tablished wisdom. Conceptually, my major thrust was a point-by-point defense of the common law system of labor relations. The high point of that exposition was my then-unthinkable defense of the "yellow-dog contract," under which a firm and worker could agree that the worker would not join, nor agree to join, a union so long as he continued to work for his employer.[3] The choice of my subtitle was a not-so-subtle allusion to my endorsement of a common law framework that was universally reviled and explicitly rejected by the major labor law reform statutes of the 1930s, including the Norris-LaGuardia Act of 1932[4] and the National Labor Relations Act of 1935.[5]

My impassioned defense of the common law system provoked a tart and indignant response from Professors Julius Getman and Thomas Kohler. They accused me of taking a "breathtakingly simple" approach to labor law, when a more nuanced and incremental approach was desperately needed.[6] The tenor of the reaction is evident in the following paragraph, which I quote with reluctance because it illustrates the establishment's resentment towards the defense of laissez-faire economics:

> Professor Epstein's work does not contribute in any way to our existing store of knowledge about labor law. It sheds no light on the reality of labor relations, nor does it contribute anything to our understanding of the impact of labor law on society. Given the antiquated nature of his methodology, it is not surprising that Professor Epstein reiterates many of the same propositions, syllogisms and rationalizations of those who opposed the enactment of the NLRA and the Norris-LaGuardia Act in the first place, and without any newer evidence.[7]

Their article had its own problems. It offered no explanation as to why or how this costly system of cartelized labor relations

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3. *See id.* at 1370–75. The major decision in that regard was *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917), with an opinion from the astute Justice Mahlon Pitney, which I still regard as the textbook example of sound economic reasoning.

4. Ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101-115 (2012)).

5. Ch. 332, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-169 (2012)).

6. *See* Julius G. Getman & Thomas C. Kohler, *The Common Law, Labor Law, and Reality: A Response to Professor Epstein*, 92 YALE L.J. 1415, 1415 (1983).

7. *Id.* at 1416.

outperforms competitive markets.[8] It failed to anticipate the level of decline in union membership in the years that followed.[9] It made no reference to the unprecedented improvement in human welfare in the United States that took place during the period of 1870 to 1940 when laissez-faire synthesis predominated[10]—which, as Johan Norberg chronicles, only a program of market liberalization could duplicate worldwide.[11]

Their response prompted my equally pointed reply that, while their insistence on carefully studying incremental changes is an effective way to avoid serious intellectual inquiry, it offers no theoretical defense of the body of law that has come under attack.[12] My war cry then, and my war cry now, is that "it takes a theory to beat a theory,"[13] and defenders of modern legislation, and modern constitutional theory, too often consider implacable outrage at older common law systems to be a refutation of that system's central premises.

In fact, the use of the yellow-dog contract was a well-conceived private effort by employers to preserve competitive markets in labor.[14] Competition works as well for labor as for goods, so these contracts should be welcomed as a matter of public policy. At the time, this point was recognized when the unanimous 1908 Supreme Court decision in *Loewe v. Lawlor*[15] rightly applied the antitrust prohibitions of the Sherman Act to

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8. *See* Richard A. Epstein, *The Progressives' Deadly Embrace of Cartels: A Close Look at Labor and Agricultural Markets, 1890–1940*, *in* THE PROGRESSIVES' CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATE 339 (Stephen Skowronek et al. eds., 2016).

9. *See* James Sherk, *Labor Unions: Declining Membership Shows Labor Laws Need Modernizing*, HERITAGE FOUND. (Jan. 22, 2013), http://www.heritage.org/jobs-and-labor/report/labor-unions-declining-membership-shows-labor-laws-need-modernizing [https://perma.cc/D2ZA-WRYH].

10. *See* ROBERT J. GORDON, THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR (2016). Gordon never, however, correlates that development with the dominant labor law regime in place at the time. *See* Richard A. Epstein, *The Real Cause of American Growth*, DEFINING IDEAS (Hoover Institution, D.C.) (Feb. 29, 2016), http://www.hoover.org/research/real-cause-american-growth [https://perma.cc/E2EC-BXSA].

11. *See generally* JOHAN NORBERG, PROGRESS: TEN REASONS TO LOOK FORWARD TO THE FUTURE (2016).

12. *See* Richard A. Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 YALE L.J. 1435, 1435 (1983).

13. *Id*.

14. *Id*. at 1437.

15. 208 U.S. 274 (1908).

labor organizations, prompting the passage of Section 6 of the Clayton Act after the progressive Woodrow Wilson was elected president.[16] Applying separate common law rules to labor and goods was one sign among many of the weakness of the progressives' position.[17] There is no deep gulf that separates sound principles for labor markets from parallel principles that work for goods, real estate, or insurance, and a proper theoretical framework should reflect that.

Decisions such as *Hitchman Coal & Coke Co. v. Mitchell*[18] and *Loewe* are consistent with a general theory of social welfare. The initial move of the common law can be simply stated: contract is good but coercion is bad. The explanation of this starting point is simple enough. Contracts improve the lot of both parties, and in general improve the opportunities of all third parties. Coercion restricts individual choices and thus produces losses that exceed the gains. Coercion also negatively affects third parties by hobbling or removing potential trading partners. There are of course both complications with, and limitations on these rules, most of which I cannot discuss here. But the critical move is to constrain contracts between people to use force against third parties, for these agreements are deeply subversive of social welfare. It is not enough to make these contracts unenforceable because informal norms allow them an extended time in which to wreak destruction. The synergistic gains from cooperation increase the likelihood of negative externalities if third persons will be subject to violence or forced to enter into transactions against their will. It is precisely because the negative externalities are so large that we develop a

16. *See* Clayton Act, ch. 323, § 6, 38 Stat. 730, 731–32 (1914) (codified at 15 U.S.C. § 17 (2012)):

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

17. For a longer discussion, see RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 89–99 (2006).

18. 245 U.S. 229 (1917).

body of law that punishes conspiracies to rob banks or kill innocent persons.

The dangers of conspiracy spill over, albeit less dramatically, into monopoly situations where parties enter into contracts in restraint of trade whereby they hope to become a single supplier of goods or services—the major target of the Sherman Act of 1890.[19] It is a well-established practice that a single supplier of key goods and services, as with public utilities and common carriers, is required to serve its customers on fair, reasonable, and nondiscriminatory terms.[20] The logic here is that breaking up these corporations is not feasible because the single supplier can serve the market more cheaply than multiple suppliers, given the need for heavy front-end investment.[21] So the next-best alternative is a cautious regime of price regulation, with an effort to bring those prices down to competitive levels. Socially, it is too costly to allow any party to refuse to deal with customers who have no market alternatives: the holdout position is just too strong.[22]

This obligation to serve does not extend to competitive markets, including labor markets. In these settings there is no forced business, and therefore the earlier decisions of *Adair v. United States*[23] and *Coppage v. Kansas*[24]—striking down the collective bargaining statute—were not, *pace* Getman and Kohler, some ancient curiosities. Rather, they presented the sound approach. Then, in basic market settings, the traditional tort of

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19. Sherman Antitrust Act, ch. 647, 26 Stat. 209, 209–10 (1890) (codified at 15 U.S.C. §§ 1–7 (2012)).

20. *See, e.g.*, Anne Layne-Farrar, A. Jorge Padilla & Richard Schmalensee, *Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of Frand Commitments*, 74 ANTITRUST L.J. 671 (2007). The rules here are a carryover from those that start with rate of return regulation for public utilities. *See generally* Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989).

21. For a classic exposition, see Harold Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55 (1968); *see also* Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969).

22. This issue is one that has kept me occupied for years. *See* RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD, 279–318 (1998); Richard A. Epstein, *Hayek's Constitution of Liberty—A Guarded Retrospective*, REV. OF AUSTRIAN ECON. (2016); Richard A. Epstein, *The History of Public Utility Rate Regulation in the United States Supreme Court: Of Reasonable and Nondiscriminatory Rates*, 38 J. SUP. CT. HIST. 345 (2013).

23. 208 U.S. 161 (1908).

24. 236 U.S. 1 (1915) (like *Hitchman*, written by Justice Pitney).

inducement to breach of contract is a counterweight to union power that helps preserve competitive bargaining on both sides of the market. Hence the case for the yellow-dog contract alluded to above: if you ask workers on a job who are not union members to come out in unison when called, it's inducement to breach of contract, which is tortious, and you can enjoin them and hold them responsible. All of this makes economic sense: the employer gets stability and the workers get protection against both work instability and union pressures to covertly join their ranks. Damning these contracts has become an article of faith for a church from which only a few people, like myself, decline membership, both today and during the New Deal period between 1932 and 1940. But, if my view is right, the National Labor Relations Act, the Norris-LaGuardia Act, and the Fair Labor Standards Act, which regulates minimum wage and overtime,[25] should go the way of all flesh. They have to be rejected on political grounds, and in my view should struck down on constitutional grounds as well, as in *Adair* and *Coppage*.

B. Free Speech Without the First Amendment

This lengthy and ominous introduction relates very closely to my chosen topic, for the same approach of working off the common law rules yields large dividends in understanding what is right, and all too often, wrong in modern American First Amendment law. The current law is often quite confused. Sometimes it does not extend its protection far enough but, sadly, in too many contexts it cuts too wide a swath. The remarks that follow are designed to expose its endemic weaknesses.

The key analytical starting point is that the common law does not relegate speech to one box and conduct to another. Thus the discussion of these labor law cases has to address the question of what kinds of human activities, broadly conceived, should be regarded as tortious. One is inducement of breach of contract, already encountered in connection with the yellow-dog contract in labor markets and applicable everywhere else in principle. Well, inducement almost always involves speech,

25. Fair Labor Standards Act, ch. 676, 52 Stat. 1060, 1060 (1938) (codified at 29 U.S.C. § 201, et seq. (2007)).

or at least pantomime. So the key question is, if it involves speech, why is it not protected by the First Amendment, with its categorical statement that Congress shall make no law abridging the freedom of speech? Consider also the common carrier who refuses to deal with a customer. Is that spoken or written refusal protected by the First Amendment against government regulation? Conversely, where there is no monopoly power, the refusal to deal offends no common law principle. How then is it possible for the state, consistent with principles of free speech, to say that expressing a refusal to deal is not protected under the First Amendment?

These are not idle questions, and at the very least, they raise the following puzzle. Aren't matters exactly backwards if speech that is tortious at common law turns out to be protected under the Constitution, and speech that is protected at common law turns out to be punishable under those pesky, but all-too constitutional, New Deal statutes? Just asking that question should demonstrate that the juridical shift from the older system of common law entitlements to the newer system of labor relations is no mere marginal adjustment in the evolution of the law, but a fundamental inversion of basic relationships. It's like taking a ship that has been sailing due north, and turning it around so that it now sails due south, saying all the while, "We haven't done anything except a modest course correction."

Thus, one ought to rethink the analysis of any topic relating to freedom of speech that separates speech from all other forms of human conduct. That approach should caution you to scrutinize any claim that affirmatively differentiates between pure expression, pure conduct, or, like billboards and signs, some mixture between the two. Why worry about these classifications as a matter of constitutional law if they don't work as a matter of common law theory?

But why worry about the common law? For its internal coherence and good sense. The set of common law rules should not be understood as some arbitrary assemblage of rules, but as a comprehensive world-view that seeks, however haltingly, to understand the proper spheres for cooperation and coercion in diverse settings. Put otherwise, common law is not just a process for incremental decision-making. It is also a deep normative commitment to the basic rules of property, contract, tort, and restitution. Efforts like that of my Chicago colleague, Da-

vid Strauss, to keep the process and junk the substantive commitments give far too much leeway to the directionless actions of judges and legislators in every area of law.[26]

Against this backdrop, one must develop a deep and permanent skepticism toward attributing fundamental significance to classifications that don't work. So long as speech can be innocent or tortious, and conduct can be innocent or tortious, the real task is to discern which speech and which conduct fall into which category, and why. That is ultimately a social inquiry that asks whether protecting particular forms of speech or conduct optimizes social gains. Speech that moves social behavior toward competition meets that test, and that which facilitates monopoly does not. One cannot put both pro-competitive and anti-competitive speech into the same box, when they have opposite social consequences. The theoretical gulf between these two forms of speech cannot be papered over.

At this point we can see the built-in advantage that the common law enjoys over a constitutional analysis that tries to compartmentalize and separate all speech and all conduct. The common law's goal was to protect voluntary transactions in (as it turns out) competitive markets, and to stop coercion in the other. As we look at that question once again, the supposed line between speech and conduct breaks down.

It is helpful to define coercion. The obvious case is the use of force. Common wisdom suggests that force is not speech, but this is oversimplified, for coercion also involves the *threat* of the use of force. No matter how clever you are with words, you cannot come up with a credible argument that threats are not a form of speech. You might insist that certain bodily movements are not speech, but even that is an idle gesture. Where there is a desire to protect benevolent forms of speech, no one argues that pantomime is not protected because no words are spoken. Indeed, the inexorable doctrinal move from freedom of speech to freedom of expression is a silent tribute to the view that speech under the Constitution must encompass more than speech. But the intellectual move that words includes expression cannot ignore bad expressions either. Both words and ex-

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26. *See* David A. Strauss, *The Living Constitution*, U. CHI. L. SCH. REC., Fall 2010, at 8, http://www.law.uchicago.edu/news/living-constitution [https://perma.cc/93YA-CTXD]; *see also* Richard A. Epstein, *Linguistic Relativism and the Decline of the Rule of Law*, 39 HARV. J.L. & PUB. POL'Y. 583, 593–99 (2016).

pressions are speech, and both warrant parallel treatments. Matters don't get any easier when we return to the problem of the common carrier who lacks the luxury of the refusal to deal. He does not threaten force against others, but his general monopoly power has long created the general duty to serve, as noted above.

We have seen that there is no fundamental distinction between conduct, on the one hand, and speech, on the other, both normatively and positively as a matter of common law. The next question concerns which forms of conduct are protected, and which are not. Let's begin with a very naive premise—that generally speaking, people know their own self-interest. And so, if they decide to do a particular action, the reason we favor freedom for them—that is, all of them—is we now know that somebody is better off, and we don't have any information as to whether or not, either episodically or systematically, anybody else is worse off. So there is a Pareto improvement under the familiar definition. Generally speaking, the older I get, the harder it is to find some supposedly free-standing moral objection to a move from some initial state of nature that works a Pareto improvement. Who should hold that trump card, and of what does it consist? There are all sorts of reasons to think that simple egoism is indefensible because it implies that I don't care what happens to anyone else so long as I am better off. A rule of that sort, generally applied, leads to social conflict and worse. I have not seen anyone construct a credible moral theory for the unvarnished moral claim that a rule that works to the advantage of all is for some unspecified reason unacceptable. It is perfectly permissible to say that what one person wants could be morally impermissible because of its effect on other parties. But if *everyone* shares the same view that externality problem disappears.

The reason that I speak of this as a presumption is that we must reject it in some circumstances to forestall the possibility of anarchy. That point was expressed in the older language of political theory by drawing a distinction between *liberty* and *license*, where the former is keenly aware of possible externali-

ties on third persons, which the latter systematically ignores.[27] Now these externalities are of two sorts. There are some that are positive, which are extremely important but tend to be ignored in legal analysis because they usually don't result in legal action. The few but important exceptions arise in cases of unjust enrichment where someone provides direct assistance to another person, by protecting person or property when that person cannot protect himself. I shall talk about these somewhat, but for the moment it is sufficient to observe that in legal and political theory the first order of business is not to subsidize positive externalities. Instead, it is to make sure that negative externalities, properly defined, will be effectively controlled so that mass mayhem does not upset the peace and good order of society.

Thus the libertarian says, and says rightly, that the use or threat of force is not a part of any system of protected liberty, because, if systematically engaged in by all persons against all other persons, it would lead to the war of all against all, in which nobody is better off. This is not a very difficult empirical judgment, either before or after Thomas Hobbes's *Leviathan*.[28] And so what you must do is to find a way to yoke together certain forms of speech and other conduct that can then either be equally permitted or prescribed under some general formula.

Now the libertarian recognizes that force has a kid brother, which turns out to be some form of misrepresentation. We talk about force and fraud. There is a nice relationship between fraud and (innocent) misrepresentation, in which the statement is not known to be false to the person who makes it. The latter has the capacity to hurt, but generally carries a different valence for two reasons. First, people who make innocent misrepresentations often try to correct them, and second, these misstatements, being less purposive, usually carry less serious consequences. So if we concentrate on fraud, we get most of the universe except perhaps in such recondite areas as security registration statements, where liability tends to rest on negligence

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27. *See, e.g.*, Alexander Rosenthal-Pubúl, *Reflections on Ancient and Modern Freedom*, MODERN AGE, Winter 2016, at 35, https://home.isi.org/sites/default/files/MA_58.1_Rosenthal-Pubul_Web.pdf [https://perma.cc/4VLR-67TE].

28. THOMAS HOBBES, LEVIATHAN (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651).

in England[29] and on strict liability in the United States.[30] Once again, no great genius could credibly claim that fraudulent speech or fraudulent conduct should be regarded as something other than speech. Yet nobody would want to defend the propriety of fraudulent behavior as a matter of course, even though there are many times where lying may be perfectly justified, as in self-defense, or to preserve privacy against a snoop. Of course, lying is less risky than menacing behavior because it is easier to walk away from the former than the latter so that all lies do not achieve their objective, given the relative ease of self-help. You can lie *to* someone, and it is his reaction that determines whether you have deceived that person, by establishing the needed causal link based on some combination of materiality[31] and reliance.[32] But when the deceit works, it can be deadly, such as when it leads someone to eat poisonous food or walk into a hidden trap.

Those lies turn out to be even more dangerous, even deadly in the context of defamation, where *A* states a falsehood to *B* about the position of *C*. If I lie to the king and he executes the person on the strength of my representations, defamation kills. And while the king may check out the story, he is unlikely to exercise as much care in the defense of *C* as he will of himself. In more prosaic situations, a false statement to a business person could lead him or her to refuse to conduct business with a third person. That loss of a business opportunity or a social association can have very large consequences, which is why defamation has always been actionable as a species of interference with advantageous relationships.[33] It is also worth noting that the deliberate use of force against a third party can achieve similar results with even more powerful effects, as exemplified by the famous example of the schoolmaster who frightens away his pupils by shooting at them when on the way to a

29. See, for the English experience, *Directors Liability Act, 1890*, 7 CAPE L.J. 253 (1890), which expanded liability to a negligence standard after *Derry v. Peek* (1889) 14 App. Cas. 336 (HL) (appeal taken from Eng.).

30. *See* 15 U.S.C. § 77k(a) (2012).

31. *See* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

32. *See* RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST. 1977).

33. *See id.* § 559.

competitor's school.[34] There was no force against the rival schoolmaster, but the pupils found it prudent to stay away at low cost, ruining the rival schoolmaster's business through the loss of his customers. So it is no wonder that in dealing with these interference cases, force and fraud tend to be substitutes for each other, where the former is more potent, but the latter more common.

It is here, moreover, that we start to see cases where the extensive protection of the First Amendment understates the risks of misrepresentation. The older common law accommodation held that political figures could bring actions for false statements of fact, even if statements of opinion were absolutely protected.[35] But how to draw the line between them? The best response is that a given statement, say that *X* is a thief, looks like a statement of fact if made as a bald assertion. But the position changes once the speaker outlines, truthfully, the facts on which those allegations are based, so that the audience can judge for itself the truth behind the inflammatory allegation.[36] Unfortunately today, false statements of fact, often with devastating consequences, are only actionable with proof of actual malice, that is, knowledge of the statement's falsity or reckless indifference to its truthfulness.[37] That rule was introduced in *New York Times v. Sullivan*[38] to spare the *Times* from a set of outrageous jury verdicts in Alabama that could have bankrupted the paper. But that Alabama judgment was deficient on so many grounds—its wild-high estimate of general damages was ludicrous, for example—that there was no need

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34. For an account, see *Keeble v. Hickeringill* (1706) 103 Eng. Rep. 1127 (KB), dealing with the Schoolmasters' case decided in the reign of Henry IV. Note that Lord Holt drew the correct distinction between competition and the use of force:

> This is like the case of 11 H. 4, 47. One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to his new. (The action there was held not to lie.) But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars.

Id. at 1128; *see also* Tarleton v. M'Gawley (1793) 170 Eng. Rep. 153 (KB).

35. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 267 (1964).

36. For the best exposition, see Van Vechten Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413, 419–20 (1910).

37. *N.Y. Times Co.*, 376 U.S. at 279–80.

38. 376 U.S. 254 (1964).

to remove an essential protection for reputation in typical cases that do not come up through a segregationist system in the old South.[39] It is not that the common law offers no protection for the freedom of speech. Rather, the best way to look at the constitutional dimension is to say that the First Amendment prevents the *contraction* of the common law protections, but does not require their systematic expansion. The loss of the correlative rights has poor consequences of its own, by making individuals less likely to participate in politics if they can be exposed to that form of abuse without adequate means of legal remedy in the case of serious defamation in cases when counterspeech cannot be invoked in time: think of the candidate for public office who is defamed on the eve of an election. Counterspeech the next day will not change the vote. A damage remedy might deter the conduct. The protection of reputation therefore also advances the free and robust debate that *New York Times* sought to protect.

By putting these pieces together, it is possible to determine which kinds of behaviors are worthy of protection and which are not, *without* invoking any kind of general constitutional doctrine. But it turns out that the constitutional mistake in *New York Times* is replicated in other areas as well. It is useful to play out this theme with several further examples.

The model that I have developed thus far has omitted very important issues that must be brought back into the equation. Sometimes using force or fraud is *justified* under the circumstances. Now there are people who want to deny this, one of the most famous illustrations coming from Immanuel Kant, which basically relegates him on this point to the class of "insane philosophers on a bad day." The famous example arises if an intruder into your house asks the whereabouts of your children so that he can murder them. You may, Kant opines, remain silent, but you may not lie in order to throw him off the scent.[40] What an odd use of the distinction between misfeasance and nonfeasance! That venerable line has no traction here because the law of misrepresentation treats lies, concealment,

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39. *See* Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782 (1986).

40. Immanuel Kant, *On a Supposed Right to Lie Because of Philanthropic Concerns*, *reprinted in* GROUNDING FOR THE METAPHYSICS OF MORALS 63, 63 (James W. Ellington trans., Hackett Publ'g Co. 3d ed. 1993) (1785).

and disclosures as part of a uniform system, and finds many cases where disclosure is appropriate as a prelude to a market transaction.[41] The misfeasance rule gains traction only in cases that deal with the asserted duty to rescue strangers, which has traditionally been denied at common law.[42] In practice, the issue in Good Samaritan cases is usually one of rash rescues leading to death or serious injuries.[43] The distinction has no place in dealing with verbal interactions with people, where an omission can often arise from a duty to speak—a point that is lost in the Kantian account of lying.

This odd position on the status of justifications is supposed to follow from the Kantian categorical imperative, binding on all sentient beings out of some "absolute necessity" that is said to follow from Kant's conception of pure reason.[44] This mindset seems to have some appeal among modern philosophers, who recoil from the difficulty of the stated example, but who nonetheless limit the kinds of maneuvers that people can use to weave a web of deceit to throw the murderer off the track.[45] The concern is that excessive duplicity interferes with the system of trust that honest communication requires.[46] But that intermediate position shares, albeit in reduced form, the same vice as the Kantian view, tolerating at least some cases in which the killings take place when the allowable ruses have not worked. Of course, trust is critical in relationships of confidence, for example, in such matters as medical information, trade secrets and national security. But the appropriate steps in these areas are not impaired in the slightest by taking maximum resistance to guard against the harms by potential thieves and murderers. Nothing in moral theory or under the First

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41. *See, e.g.*, Laidlaw v. Organ, 15 U.S. (2 Wheat.) 178 (1817).

42. *See, e.g.*, Buch v. Amory Mfg. Co., 44 A. 809 (N.H. 1898).

43. *See, e.g.*, Wagner v. Int'l Ry. Co., 133 N.E. 437 (N.Y. 1921). The futile effort of the plaintiff to rescue his cousin, already dead, was justified by the famous phrase "Danger invites rescue." *Id.* But the rescue was already being undertaken by the conductor and his staff, so that the plaintiff's needless intervention put both himself and everyone else at risk. *Id.* at 438. The danger of futile rescues really matters, given the large number of deaths and injuries that follow. *See* David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 712 (2006).

44. KANT, GROUNDING FOR THE METAPHYSICS OF MORALS, *supra* note 40, at 2.

45. *See* SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY AND THE LAW 5–46 (2014).

46. *Id.* at 46.

Amendment blocks or hampers these efforts to counter fraudulent schemes or practices. Half measures will not do.

The carryover between public and private law runs as follows: think of the substantive guarantees of the Constitution as creating a set of prima facie cases—prima facie you're allowed to talk—and then you can overcome that by showing force or fraud, followed by the allowance for justifications. And it turns out, even the most ardent textualist will only be able to make sense of the substantive issues by introducing these exceptions, often under the rubric of the police power to make the system cohere, long a major topic of constitutional adjudication, although the words appear nowhere in the document.[47] And Justices like the late Justice Antonin Scalia, wary of implication within their originalist framework, will commonly make serious mistakes in putting the pieces together, as was surely the case with Justice Scalia's takings decisions.[48] Sooner or later, probably sooner, the issue of how you introduce justifications and tease out their implications is going to be a central part of your overall system, which means that textualism properly understood is a constitutional norm that answers a few questions directly, and then commands you to develop a comprehensive theory of liability, excuses, and justification.[49] If you're a good common-law pleader, you know that confession and avoidance do not exhaust all possibilities, which is also the case with the police power. There are replies to these defenses and further pleas down the road.[50] By the time you're done, there are strong parallels between the short texts of ancient law and the modern constitution. Thus, the simple command of the *lex Aquilia*—that one not kill unlawfully the slave or herd animal of another person—generates a hugely sophisticated account of tort law that deals with hard problems of causation, consent,

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47. *See generally* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Little, Brown, & Co. 7th ed. 1903); ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS (1904); CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES (1886).

48. *See* Richard A. Epstein, *Missed Opportunities, Good Intentions: The Takings Decisions of Justice Antonin Scalia*, 6 BRIT. J. AM. LEGAL STUD. 109 (2017).

49. *See* Epstein, *supra* note 26.

50. *See* Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973).

self-defense, necessity, and much more.[51] As I have long stressed, constitutional interpretation follows exactly the same logic. The differences between Latin and English, between Rome and America, and between then and now play virtually no role in any side by side comparison of the Roman text with the Constitution.[52] But the element of surprise should be reduced when it is recalled that the notion of a constitutional republic begins with Rome, and many of our constitutional terms, for example senator and republic, are direct takeovers from the Latin.[53] Historical myopia is dangerous intellectual business. Nothing is more dangerous than seeking to understand constitutional law of the First Amendment or indeed anything else, within this type of historical void.

At this juncture, we need to push ahead a little bit further and say, what else is there about common law that must be addressed after going through the prima facie case justifications and exceptions? The answer is that it is critical to understand how the law of remedies fits into the overall analysis. Good libertarians tend to start their analysis in the ex post world where a single discrete causal action has taken place that links together two parties. The only question they like to address is rectification for past harms, under the model Aristotle put forward in abbreviated form in the *Nicomachean Ethics*.[54]

Aristotle's analysis is in many ways the starting point for serious discussions of legal rights and duties. It accomplishes two major points. First, it insists that the link between the two parties is the trigger for any remedy between the two parties.[55] Second, it holds that the actions themselves, not the general merit or demerit of the parties, determines their rights and duties. A good man can be liable for harm inflicted on the bad man, as

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51. *See* DIG. 9.2.2 (Gaius, Ad Edictum Provinciale 7).

52. *See generally* Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699 (1992).

53. *Id.* at 705.

54. ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 126 (R.W. Browne trans., 1853) (1132a2–6) ("[I]t matters not whether a good man has robbed a bad man, or a bad man a good man, nor whether a good or bad man has committed adultery; the law looks to the difference of the hurt alone, and treats persons, if one commits and the other suffers injury, as equal, and also if one has done and the other suffered hurt.").

55. *Id.*

well as the reverse.[56] But beyond that, Aristotle's account is skimpy on issues of liability. There is no discussion of the basis of liability—strict liability, negligence and intentional harms—and their interaction. And the issue of defense receives no systematic treatment.[57] The Roman law addressed both deficiencies.[58] These issues must be fleshed out, and in my view the general relationship between strangers is one of strict liability, subject to affirmative defenses typically based on either the plaintiff's own conduct or the assumption of the risk of loss.[59] That strict rendition maps well into explicit constitutional guarantees. The First Amendment speaks about abridging freedom of speech, and does not require that the limitations be intentional, even though in most cases they are. The question of defense is always brought back into the law through the discussion of police power justifications for the abridgment of these rights based on the famous quartet of health, safety, morals, and the general welfare, each of which requires extensive separate analysis.

There is also a second serious difficulty with legal analysis that is endemic to all legal systems—namely, how to deal with the difficult problem of uncertainty. It is very commonplace for people to engage in actions that may or may not turn out to be harmful, and the law must decide whether to supply an ex ante remedy, an ex post remedy or, as is commonly the case, some combination.

The choice among ex ante remedies is exceedingly complicated. They have a temporal component to them; just how far back does the law go before it intervenes? In physical injury cases, the common law tended to wait until harm was actual or imminent before injunctive relief was supplied.[60] First Amendment cases rightly follow that view, so that early censorship is not used except where profound interests of national

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56. *Id.*

57. *See id.*

58. *See* Epstein, *supra* note 52, at 706–12.

59. Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974).

60. *See, e.g.*, Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1983).

security are at stake.[61] But timing is not the only issue. Injunctions could have conditions attached, or the rules could be crafted so as to minimize their effects on third parties.[62] They are also subject to revision on the basis of new information.[63]

The ex post world of damages has its own set of complications. There is no unique measure of damages within a corrective justice system. Putting the injured person back in the position that she occupied before the wrong occurred is impossible in death cases, and often unwise in cases of serious injury like quadriplegia, where no amount of money achieves the objective of restorative justice, and excessive payments could rob the defendant of resources needed to conduct essential life-saving activities. The public law faces the same question as to how to calculate the fines applicable to different sorts of violations—and this must be answered. But you can stare at the constitutional text as long as you want, and you will discover not a word in it that explicitly addresses these remedial issues. As good First Amendment lawyers, we start hearing that you do not allow prior restraint, except in the few cases when you do. So you have to figure out why the presumption is set one way rather than the other, and what is needed to overcome it.

This exercise follows the same standards as those developed by courts of equity centuries ago. In the exercise of their inherent discretion, they often delayed injunctions knowing that people took needed precautions, and damages and injunctions are available down the line. The error costs of moving too soon are high, because an injunction could turn out to stop too much activity that turns out to be innocent. One early manifestation of this tendency is found in the old English case of *Turberville v. Savage*,[64] in which the plaintiff said, "If it were not assize-time [that is, if the judge were not in town], I would not take such language from you."[65] The court held that the words, "if it were not assize time," did not constitute an assault, given the absence of an intention to commit the assault. Hence the defend-

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61. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (no injunction against release of Pentagon papers).

62. THOMAS CARL SPELLING, 2 A TREATISE ON INJUNCTIONS AND OTHER EXTRAORDINARY REMEDIES § 1032 (2d ed. 1901).

63. *Id.* § 1033.

64. (1663) 86 Eng. Rep. 684 (KB).

65. *Id.* at 684.

ant could not interpose the assault of the plaintiff as a defense. But if in fact the blow were struck, the words would no longer matter, and the self-defense privilege would have then been activated.

That case is a stripped-down protocol of modern cases like *Schenck v. United States*,[66] *Abrams v. United States*,[67] and *Dennis v. United States*,[68] in which the stakes are obviously raised because of the uncertain prospect of the violent overthrow of the United States. But even though the stakes are vastly higher, the correct analytical techniques are the same as those used to deal with simple assault. Ex ante relief cannot be ruled out, but there are serious issues as to how early in the cycle that intervention takes place, and the choice of remedy once some intervention is justified. And to add to the mix, charges of aiding and abetting or conspiracy are also appropriate for crimes that deal with speech as much as with anything else. The impassioned views of Justice Brandeis in *Whitney v. California*[69] about the dangers of government overregulation of speech were not part of some passionate attack on government misbehavior. Rather, they were delivered in a *concurrence* that upheld the conviction for conspiracy, while warning against pushing the envelope too far outward.[70] But what makes this area so difficult is that it is often easy to state the choices, but difficult to pick the right damages.[71] The standard used for remedies in all contexts is the unavoidable test that relies on the "sound discretion of the trial judge," subject to the usual forms of judicial review.[72] How that discretion should be exercised, and what standard of review is appropriate are the kinds of questions in which errors of over- and under-intervention must be simultaneously addressed, which is why empirically it is sometimes difficult for people who agree on an analytical framework to reach a consensus on

66. 249 U.S. 47 (1919).

67. 250 U.S. 616 (1919).

68. 341 U.S. 494 (1951).

69. 274 U.S. 357 (1927).

70. *See id.* at 379 (Brandeis, J., concurring).

71. Richard A. Epstein, *The Fundamentals of Freedom of Speech*, 10 HARV. J.L. & PUB. POL'Y 53, 57–58 (1987).

72. Richard A. Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, 4 CATO J. 711, 717 (1985).

the facts of any given case.[73] Needless to say, the fact-specific nature of each determination makes it hard to develop per se rules that can confidently guide the extension of the basic rule from one case to the next. The choice of remedies in national security cases[74]—what kinds of wiretaps and surveillance tools are permissible—is but a modern manifestation of an age-old problem.

The moral should by now be clear. The same kinds of interpretive commitments that are required to make sense of our constitutional guarantees are identical to those used in ordinary private law disputes. As in private law disputes, the more complicated the case, the more contested the remedial choices. And so, the logic of the argument shows that the higher stakes of constitutional litigation can easily put judges squarely into the unhappy position where they have to exercise their sound discretion on remedial issues.

This situation is, to say the least troublesome, especially for someone who wrote a book with the title *Simple Rules for a Complex World*.[75] But it is also unavoidable for this reason: it is easy to know what to do when everyone abides by the rules of the road. So the great office of the positive law is to lay out that map, which then reduces the likelihood that people will go astray. But once they deviate off the main road, it is not possible to catalogue in advance all the subsequent moves that other parties will, or should, make in response to the initial mistake in unanticipated ways.

C. Sound Discretion and the Rule of Law

The harder question is whether the use of discretion at the remedial level is in some sense fatal to the rule of law. The answer to that question is a confident no. Before getting worried

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73. *See* Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 49 (2000); *see also* Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 470 (1986).

74. Richard A. Epstein, *Let's Not Kill All The Lawyers*, FORBES (Mar. 16, 2010), https://www.forbes.com/2010/03/15/al-qaeda-lawyers-combat-opinions-columnists-richard-a-epstein.html [https://perma.cc/Q9HK-PQCR]; *see also* Richard A. Epstein, *Security, Uncertainty, and the National Security Administration: The President Should Defend, Not Revise, Current NSA Procedures*, JUST SECURITY (Jan. 28, 2014, 10:35 AM), https://www.justsecurity.org/6424/guest-post-richard-epstein/ [https://perma.cc/YZ54-8Q3T].

75. RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995).

by complex doctrinal variations, the first question you must always ask is: what is the real-world frequency of occurrence of the difficult hypotheticals that judges and law professors raise in the abstract? In one of my Eureka moments in law school, I was sitting in a class on civil procedure taught by the late Fleming James,[76] who doubled as a distinguished tort professor.[77] I had just finished my English education, reading all of the variations on causation across the entire range of tort law that H.L.A. Hart and Tony Honoré had discussed in their masterpiece *Causation in the Law*.[78] Much of that subtlety was lost on James, an old railroad lawyer, who had this to say about the doctrine of proximate cause: "Do you know what this stuff is about? Somebody (usually a train) ramming into somebody else." And he then said "pow," as he struck his right fist into his left palm. His point was that most of these cases are collision cases for which it is necessary to know who hit whom and who had the right of way. [79] That test works especially well with trains. If ninety-eight percent of the cases turn out to be like that, any worry about the difficulties of causation and the duty of care in cases like *Palsgraf v. Long Island Railroad*,[80] addressing as it did the unintended consequences of knocking an unmarked package of explosives from the arms of a boarding passenger, will have little consequence of the day-to-day operation of the law.

Indeed, as an instructive aside, cases of far-higher salience often have little effect. When I worked as a consultant to the

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76. *See* FLEMING JAMES, JR., CIVIL PROCEDURE (1965).

77. *See* FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS (1956).

78. H.L.A. HART & A.M. HONORÉ, CAUSATION IN THE LAW (1959). At the time the book was the best treatment of the subject. By the time of the second edition in 1985, it no longer held pride of place in large measure because it did not take into account systematic work with the probabilistic nature of causation in many toxic torts, malpractice, and products liability cases.

79. For the empirical observation in the same direction, see H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 98 (2d ed. 1980):

> Taking the doctrine of negligence per se to an extreme doubtless unforeseen by the makers of the formal law, adjusters tend to define a claim as one of liability or of no liability depending only on whether a rule was violated, regardless of intention, knowledge, necessity, and other such qualifications that might receive sympathetic attention even from a traffic court judge. Such a determination is far easier than the task proposed in theory by the formal law of negligence.

80. 162 N.E. 99 (N.Y. 1928).

American Insurance Association in the 1970s on product liability tort reform, everyone knew the concurring opinion of Justice Roger Traynor in *Escola v. Coca Cola Bottling Co.*,[81] urging strict liability instead of a negligence rule aided by the use of *res ipsa loquitur*, had no effect whatsoever on insurance rates. The exposure for liability under the two theories differed only marginally, and the presence of a strong defense was "defined in terms of the safety of the product in normal and proper use, and should not extend to injuries that cannot be traced to the product as it reached the market."[82] It was only when the basic rules of the game were changed—so that the defendant could still be held responsible for harms caused by altered products that had been used improperly by a plaintiff well aware of the danger—that the field expanded wildly. But when I was first engaged to work on tort reform by the American Insurance Association, its key officials were keenly aware of the huge bump in payouts that drove a huge increase in premiums. They sensed that it was not attributable to the Restatement (Second) of Torts adopted in 1965, even with its expanded strict liability provision in Section 402A.[83]

So, there is a lesson to be learned here: if the basic structure is sound, the countless low-frequency variations are not institutional issues, but are of concern primarily to litigators only. But if the complexity displaces the simple rules in the ninety-eight percent of ordinary cases, the social consequences can be dramatic, as with both the explosion of tort liability in medical malpractice and products liability cases in the late 1960s and 1970s.[84] Thus, traffic rules are the dominant constraint in highway accidents; but with medical malpractice, the decline of custom as setting the standard of care ushered in a new age of liability.[85] It was no accident that physicians and hospitals living with the old malpractice rules, then tried to contract out of these rules, only to be slapped down by courts heavily influ-

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81. 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

82. *Id.* at 444.

83. RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965).

84. Richard A. Epstein, *Plaintiff's Conduct in Products Liability Actions: Comparative Negligence, Automatic Division and Multiple Parties*, 45 J. AIR L. & COM. 87, 115–16 (1979).

85. *See* Richard A. Epstein, *Medical Malpractice: The Case for Contract*, 1 AM. B. FOUND. RES. J. 87, 95 (1976).

enced by beliefs that these novel institutional contracts were suspect contracts of adhesion.[86] Similarly, with products liability, tort liability expanded when the courts began rejecting the older, and superior, paradigm that liability only attached to products that contained latent defects in their original form that manifested itself after normal and proper use.[87] Once again, efforts to contract out of the new rules were stoutly resisted by courts, so that tort law locked everyone into a vastly inferior set of rules.[88] These differences are not small, but are literally differences in orders of magnitude.

II. FIRST AMENDMENT CASES—AT LAST

At this point, I shall move from the abstract to the concrete by discussing an important set of cases that look at both sides of the coin: those in which the Supreme Court has followed, to good effect, established common law principles, and those in which the Supreme Court has, to bad effect, deviated from those principles.

A. Good Speech Doctrine

First, I will discuss those areas where the Court has been successfully guided by common law principles: offensive speech and truthful speech.

1. Offensive Speech

On the former point, let me mention just two doctrines that resonate. The first is the view taken in cases such as *Texas v. Johnson*,[89] in which the Court held that the offense that the public at large takes to flag burning does not justify banning this vivid form of expressive conduct. The argument in favor of this position does not rest on any distinctive First Amendment doctrine, but follows from the standard common (and Roman) law

86. *See* Tunkl v. Regents of Univ. of Cal., 383 P. 2d 441, 447 (Cal. 1963).

87. RICHARD A. EPSTEIN, MODERN PRODUCTS LIABILITY LAW (1980) (detailing the expansion in design and warning cases).

88. *See, e.g.*, Greenman v. Yuba Power Products, 377 P.2d 897 (Cal. 1964); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960). The rejection of all waivers and disclaimers is institutionalized in RESTATEMENT (THIRD) OF TORTS § 18 (AM. LAW INST. 1998).

89. 491 U.S. 397 (1989).

view that certain forms of harm must be regarded as *damnum absque injuria*, literally harm (*damnum*) without legal injury (*absque injuria*). This doctrine is indispensable for development of a coherent legal system. To argue that government should intervene in any case of harm means virtually all human conduct becomes actionable, including blocking views by constructing new buildings and refusing to deal in competitive markets.

The underlying rationale for the rigorous application of this principle is that the private loss of the plaintiff is *inversely* related to overall social welfare, so that individual claims must be rejected categorically, lest legal action systematically shut down productive activity. The view here is not based on some narrow sense of "individualism"—an evocative word that has all-too-often been used to condemn laissez-faire economics.[90] But similar logic applies here. To protect individuals against mere offensive conduct is to invite people to merit that exalted status by getting angrier and angrier, so that their private resentments give strong claims of rights against one another. Everyone can play this game so that mutual indignation becomes the source of great anxiety or worse. The concept here is not viewpoint sensitive, for it applies equally to the person who is offended that the United States has gone to war and to the person who is offended that the United States did not go to war. One way to advance social peace is to deny any positive return to heightened emotions intended to stir the flames. Offensive speech thus falls into a different category from "fighting words" to a political opponent—an implicit threat of force that is within the proper scope of government regulation.[91]

Fortunately, this prohibition has held firm. Thus in *Matal v. Tam*,[92] the Supreme Court held that the head of the Patent and Trademark Office (PTO) could not deny a trademark regulation to a San Francisco Asian band named "The Slants" on the ground that its name contravened the Lanham Act provision prohibiting the registration of trademarks that may disparage

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90. Richard A. Epstein, *Elizabeth Warren's Sloppy Progressivism*, DEFINING IDEAS (Hoover Institution, D.C.) (Jan. 10, 2012), http://www.hoover.org/research/elizabeth-warrens-sloppy-progressivism [https://perma.cc/L93S-XP5U].

91. *See* Chaplinksy v. New Hampshire, 315 U.S. 568 (1942).

92. 137 S. Ct. 1744 (2017).

or bring into contempt any person living or dead.[93] Justice Alito, speaking for a unanimous Court held that "[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[94]

It is worth noting that *Matal v. Tam* involved not a direct suppression of speech, but the refusal of the PTO to give The Slants a more efficient route for trademark protection. Yet the doctrine of unconstitutional conditions rightly applies—given that the state has a monopoly on licenses, it cannot use that power to indirectly suppress speech it may not suppress directly. Thus, even if, as seems the case, *Tam* struck down the disparagement clause, there would still be a few instances in which the PTO could refuse to issue a trademark to an offensive use of language that did not enjoy common law protection. There is no reason why the PTO should have to give a mark, already invalid under common law principles, the added benefits of registration, namely effective notice and presumptive validity.

Indeed *Tam* is of exceptional importance because it reaffirms the bottom-up view of intellectual property rights more generally. Registration does not create the right for a trademark any more than it creates the right to acquire land. What it does, consistent with Lockean theory, is to make these property rights more secure, in the same way that the statute of frauds and a land office regulation make the title property more secure, also by giving the notice to the world and conferring a presumptive validity on the title. As Justice Alito argued, that standardized protection under clear priority rules is worlds apart from the massive government transfer programs funded out of general tax revenues, which raise wholly different issues.[95] The full set of constitutional doctrines thus works together in perfect harmony.

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93. 15 U.S.C. § 1052(a) (2012).

94. *Tam*, 137 S. Ct. at 1764 (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

95. *Id*.

2. Truthful Speech

The second notable set of free speech doctrines are those that protect the ability of commercial parties to make truthful statements about the services and goods that they sell. The only justified area for government repression is false and misleading speech, which again hearkens back to the standard common law doctrine on misrepresentation. The point involves not only ordinary services, but also, most critically, the dissemination of information on matters of life and death, in connection with the truthful promotion by drug companies of their products to either physicians or patients.[96] The correct line in these cases follows the lead of Justice Clarence Thomas, who wrote, "I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.'"[97]

As a matter of first principle, it strains credulity that there is any legitimate government justification for blocking the dissemination of truthful information that could aid in making life-or-death decisions. And, in light of what was said in *Tam*, the government gets no added regulatory power in FDA cases by virtue of that fact that its license is needed to market the drug. Once again the doctrine of unconstitutional conditions limits the grounds on which the government, given its monopoly position, should be allowed to turn down applications. If it cannot suppress speech by ordinary people when no license is required, it cannot use its licensing power, given to protect health and safety to block the dissemination truthful information about drugs from persons of full age and competence.

B. Bad Speech Doctrine

I now turn to cases where the First Amendment law loses its traction precisely because it does not conform with standard common law principles: collective bargaining, antidiscrimination law, and force and fraud cases.

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96. *See, e.g.*, United States v. Caronia, 703 F.3d 149 (2d Cir. 2012); Amarin Pharma, Inc. v. United States FDA, 119 F. Supp. 3d 196 (S.D.N.Y. 2015) (finding promotion of drug for off-label use protected).

97. *Tam*, 137 S. Ct. at 1769 (Thomas, J., concurring) (quoting Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 572 (2001)); *see also*, *e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996) (Thomas, J., concurring).

1. Collective Bargaining

The first illustration comes from the limitations on freedom of speech that are accepted in modern American labor law. As already noted, the mandatory collective bargaining scheme should on principle be rejected on the ground that employers do not enjoy any monopoly power that justifies forcing on them the duty to bargain under a theory rightly reserved to common carriers and public utilities. But now that the objection has been overrun, the question is whether traditional protections afforded to property and speech still have a role to play. In both areas, the law has to bend to accommodate the new basic premise.

Note the transition. In *Kaiser Aetna v. United States*,[98] the Supreme Court announced categorically "that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation."[99] But apparently not in labor cases. Thus, in *Republic Aviation v. NLRB*,[100] the Supreme Court sided with the NLRB when it treated as an unfair labor practice "the rule against solicitation in so far as it prohibits union activity and solicitation on company property during the employees' own time."[101] The word "trespass" did not appear in this decision, yet that is precisely what happened.

Normally the common law rules on exclusive use are suspended in cases of necessity, as when entry takes place to prevent imminent death, serious bodily injury, or serious property disruption.[102] But that is not the case here. The union, of course, is engaging in speech activities when it solicits workers for membership, but it would be idle to claim that it was entitled to protection for its activities on any ground of freedom of speech on the premise that the state is involved if the owner seeks its assistance in expelling the intruders. The protection of this common law right is not a form of state action, let alone, as

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98. 444 U.S. 164 (1979).

99. *Id.* at 179–80.

100. 324 U.S. 793 (1945).

101. *Id.* at 796.

102. *See, e.g.*, Vincent v. Lake Erie Transp. Co., 124 N.W. 221, 222 (Minn. 1910) (allowing the privilege, but requiring compensation for property loss); Ploof v. Putnam, 71 A. 188, 189–90 (Vt. 1908) (allowing the privilege without compensation).

Tam notes, a state subsidy.[103] Free speech again must be understood within a comprehensive framework of general property rights. One can no more trespass to gain access to speak than to gain access to farm equipment. But once the duty to bargain is imposed, it makes no sense to continue to allow the traditional right to exclude. Then the employer could first agree to a deal and then exercise its right to exclude workers from its plants.

The change in one basic rule of freedom of association requires a similar change in the rules on freedom of speech. In ordinary discourse, each side can say what it wants to advance its position so long as it does not engage in the threat of force or the commission of fraud. Hence, it is perfectly permissible at common law to threaten the performance of a *lawful* action, namely the refusal to deal. So, a statement that I shall move my business, introduce machines, or fire you all is part of the way in which the parties determine whether to deal or not, and if to deal, on what terms. But once the labor law is put into place, the right to walk away disappears. So now any threat to move a business or close down a section should be understood as the threat to commit an *unlawful* act that the state can then bar.[104] At this point, the hard question is just what can an employer state that would not be construed as an implied threat. One reading is nothing at all. The most it can do is exercise its right under the NLRA not to make a specific concession in the course of bargaining,[105] which has the unpleasant consequence of leaving the union in the dark as to the employer's reservation price on critical terms. The Taft-Hartley reform, Section 8(c), seeks to provide the appropriate roadmap when it says:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.[106]

The last phrase, dealing with a threat of reprisal or force or promise of benefit makes the fatal linkage. Threats of force

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103. Matal v. Tam, 137 S. Ct. 1744, 1760–61 (2017).

104. *See, e.g.*, Textile Workers Union of Am. v. Darlington Mfg. Co., 380 U.S. 263 (1965).

105. 29 U.S.C. § 158(d) (2012).

106. 29 U.S.C. § 158(c) (2012).

should always be off the table, but the term "reprisal" is clearly meant to go beyond that state of affairs, to cover other kinds of actions that make it more difficult for unions to organize. And the promise of a benefit, that is, a statement of what the employer will do if the workers choose not to join the union, is banned to make sure that the employer is not allowed to undercut the collective bargaining system by competing for the loyalty of workers by offering them a better deal—including terms that allow the firm and the worker to divide the productivity gains by blocking any union that seeks to organize the workers from gaining a cut of the deal. The situation is further compounded by the insistence of dissident union members that they have a free speech right not to pay dues to a union whose mission they do not support,[107] which is then met by the converse claim that the union is entitled to recoup from the state under a takings theory the lost dues that come from the state adoption of a right-to-work rule that in its view allows dissident workers to free-ride on union efforts.[108]

My point here is not to resolve this jumble of confusions, but only to point out yet again that none of these issues arise under a common law framework. The employer can decide to refuse to deal with workers, and can enter into yellow-dog contracts to secure loyalty from those to whom he extends offers. The union can only include in its ranks the members it can lawfully recruit into the organization. So there the standard theories of speech and association obviate all the second-best adjustments that need to be made, fitfully at best, in these cases. Once again, the unified theory beats the ad hoc approach as a matter of common, statutory and constitutional law.

2. Antidiscrimination Law

In one sense, the employment discrimination laws of the 1960s are a second generation attack on freedom of contract in competitive markets. As was the case with collective bargaining, the introduction of the new system necessarily places large

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107. *See, e.g.*, Harris v. Quinn, 134 S. Ct. 2618 (2014).

108. *See* Sweeney v. Pence, 767 F.3d 654, 671 (7th Cir. 2014) (Wood, C.J., dissenting); Int'l Ass'n of Machinists v. Wisconsin, No. 2015CV000628, 2016 Wisc. Cir. LEXIS 1, at *6 (Wis. Cir. Ct. Apr. 8, 2016). For my critique, see Richard A. Epstein, *The Misconceived Attack on Right to Work Law*, 2017 U. CHI. LEGAL FORUM (forthcoming 2017).

and unprincipled limitations on freedom of association. Some of these limitations are of lesser practical consequence because they tend to match the private preferences of the firms subject to their scope: there are many more firms that support diversity and affirmative action than want to exclude minorities from their ranks—by orders of magnitude.[109] But it is important to understand which way dual preferences, public and private, should be reconciled. Rightly understood, they are reason to *remove* state compulsion, since markets already echo the dominant sentiment. And that case for getting rid of these laws in the absence of monopoly power (which is never found in labor markets) is stronger because there are serious dangers that government will apply these antidiscrimination laws (or human rights laws as they are often called) to small groups that have their own reasons for bucking the dominant trend. The issue of divergent preferences arises not only in employment contexts but also with charitable and religious organizations that have consistent sets of beliefs out of step with the world at large.

As noted earlier, the correct common law view on this subject only uses the antidiscrimination norm as a counterweight to monopoly power, so that it has no proper application to any business or social organization operating in a competitive environment. That argument applies equally to all forms of discrimination on the grounds of race, sex, sexual orientation, or age. Remove these particular rules and we should expect to see some private organizations depart from any *X*-blind rules, including diversity or affirmative action programs that have attracted widespread social support today under the banner of "inclusion and diversity." The great virtue of a competitive market is that different organizations can experiment with different programs, allowing for a higher level of social satisfaction precisely because all organizations do not toe the same line.

It is of course clear that in modern social discourse the antidiscrimination norm has emerged triumphant against all rival

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109. Jonathan D. Glater, *Affirmative Action: A Corporate Diary,* N.Y. TIMES (June 29, 2003), http://www.nytimes.com/2003/06/29/business/affirmative-action-a-corporate-diary.html [https://perma.cc/4FMB-9ZYC]; Roger Parloff, *Big Business Asks Supreme Court to Save Affirmative Action*, FORTUNE (Dec. 9, 2015), http://fortune.com/2015/12/09/supreme-court-affirmative-action/ [https://perma.cc/G9J4-NZZF].

claims of economic liberty, with of course a huge exception from the so-called color-blind or sex-blind rules for given protected classes. But the First Amendment is made of sterner stuff. Under its two-tier system of constitutional rights, it calls for a higher level of scrutiny of government actions. But here again the confused state of the basic norm destabilizes the system, so that the antidiscrimination norm often trumps associational freedom when monopoly is nowhere in sight. One early case for this position was *Roberts v. United States Jaycees*,[110] where the Court, with an opinion from Justice Brennan, sustained an order under the Minnesota Human Rights Law for the Jaycees to admit women as equal voting members in the organization. In his view, the freedom of association only came out ahead in certain kinds of "intimate human relationships," of which membership in a large organization was not one.[111] Brennan's carefully crafted exception was clearly motivated by the desire to prevent the state from making it illegal for people to turn down marriage partners for reason of race and religion.

In those cases, the freedom of association is at its strongest. But why does the right vanish when the organization gets larger? Socially, everyone understands the difference, which is why marriage and social organizations operate under different rules, even in the absence of the antidiscrimination norm. The Jaycees will be subject to much social pressure to change their rules, and if they refuse to buckle, other organizations will expand or form to take up the slack. Given these powerful forces it is risky business for the government to decide whom any group must admit and whom it may exclude. Public agencies have little knowledge of the internal dynamics of discrete private organizations that justifies putting them in a position to dictate values on group membership or rules of internal organization. Groups that go too far out of line with social practices will find it hard to attract new members or trading partners.

Predictably, *Roberts* raised unwelcome complications with the decision in *Boy Scouts of America v. Dale*,[112] where a bitterly divided Court took the opposite view and allowed the Boy Scouts to refuse to make Dale a troop leader solely because he

110. 468 U.S. 609 (1984).
111. *Id.* at 617–18.
112. 530 U.S. 640 (2000).

was gay. The case thus drew the opposite balance as *Roberts* for this large-scale organization, in part because of its religious overtones. That decision provoked a sharp dissent from Justice Stevens who insisted that the only organizations that should be entitled to First Amendment protection against antidiscrimination laws are those that have deep commitments to their extreme substantive views, which the Scouts could not claim because of internal inconsistency on gay rights.[113] But Justice Stevens's view (like the rules on offensive speech) only strengthens the hand of extremists in every organization. The voice of moderates should count equally.[114] In fact, in the aftermath of *Dale*, extended internal deliberations ultimately resulted in a shift of policy, all the more legitimate precisely because it was achieved internally.[115]

The greatest controversy comes from recent cases in which small businesses have been subject to the full brunt of the law in connection with their refusal to make wedding cakes,[116] take photographs,[117] or supply flowers for same-sex marriages.[118] These proprietors have uniformly claimed that they cannot enter into activities that violate their personal and deeply-held religious beliefs, for which they have received a storm of abuse from government officials on the ground that those individuals who don't want to play by the human rights laws are bigots who should be shut down.[119] The question is whether there is

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113. *Id.* at 675 (Stevens, J., dissenting).

114. For my views, see Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119 (2000).

115. David Crary & Brady McCombs, *Boy Scouts faring well a year after easing ban on gay adults*, ASSOCIATED PRESS (July 23, 2016), https://apnews.com/3de59dad2ba74b8f98bd3bc9b93c9bfc/boy-scouts-faring-well-year-after-easing-ban-gay-adults [https://perma.cc/L9L9-M8BV].

116. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. Ct. App. 2015), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017).

117. Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013).

118. State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017).

119. *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES (2016), http://www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.PDF [https://perma.cc/R6GY-PQ5P]. The report contains a separate statement by five of the commissioners—Chairman Martin Castro, joined by Commissioners Roberta Achtenberg, David Kladney, Karen Narasaki, and Michael Yaki—who write: "These laws"—which seek exceptions to the antidiscrimination laws—"represent an orchestrated, nationwide ef-

any pushback to these intemperate statements. One line of defense is that taking pictures, baking cakes, and arranging flowers are forms of expressive activity. A second is that the defendants do not discriminate on grounds of sexual orientation, but only on their views of proper marital status.[120] The first argument pushes the expression-conduct line so that much can be made conduct. The second is hard to sustain given the high, but by no means complete, correlation between the two positions: these same bakers will not make cakes for polygamous marriages either.[121]

Within the current framework, both First Amendment arguments have been blown away by courts that treat human rights laws as embodying a compelling state interest. Thus it is said that: "Antidiscrimination laws have important purposes that go beyond expressing government values: they ensure that services are freely available in the market, and they protect individuals from humiliation and dignitary harm."[122] Or further, that "[t]he reality is that because it is a public accommodation, its provision of services can be regulated, even though those services include artistic and creative work."[123] Or finally: "At first blush, it may seem reasonable that a private business should be able to refuse service to anyone it chooses. This view, however, fails to take into account the cost to society and the hurt caused to persons who are denied service simply because of who they are."[124] The explicit strategy is to reduce these cas-

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fort by extremists to promote bigotry, cloaked in the mantle of 'religious freedom.'" *Id.* at 160.

120. *See, e.g.*, *Arlene's Flowers*, 389 P.3d at 553.

121. This rationale motived Justice Ginsburg in *Christian Legal Society v. Martinez*, 561 U.S. 661, 689 (2010) ("Our decisions have declined to distinguish between status and conduct in this context."). Indeed, just this point surfaced in the recent Supreme Court decision in *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017) (striking down a Missouri constitutional provision forbidding any cash contribution to religious organizations and insisting on a distinction between status and conduct). That distinction was rejected by Justice Gorsuch, who would have extended the First Amendment protection further, *id.* at 2025 (Gorsuch, J., concurring), and by Justice Sotomayor, who thought that the protection went too far and would have allowed some states to impose the prohibition even if others did not, *id.* at 2027 (Sotomayor, J., dissenting).

122. *Elane Photography*, 309 P.3d at 64.

123. *Id.* at 66.

124. Craig v. Masterpiece Cakeshop, Inc., Colorado Civil Rights Commission CR 2013-0008, at 4 (2013). The United States Supreme Court later granted certiorari on the question of "Whether applying Colorado's public accommodations law

es to issues of economic liberty where the state's power is thought to be greater.

Yet the common law framework does not yield to these facile arguments. These statutes do nothing to ensure that various services are available in the market. The parties who claim protection as a matter of freedom of religion or of association possess no power to prevent a huge industry from serving groups that a few isolated, small merchants refuse to serve, and then only for the religious ceremonies. That market is quite robust, even if 100% of the firms do not serve it. But even worse, the claims for legal protection are driven by an exaggerated sense of dignitary harms of the very sort that were emphatically rejected in *Matal v. Tam*.

More generally, any claim of dignitary harm has to be rightly resisted, lest any refusal to deal on any ground not covered by the Washington human rights law could count as a dignitary harm, including customer decisions not to patronize religious organizations because they find their beliefs offensive. And it is easy to embroider these claims. For example, the private complainants, who had patronized Arlene's Flowers for years, claimed that they lost their appetite for a large wedding once they were rebuffed for fear that other proprietors would follow, even after Barronelle Stutzman, Arlene's proprietor, provided the names of nearby shops that would take their business, while other merchants, following their Facebook feed, supplied the couple free services.[125] It is easy to embellish the level of emotional anguish by claiming that they were "feeling very hurt and upset emotionally," and "so deeply offended that apparently our business is no longer good business," because "[his] loved one [did not fit] within [the vendor's] personal beliefs."[126] Note how the religious element drops out of the description of the case.

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to compel the petitioner to create expression that violates his sincerely held religious beliefs about marriage violates the free speech or free exercise clauses of the First Amendment." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/ [https://perma.cc/S2TR-UU4A] (last visited Sept. 25, 2017).

125. *Arlene's Flowers*, 389 P.3d 543, 549.

126. *Id.*

The simple way to understand the exaggerated nature of these customer complaints is to ask about the tradeoffs demanded. The religious organizations only ask that people, for a limited subset of services, go down the block to another business that is happy to serve them. The human rights proponents ask people to give up their religious beliefs or go out of business entirely. They care not about the emotional anguish that those threats cause. Nor are these proponents much moved when these small proprietors are subject to multiple threats and unkind messages. To make matters worse, the human rights law compounds the risk of set-up. A gay couple that has no desire to have their wedding services provided by fundamentalist Christian groups may put in a diplomatic request, and when politely referred somewhere else, turn the matter over to a civil rights commission that finishes the job by initiating full scale prosecution, complete with demands for reeducation of offenders in good Maoist style.[127]

There is a lesson to be learned here. There is little that the First Amendment will do to protect people once the antidiscrimination laws are held to be a compelling state interest even in fully competitive markets. It is no pleasure to see the full brunt of the law brought against small businesses. There was once a time when the purpose of constitutional guarantees of individual rights was to protect, in the famous words of Footnote 4 of *United States v. Carolene Products*,[128] "discrete and insular minorities" against oppression by government actors.[129] It was that spirit that led to the decision in *NAACP v. Alabama*,[130] where associational freedoms were protected against state demands for the disclosure of membership lists that could expose their members to just this form of abuse. But now that the gay rights movement is ascendant, small evangelical Christians can be forced to choose between abandoning their religious beliefs or their business. The lesson here is that vulnerable individuals and groups cannot be protected against a legal onslaught once

127. *See* Steven F. Hayward, *Persecution and The Art of Baking, Or How Civil Rights Became Corrupt*, FORBES (June 30, 2014), https://www.forbes.com/sites/stevenhayward/2014/06/30/persecution-and-the-art-of-baking-or-how-civil-rights-became-corrupt/ [https://perma.cc/JY5F-4KSL].

128. 304 U.S. 144 (1938).

129. *Id.* at 152 n.4.

130. 357 U.S. 449 (1958).

economic liberties fail. Economic liberties and political liberties stand together or fall together. The antidiscrimination laws are now used to steamroll associational freedoms where it matters most—on matters of religious belief and conviction.

3. Force

The next set of cases that I wish to examine involves the relationship of First Amendment protections to private conduct that involves the use of force. Commonly, there are legitimate grounds for the restriction or suppression of force as well as fraud, and genuine uncertainty as to how that goal should best be accomplished. One of the areas which gives rise to the greatest tension is picketing around some controversial site. Traditionally that tension arose in connection with labor disputes, where it has always proved difficult to tease out the threat of force on the one side of the equation from the effort to persuade on the other. At times, these decisions have been based on common law principles,[131] and at other times on the First Amendment.[132]

As should be apparent, there is in principle no reason to expect or accept any systematic divergence between the two approaches, since they both share a common objective of sorting the wheat from the chaff. The evident difficulty is that courts struggle to come up with some general rule that works across all cases. But by the same token, allowing endless variation in defining the scope of an injunction invites excessive levels of judicial discretion in individual cases. Unfortunately, modern First Amendment law often takes the wrong approach on both liability and remedies.

In *Snyder v. Philips*,[133] members of the Westboro Church picketed near the funeral site of a Marine Lance Corporal who was killed while serving in Iraq. The signs at some distance from the funeral promised to wreak vengeance on all those who were in the U.S. military.[134] But the picketing took place some 1000 feet from the funeral site and could not be seen or heard

131. See, for illustrations of the problem, *Vegalahn v. Gunter*, 44 N.E. 1077 (Mass. 1896) (finding picketing illegal, over a passionate Holmes dissent).

132. *See* Thornhill v. Alabama, 310 U.S. 88 (1940).

133. 562 U.S. 443 (2011).

134. *Id.* at 448.

or heard during the ceremonies.[135] The plaintiffs only learned about the activities after the services were over.[136] They brought five different common law causes of action: defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy.[137] There is little reason to go into these in great detail, but essentially each of them would fall short under standard tort law. The most obvious candidate would be intentional infliction of emotional distress. But so long as there is no direct interaction between the defendant and plaintiff that claim would fail, for the supposed impact is no greater than if the demonstration were done 100 miles away.[138] Short of interference with the ceremony, the case is at an end.

Accordingly, the jury verdict of $2.9 million for intentional infliction of emotional distress and intrusion on seclusion goes way beyond the traditional limits of that tort. I am not aware of any tort case in which an adverse reaction to mean and nasty words or gestures is actionable in the absence of some direct connection. Perhaps one should be able to argue for a reversal of that rule, but remove the physical connection and the scope of liability becomes virtually unlimited. Either way, that too is a federal constitutional issue for the same reason that the contours of the tort of defamation was a constitutional issue in *New York Times v. Sullivan*. Freedom of speech begins where the tort law ends, so that interdependence between the two is total.

The Supreme Court in *New York Times v. Sullivan* did not examine the soundness of the state law judgment by asking whether it violated any norms against force and fraud. Instead, it assumed that state law had final say on the tort law, so that the First Amendment only came into play after the tort decision was settled.[139] That approach represents one of the occupational hazards of insisting that tort and constitutional law fall into separate compartments. But in *Snyder v. Phelps*, the shift in approach leads to the wrong place, by asking whether the speech was a matter of public interest and concern that rated a higher level of constitutional protection than matters of merely private

135. *Id.* at 449.
136. *Id.*
137. *Id.* at 450.
138. *See, e.g.*, Thing v. La Chusa, 771 P.2d 814, 815 (Cal. 1989).
139. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 267–68 (1964).

level of concern. But in this context why worry about this distinction at all? If there had been some direct abusive conduct, I am hard pressed to think that the conduct should be protected from tort liability because the abuse related to the war in Iraq as opposed to the decedent's bad posture. The content makes no difference here, for any matter of public concern can be raised, as it was done in this case out of eyeshot and earshot of the plaintiff. There is no reason for some distinctive constitutional overlay. The difficulties at the borderland of the tort theory are not resolved by invoking some supposed constitutional norm that itself faces the same degree of difficulty. Once again, the common law rules are an accurate guide to constitutional law, in difficult as well as easy cases.

The issue of picketing surfaced yet again in *McCullen v. Coakley*,[140] which involved a Massachusetts statute that imposed a thirty-five-foot buffer zone around abortion clinics targeted solely at picketers.[141] A statute of this sort would be wholly out of line if there were no explicit or implicit threat to people entering the clinic. But there was a legislative record that documented frequent occasions in which persons who claimed to be giving compassionate advice were perceived by women in an obviously vulnerable position as making unwelcome advances that crossed over from persuasion to coercion.[142] Women who have scheduled an appointment at an abortion clinic are not the most likely targets for advice that they switch course at the last moment.

The question is how to sort out these messy situations, and common law courts are by necessity left with the need to work out individual injunctions in ad hoc decisions that could produce different outcomes from case to case. The legislative solution was intended to remove this uncertainty by picking a distance that allowed picketers to get close enough to have their signs read and their messages heard, but not so close as to reach out and touch people seeking to enter the clinic, which for these purposes is a guaranteed constitutional right no mat-

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140. 134 S. Ct. 2518 (2014).

141. MASS. GEN. LAWS ch. 266 § 120E1/2(b) (2012) ("No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility . . . .").

142. *McCullen*, 134 S. Ct. at 2535.

ter what one thinks of the constitutional soundness of *Roe v. Wade*.[143] It looks as though this statute makes an appropriate accommodation for the relevant interests. I would vote for the statute if a member of the state legislature.

It is therefore instructive to see how current constitutional jurisprudence skews the analysis in ways that led to striking the law down. One class of First Amendment cases involves the application of content-neutral rules that impose time, place, and manner restrictions that do not, and are not, intended to switch the balance of advantage between rival positions.[144] These in general receive more deference than content-specific statutes which generally require higher scrutiny because of their greater ability to tip the scales in one direction or another in any substantive debate.[145]

In practice, however, both these presumptions are much too rigid. In *McCullen*, Chief Justice Roberts took the view that the Massachusetts law imposed a content-neutral restriction, which he then struck down because he thought that historically the ability of the state to regulate protests on public streets was "very limited."[146] There is no doubt that this judgment makes sense in most cases. But it does not obviously apply at a choke point at the access to private property where threats are far higher. So, in this case, the basic presumption is overcome, as the right of ingress and egress should dominate.

Justice Roberts's position is in my view subject to a strong objection that the Massachusetts law is a content-based decision, given that it is known that the only protestors that will camp outside reproductive health care facilities are abortion protestors. But once again it does not follow that the Massachusetts statute should fall because it is content-based, as Justice Scalia protested,[147] in light of the good reasons for imposing that restriction. It would be wildly inappropriate to impose these same limitations in front of those businesses that face no picketing threats. To rely on the content-based distinction

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143. 410 U.S. 113 (1973).

144. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949).

145. United States v. Alvarez, 567 U.S. 709, 724 (2012).

146. 134 S. Ct. at 2522 (quoting United States v. Grace, 461 U.S. 171, 177 (1983)). For the origin of the doctrine, see *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515–16 (1939).

147. 134 S. Ct. at 2548 (Scalia, J., concurring).

misses the central point. This uniform statutory rule is meant to supply a wholesale substitute to case-by-case injunctions. In practice, those injunctions would necessarily be confined to abortion clinics, so any statute that went beyond the area of controversy would necessarily be overbroad. Using content-based distinctions as a targeted response to a content-based problem is wholly appropriate. The Massachusetts statute did a good job of minimizing uncertainty in its administration by setting a distance that balanced the competing interests. It deserved to pass constitutional muster.

4. Fraud

A parallel afflicts the dominant Supreme Court approach in cases of fraud. Initially, the First Amendment adds nothing to the proper definition of fraud. There are many cases, especially under the securities law, where it is always an open question of how to draw the line between statements of fact and statements of opinion, or to determine potential liability for concealment or nondisclosure, or to address the issue of causation in fraud cases. A quick aside, all the common law issues surface in parallel form with fraud actions under the securities law, and once again the same arguments that have traction in the common law context tend to be those that work best at the statutory level.[148] The correct approach is to first determine the scope of fraud, and then to make sure that the government is not allowed to force into the fraud category truthful statements that do not belong there. It is just this sound procedure that is followed in cases that make "false and misleading" statements the touchstone for liability. To be sure, in some cases, fraud morphs into misrepresentation under either a negligence or

148. *See, e.g.*, Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1330 (2015). *Omnicare* relied in part on the common law decision in *Smith v. Land and House Property Corp.* (1884) 28 Ch D 7 (C.A.) 15 (Eng.), which showed a better grasp of the overall situation, by placing the correct emphasis on asymmetrical information. Thus, in that case the owner of a set of flats knew that his tenant had problems making rental payments, but nonetheless falsely described him as a desirable tenant. But in *Omnicare* the prospect of further government regulation was surely known to both sides in a sophisticated transaction, so that the claim for a false statement of fact was far weaker. The case should not have been remanded for a full trial. There should have been a summary judgment for the defendant.

strict liability standard,[149] but even then, the element of falsehood remains. But, as in *McCullen*, it is critical to understand the interplay between public and private remedies.

One case that illustrates these current doctrinal pitfalls is *United States v. Alvarez*,[150] which arose out of a criminal prosecution under the Stolen Valor Act, the key provision of which provided:

> (b) FALSE CLAIMS ABOUT RECEIPT OF MILITARY DECORATIONS OR MEDALS. — Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . . shall be fined under this title, imprisoned not more than six months, or both.[151]

The statute then imposed enhanced penalties for claiming to be a recipient of the Congressional Medal of Honor—this nation's highest military award.[152] The statute as drafted contained no scienter requirement, but as a matter of good sense, the government was prepared to prove scienter in its prosecution of Alvarez who had stated falsely on multiple occasions, "I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy."[153]

In striking down this statute Justice Kennedy did not start with the notion that common law fraud is generally actionable, but begun instead with First Amendment doctrine that subjects content-based restrictions on speech to a high level of scrutiny and not some "free-floating test" that purports to weigh the relative costs and benefits in each case.[154] Instead, he notes that this balancing approach applies to various cases involving defamation, threats of imminent lawless action, and fighting words.[155]

Critically, he does *not* apply the same logic to ordinary common fraud, even if that is punished time and again under the

149. *See supra* text accompanying notes 29–30.
150. 567 U.S. 709 (2012).
151. 18 U.S.C. § 704(b) (2012).
152. *Alvarez*, 567 U.S. at 724.
153. *Id.* at 714.
154. *Id.* at 717 (quoting United States v. Stevens, 559 U.S. 460 (2010)).
155. *Id*.

securities law, or laws dealing with false claims for medical reimbursement, resume fraud in job applications, the unfair trade practices law, and the like. In these areas, the rationale for the strong prohibition against fraud is that feeding people false information can lead them to make bad decisions of a business or social nature—decisions that they would not have made had they known the truth. Justice Kennedy then argues that the government had not established any actual link between the false statements and harm to anyone else, and did not show that counter speech would not be sufficient to handle the situation, given that the false nature of his speech was readily apparent to most people.[156]

In contrast, the concurrence of Justice Breyer stresses that in some cases, lies are justified to keep away prying eyes, or to help patients who are ill.[157] But there is of course no shred of any independent justification offered in this case. Nor does this case involve those tricky mixes of fact and opinion, which should generally be given a wide berth. Unlike Justice Kennedy, Justice Breyer thinks that a more "finely tailored" statute might survive scrutiny, without telling us how that revised law might look.[158] But none of this deflects the single most obvious point that Alvarez engages in the worst kind of lying for private gain and the expense of others. Only Justice Alito's dissent made the sensible point that these frauds had occurred pervasively with literally hundreds of people making these false claims in a year, with little repercussion.[159] Striking down the statute knocks out the ability to control these cases where the frauds may themselves work serious harms.

So, the real question is how should a common law lawyer look at this issue, and the answer is—as in the abortion picketing situation in *McCullen*—that it is always appropriate for legislatures to enact state remedies when private rights of action turn out to be inadequate. The same is true with the securities laws concerned about fraud on the market precisely because it is so difficult to prove reliance in individual cases.[160] The situation here gives rise to the usual collective action problem,

156. *Id.* at 726–27.
157. *Id.* at 733 (Breyer, J., concurring).
158. *Id.* at 737.
159. *Id.* at 741–42 (Alito, J., dissenting).
160. *See, e.g.*, Basic, Inc. v. Levinson, 485 U.S. 224, 232 (1988).

where no single potential target will sue over false speech that harms large numbers of unrelated persons. The statute thus sensibly dispenses with proof of specific causation in the individual case, and imposes injunctive relief or criminal sanctions to counteract the virtual certainty that some unidentified, and perhaps unidentifiable, individual has been hurt. Socially, improved deterrence can be achieved even if the particular victims cannot be isolated. That happens with standard consumer fraud statutes that follow exactly this position. So why then deviate from these rules just because the particular victim is not found? The common law rules on fraud are perfectly general, they apply to all material false statements of fact, and there are no special rules carved out for certain types of speech.[161] If a statement is a lie, it should be punished and the claim that the First Amendment prohibits various content-based statements makes no sense in light of the underlying risks. *Alvarez* so waffles on remedial issues that it necessarily erodes, for no good social purpose, the institutional protection against fraud. The common law position offers a far firmer foundation for this statutory prohibition.

The same difficulties in determining the appropriate boundaries of the First Amendment also arise in the commercial context, most notably in the recent decision in *Expressions Hair Design v. Schneiderman*.[162] That case involved New York General Business Law § 518, which provides that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means."[163] The purpose of this statute was to protect credit card companies whenever merchants wished to impose a higher charge for the use of a credit than for payment in cash or by check. In effect, the merchants could keep the identical price differential by offering a discount to the customers who paid by cash or by check. In pure economic terms, the dollar figures are the same if the credit card transaction costs $102 and the cash or check transaction costs $100. But it does not take a behavioral economist to recognize that the percentage of credit card transactions would likely fall if the language of penalty

161. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST. 1977).
162. 137 S. Ct. 1144 (2017).
163. *Id.* at 1147.

and surcharge were used. This is why the credit card companies supported the statute which blocked the use of terms like "surcharge."

The Supreme Court found that the regulation was directed toward speech, overruling the Second Circuit which had found that it regulated conduct. Because the Second Circuit spoke about the mode of communication, and not the information communicated, the case was remanded for further review to determine whether it "survived First Amendment scrutiny."[164] There remained the contested issue of whether the New York law was a valid commercial speech regulation under *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*,[165] or a valid disclosure requirement under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*.[166] It is a sure tipoff of intellectual disarray to leave a case hanging on these familiar, but elusive, modes of analysis.

This confusion stems from the fact that the dispute in this case revolved around the wrong question, namely, whether the New York statute regulated conduct or expression. This distinction must be drawn under current law because the law subjects speech regulation to higher levels of scrutiny than economic regulation. But the hard question is why the law should treat speech and conduct differently in the first place. From a classical liberal perspective, the choice of pricing mechanisms can be left to the banks and merchants to decide by contract, and presumably they will come up with some formula that will allow them to reach the right solution on both relevant points: the rate of interest and the mode of its presentation.

The correct approach disregards the line between conduct and speech. If the state can regulate the interest rates that private parties can charge in competitive markets, then it can regulate the mode of their communication. If it cannot regulate the first, then it cannot regulate the second. Ideally, both forms of regulation should be struck down in competitive markets, so that the balancing rituals can be safely put to one side in favor of a unified theory of the sort advocated in this article.

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164. *Id.* at 1151.

165. 447 U.S. 557 (1980).

166. 471 U.S. 626 (1985).

III. CONCLUSION

The purpose of this article is to propose that the Supreme Court rethink the way in which it organizes its inquiry into free speech cases. Right now, the general approach is to treat the First Amendment inquiry as deriving from a set of tests that are said to follow from the constitutional text. Thus, the Court places too much reliance on its uncritical defense of the usual distinctions between speech and conduct, between content-specific and content-neutral speech, between low-valued and high-valued speech, and between political and commercial speech. Its approach gives rise to an entire set of constitutional presumptions that work their way through its entire docket.

I do not regard the Court's First Amendment jurisprudence to be the same type of intellectual shipwreck that characterizes its treatment of the takings cases,[167] where the constitutional analysis of private property is wholly unrecognizable to anyone who cares or knows its basic structure, as it has been derived through the ages. The key difference between these two areas is that the rational basis test, which dominates the takings law, does not drive First Amendment analysis. Higher levels of judicial scrutiny are almost always positively correlated with higher levels of intellectual acumen. Nonetheless, the complete separation between freedom of speech and economic liberties is not possible, for example, in the context of labor laws, so that there is always some uncertainty as to which level of scrutiny applies.

As I demonstrate in this paper, a different set of results comes from thinking of the constitution as resting on common law *substantive* doctrine, which announces protection for freedom of speech, and then uses standard interpretive techniques to ask how that freedom relates to the control of force, fraud, and monopoly practices. In this situation, one key question is often whether particular speech is false or misleading, and if it is, whether it is properly subject to well-crafted regulation. A

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167. Of which the latest illustration is Justice Kennedy's majority opinion in *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017), which manages to mangle the law of regulatory takings because of its resolute refusal to return to first principles working through the field. For a critique of the subject, see Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean Up Takings Law in* Murr v. Wisconsin, 11 N.Y.U. J.L. & LIBERTY 151 (2017).

second question is whether certain forms of speech amount to the use or threat of force. In both these cases, government regulation is permissible and the great challenge is how to organize the relationship between public and private remedies when it is uncertain whether the effort to suppress fraud will also suppress proper speech.

The first of these inquiries, dealing with entitlements, tends to be conceptual and in this context one great judicial achievement is the insistence that mere offense by others to words spoken is never a sufficient justification for shutting them down. It is critical not to let these self-induced emotional and dignitary losses drive the shape of the law. Yet because freedom of speech is put into one silo and the antidiscrimination laws into another, the same kind of emotional-reaction refusal-to-deal cases based, for example, on same-sex marriages, is treated as a grave offense that justifies massive government intervention, which leads to a totalitarian overreach directed against a weak and isolated minority that also should enjoy speech and associational freedoms. A similar progressive mistake arises under Section 8(c) of Taft-Hartley, which statute's unacceptable restrictions on employer speech are justified only as a back up to the progressive system of mandatory collective bargaining, which is itself economically unwise and constitutionally suspect. These two doctrinal innovations stand together, and, more importantly, should fall together, for the effort to control employer speech has nothing to do with the control of force, fraud, or monopoly.

In other cases, however, the insistence of starting fresh in First Amendment cases tends to lead to an overexpansion of speech protection relative to a sensible common law norm. That arises with the casual attitude to fraud in cases like *Alvarez*, and to the threat of force in *McCullen*, leading to the serious under-enforcement of fundamental libertarian norms. The common law rules on the exercise of sound discretion call for courts and legislatures alike to minimize the risks of over- and under-enforcement, considering the risks of case-by-case discretion in setting legal remedies.

In the end, the doctrinal and administrative errors made by seeking to forge a distinctively constitutional culture for each provision results in excessive restriction of speech in some cases, and insufficient regulation of speech in others. Unfortunate-

ly, the two sets of errors do not cancel out. They cumulate. A fundamental call to a consistent common law approach to all areas will have two desirable consequences: first, it will allow for a more coherent exposition and development of the law governing freedom of speech, and second, it will allow for the development of a more integrated doctrinal approach across different constitutional areas, which in fact are linked together by the classical liberal principles that animate the constitution and offer the only foundation for constitutional adjudication.

THE WEDDING-VENDOR CASES

DOUGLAS LAYCOCK*

I. THE REPORT OF THE COMMISSION ON CIVIL RIGHTS

We were originally asked to address the report on religious liberty from the United States Commission on Civil Rights.[1] That report was rendered obsolete by the 2016 election, except in the sense that about half the country probably agrees with it.

The Civil Rights Commission is an advisory body.[2] The Commission delivered its report to an administration that would have agreed with some of it. But the Obama Administration certainly would not have agreed with the tone. President Obama was much better on religious liberty than conservatives give him credit for.[3]

The Trump Administration is very different, and it remains unpredictable. Religious liberty is looking better in some ways for conservative Christians. It's looking worse for Muslims, but apart from the various versions of the travel ban,[4] it is so far

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1. U. S. COMM'N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES (2016), www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.pdf [https://perma.cc/GHK8-YFWZ].

2. *See* 42 U.S.C. § 1975a (2012) (specifying the Commission's duties, none of which include any power to regulate or enforce); United States v. Wilson, 290 F.3d 347, 350 (D.C. Cir. 2002) ("The Commission's functions are purely investigatory and advisory—it has neither the power to enforce federal law, nor to promulgate any rules with the force of law.").

3. *See* Douglas Laycock, *Opening Essay: Protecting Religious Liberty in the Culture Wars*, *in* DEEP COMMITMENTS: THE PAST, PRESENT, AND FUTURE OF RELIGIOUS LIBERTY 21, 32–33 (2017) (reviewing range of Obama Administration positions, which were mostly but not always supportive of religious liberty); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 862 (concluding, after detailed analysis, that Obama regulations on contraception "offer a serious plan to protect religious liberty without depriving women of contraception").

4. Proclamation No. 9,645, 82 Fed. Reg. 45,161 (Sept. 24, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

not as catastrophically worse as I had feared. Religious liberty may be less protected for liberal Christians and all other non-Christians; they are not the religions this Administration cares about. The Attorney General has issued memoranda that promise to enforce all existing protections for religious liberty and appear to make that promise even handedly for all faiths.[5] Perhaps the Administration's enforcement priorities will also be even handed; time will tell.

The Commission's report addresses only a very narrow slice of issues: the sometime conflict between religious liberty and other civil rights.[6] Just a quick reminder: religious liberty *is* a civil right.[7] Issues relating to gay rights and contraception have dominated religious liberty debates in recent years; they have taken most of the oxygen out of the room. But most religious liberty issues have nothing to do with sex, gay rights, or contraception.

Counting from *Employment Division v. Smith*[8] forward, there have been eleven merits decisions in the Supreme Court on free exercise claims brought either under the Constitution or under federal religious liberty legislation. Only two of them were about contraception.[9] None were about wedding vendors or gay rights, but now there will be one: the Court has granted review in a wedding-vendor case.[10] Nine of the eleven cases decided so far were about a great diversity of things unrelated to sex.[11] And this does not include the six cases on freedom of

5. Press Release, Dep't of Justice, Attorney General Sessions Issues Guidance on Federal Law Protections for Religious Liberty (Oct. 6, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-issues-guidance-federal-law-protections-religious-liberty [https://perma.cc/EK3L-HTCB].

6. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 1, at 1.

7. *See* Richard W. Garnett, *Religious Accommodations and—and Among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S. CAL. L. REV. 493, 497 (2014).

8. 494 U.S. 872 (1990) (holding that the Free Exercise Clause offers only scattered protections if the burdensome law is neutral and generally applicable).

9. Zubik v. Burwell, 136 S. Ct. 1557 (2016); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

10. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. Ct. App. 2015), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017).

11. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2212 (2017) (right of churches to equal access to state funding of playgrounds); Holt v. Hobbs, 135 S. Ct. 853 (2015) (Muslim prisoner's right to grow beard); Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171 (2012) (right of religious organizations to hire and fire ministers); Gonzales v. O Centro Espirita

religious speech, which were about speech on a wide range of topics.[12] A more extensive study of cases in the Tenth Circuit and its district courts found a similar pattern. Apart from the flurry of substantially identical cases about contraception, there weren't many cases and they weren't about sex.[13] There is a risk of throwing out religious liberty for all kinds of religious minorities because of the deep hostility between the two sides about sex.[14]

The title of the Commission's report is *Peaceful Coexistence*, but the text shows no interest whatever in peaceful coexistence; it calls for unconditional surrender by those claiming a right to religious liberty.[15] The majority adopted every argument it ever encountered against protecting the actual exercise of religion and in favor of protecting only the right to believe.[16] It adopted arguments that have nothing do with the nondiscrimination laws that are its charge—arguments that would tend to suppress religious liberty universally and not just in the context of

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Beneficiente Uniao do Vegetal, 546 U.S. 418 (2006) (right to use mild hallucinogenic in worship services); Cutter v. Wilkinson, 544 U.S. 709 (2005) (right to exercise religion in prison); Locke v. Davey, 540 U.S. 712 (2004) (right of theology majors to equal access to financial aid); City of Boerne v. Flores, 521 U.S. 507 (1997) (right to build worship space); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (right to sacrifice animals); Emp't Div. v. Smith, 494 U.S. 872 (1990) (right to receive unemployment compensation after losing job for using illegal drug in a worship service).

12. Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010) (statement of faith); Good News Club v. Milford Cent. Sch. Dist., 533 U.S. 98 (2001) (student Christian club); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (religious magazine); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (cross in public forum); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (movies on family life); Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (student Christian club).

13. Luke W. Goodrich & Rachel Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SETON HALL L. REV. (forthcoming 2017), https://ssrn.com/abstract=3067053 [https://perma.cc/8HNW-NKJB].

14. *See* Laycock, *Religious Liberty and the Culture Wars*, *supra* note 3 (examining how deep disagreements over issues related to sex have undermined support for religious liberty); Douglas Laycock, *Sex, Atheism, and Religious Liberty*, 88 U. DET. MERCY L. REV. 404, 411–19 (2011) (same).

15. *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 1, at 27 (appearing to recommend elimination of religious exemptions by interpretation and legislative amendment); Charles C. Haynes, *The Deeply Troubling Federal Report Targeting Religious Freedom*, WASH. POST (Sept. 16, 2016), https://www.washingtonpost.com/news/acts-of-faith/wp/2016/09/16/the-deeply-troubling-federal-report-highlighting-religious-freedom/?utm_term=.aa310ca816b6 [https://perma.cc/6JQB-6CNK].

16. *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 1, at 25–27 (Findings and Recommendations).

other civil rights laws. Examples include the conclusory assertion that protecting religious beliefs but not practices is "fairer and easier to apply," and even the absurd argument that religious liberty deserves little protection because religious beliefs and practices can change over time.[17] Its review of the cases is mechanical, wooden, and in places, inaccurate.[18] When you say that the Establishment Clause has received more consistent judicial developments than other clauses,[19] you forfeit much of the little credibility you may have had.

The formal recommendations are question-begging if read literally. The Commission says that exemptions are bad when they're overly broad; that we should not unduly burden other civil rights or civil liberties; that we should apply *Smith* except when there's controlling authority otherwise.[20] How much is overly, unduly, or controlling is not addressed in the findings or recommendations, but the majority's view is clear from the commissioners' separate statements.[21] They are opposed to religious exemptions, but they offer little reasoning in support of that view and make no attempt to grapple with the real issues. They announce at the beginning that the rights they prefer are preeminent, and therefore, they always prevail in case of any conflict.[22]

II. THE LITIGATION

Enough about the Commission. What are the real issues on the questions it addressed? The contraception issue has gone away by administrative rulemaking. The Trump Administration has issued new interim final rules that expand the range of employers eligible for the exemption and abandon the existing

17. *Id.* at 26.

18. *See id.* at 5–17 (reviewing cases). For inaccuracies, see, e.g., *id.* at 6 n.10 (citing a free speech case, Healy v. James, 408 U.S. 169 (1972), as an Establishment Clause case); *id.* at 8 n.20 (stating that religious organizations are "generally treated as private organizations even though qualifying for various tax exemptions"). This last sentence implies a deeply mistaken premise. It is fundamental to the separation of church and state that religious organizations are private actors. Even direct financial assistance would not make them state actors, *see, e.g.*, Blum v. Yaretsky, 457 U.S. 991 (1982), and tax exemption certainly does not make them state actors.

19. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 1, at 6.

20. *Id*. at 26–27.

21. *Id*. at 29–41.

22. *Id.* at second page preceding page i, 25.

regulations' measures to provide free contraception to women whose employers are exempted from providing it.[23] Now a variety of plaintiffs claim that this broadened exemption is unconstitutional,[24] but the constitutional claims in that litigation have little prospect of success.

The wedding-vendor cases[25]—do florists, bakers, wedding planners, and the like have to provide services for same-sex weddings—are not going away. These cases have mostly been a matter of state law, and so at first appeared to be not much affected by the election. The discrimination claim does not arise under federal law; there is no federal gay-rights law. And even if the Supreme Court interprets sex discrimination to cover sexual orientation and gender identity—an issue that is rapidly percolating in the courts of appeals[26]—the federal public-accommodations law does not prohibit sex discrimination, and it applies only to hotels, restaurants, gas stations, and entertainment venues.[27] So there is no federal nondiscrimination law that on any remotely plausible interpretation would reach the wedding-vendor cases. This issue remains to be fought out under state law, in state legislatures, and in Congress.

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23. 26 C.F.R. § 54.9815-2713AT (Treasury); 29 C.F.R. § 2590.715-2713A (Labor); 45 C.F.R. §§ 147.131–147.132 (Health and Human Services). These regulations are available at 82 Fed. Reg. 47,838 (Oct. 13, 2017).

24. *See, e.g.*, Complaint, Massachusetts v. U.S. Dep't of Health & Human Servs., No. 1:17-cv-11930, 2017 WL 4466414 (D. Mass. Oct. 6, 2017).

25. *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. Ct. App. 2015), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017); Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013); Gifford v. McCarthy, 23 N.Y.S.3d 422 (App. Div. 2016); State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017), *petition for cert. filed*, No. 17-108, 2017 WL 3126218 (U.S. July 14, 2017).

26. *See* Whitaker v. Kenosha Unified Sch. Dist. No. 1, 858 F.3d 1034 (7th Cir. 2017) (holding that Title IX protects against gender-identity discrimination), *petition for cert. filed*, No. 17-301, 2017 WL 3713066 (U.S. Aug. 14, 2017); Zarda v. Altitude Express, 855 F.3d 76 (2d Cir. 2017) (holding that Title VII does not protect against sexual-orientation discrimination), *reh'g en banc granted*, No. 15-3775, 85 U.S.L.W. 1647 (2d Cir. May 25, 2017); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017) (en banc) (holding that Title VII protects against sexual-orientation discrimination); Christiansen v. Omnicom Group, Inc., 852 F.3d 195 (2d Cir. 2017) (holding that Title VII does not protect against sexual-orientation discrimination, but that gay plaintiff had sufficiently alleged claim of gender stereotyping); Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017) (holding that Tile VII does not protect against sexual-orientation discrimination), *petition for cert. filed*, No. 17-370, 2017 WL 4022788 (U.S. Sept. 7, 2017).

27. 42 U.S.C. § 2000a (2012).

The most promising religious liberty defenses in these cases have also been based on state law—on state constitutions and state Religious Freedom Restoration Acts.[28] The only federal issues are a claim that the required conduct is compelled-speech,[29] a claim that the ban on sexual-orientation discrimination is not neutral and generally applicable,[30] and a claim (which usually has not been preserved) that *Employment Division v. Smith* should be overruled.

None of these claims is obviously lacking in merit, but each has doctrinal and realist problems. No long-term strategist would choose these polarizing cases either to test the meaning of "generally applicable law" or to seek a reconsideration of *Smith*. The Court's conservatives might bite on one of these federal issues because they see religious oppression and have no other way to help. There is more than one potential swing vote on these issues, but all the attention will be on Justice Kennedy. Kennedy was part of the majority in *Smith*, and he has written all the gay-rights opinions.[31]

Whatever the difficulties, the Court has agreed to decide *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[32] the case of a baker who declined to make a cake for a same-sex wedding. And the baker's case is much stronger than the preceding two paragraphs suggest. A statute that was arguably neutral and generally applicable on its face has been revealed by discriminatory enforcement to be very far from neutral or generally applicable in practice.

A Christian activist named William Jack, who is not a party to the litigation, smoked out the state of Colorado and forced it to make explicit what is usually left to speculation: the refusal

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28. *See* Laycock, *Religious Liberty and the Culture Wars*, *supra* note 3, at 844–45 & nn.22–26 (collecting these provisions).

29. *See* Brief for Petitioners at 16–37, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, No. 16-111, 2017 WL 3913762 (U.S. Aug. 31, 2017).

30. *See id.* at 38–46; Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1 (2016) (arguing that many laws are less than "generally applicable" as the Court has interpreted that phrase).

31. *Id.*; *see* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); United States v. Windsor, 133 S. Ct. 2675 (2013); Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996).

32. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017), *granting cert. to* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. Ct. App. 2015).

to protect conscientious objectors in these cases is discriminatory and one sided.[33] Colorado protects conscientious objectors who support gay rights or marriage equality, but it does not protect conscientious objectors who oppose marriage equality. Because the law is not applied equally, it is not neutral and generally applicable, and it is therefore subject to strict scrutiny under the Free Exercise Clause.[34]

What little we know of William Jack is not very attractive, but he served a purpose. Jack asked a baker to create a cake inscribed with the quotation, "Homosexuality is a detestable sin. Leviticus 18:22." The baker refused, and Jack filed a complaint alleging religious discrimination. Of course not all opposition to marriage equality is religious. And many religious believers who conscientiously object to assisting with same-sex weddings would not invoke this verse from Leviticus.[35]

But a customer who wants Leviticus on his cake is requesting a religious message. The same public accommodations law that prohibits discrimination on the basis of sexual orientation also prohibits discrimination on the basis of religion.[36] And the implementing regulations specify that this prohibition includes discrimination on the basis of religious practice or on the basis of "the beliefs or teachings of a particular religion, church, denomination, or sect."[37] It does not matter that Jack's religious belief and practice is extreme and offensive. The question is not whether the baker discriminated against Christians in some generic sense, but whether he discriminated against Jack on the basis of his particular religious belief. No one but a very conservative Christian or Jew would request this cake.

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33. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 282 n.8 (Colo. Ct. App. 2015), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017).

34. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Emp't Div. v. Smith, 494 U.S. 872 (1990).

35. Jack Phillips, the owner of Masterpiece Cakeshop, cited the first two chapters of *Genesis*, *Mark* 10:6-9, and *Ephesians* 5:21-32, all of which affirmatively describe marriage in terms of male and female, and none of which explicitly condemns same-sex relationships or uses any such word as "detestable." J.A. at 157–58, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, No. 16-111, 2017 WL 4232758 (U.S. Aug. 31, 2017).

36. COLO. REV. STAT. § 24-34-601 (2017).

37. 3 COLO. CODE REGS. § 708-1:10.2(H) (2017).

Jack Phillips, the owner and cake artist of Masterpiece Cakeshop, who refused to make a cake celebrating a same-sex wedding, is squarely on the opposite side of the same divisive issue from the baker who refused to make William Jack's cake condemning same-sex relationships. The Colorado Court of Appeals engaged in flatly inconsistent reasoning to explain why Phillips's act of conscience was illegal and unprotected while the other baker's act of conscience was legal and protected.

The Court of Appeals said that Phillips's objection to the message he said his cake would send—his confessed "opposition to same-sex marriage"—discriminated against the same-sex couple that wanted him to send that message.[38] The protected baker also objected to "the offensive nature of the requested message," but the court said that refusing to make a cake with that message did *not* discriminate against the very conservative Christian requesting that message.[39]

The protected baker's willingness to produce cakes with other "Christian themes" for other Christian customers was treated as exonerating.[40] But Phillips's willingness to produce other cakes and baked goods for the couple suing him and for other same-sex couples was treated as irrelevant.[41]

For the protected baker, the court assumed that the cake's message would be the baker's message and not the customer's; the baker could lawfully object to "the offensive nature of the requested message."[42] For Phillips, the court said that his cake would send no message, but if it did send a message, it would be the customer's message, not the baker's.[43]

For Phillips, the fact that he would merely be complying with the law meant that he would send no message.[44] If the other baker had created the cake with the offensive message from Leviticus, he too would merely have been complying with the law. But in his case, this argument went unmentioned.

The court also said that the other baker refused to put objec-

38. *Craig*, 370 P.3d at 282 n.8.
39. *Id.*
40. *Id.*
41. *Id.* at 282.
42. *Id.* at 282 n.8.
43. *Id.* at 286.
44. *Id.*

tionable words on the cake, but that in Phillips's discussion with the couple suing him, he did not learn what they wanted on their cake.[45] But Phillips could surely assume that they wanted *some* words or symbols on the cake, and an essential part of his task was to help them choose those words and symbols. In any event, the very purpose of a wedding cake is to celebrate the wedding and the marriage, with or without an inscription.

And under the court's reasoning, the case would have come out the same way even if the conversation had lasted longer and the couple had specified an explicit message celebrating marriage equality. The court's logic would still have said that it would be the customer's message, not the baker's; that Phillips would merely be doing what the law required; and that refusing to produce the requested message discriminated on the basis of sexual orientation.

Refusing to make a cake because of disagreement with the cake's message either discriminates against the group associated with that message or it does not. The message on the cake is either the baker's message, or the customer's message, or perhaps the message of both the baker and the customer. The answer to such questions cannot depend on whether the state, or the court, agrees with the message.

But that is precisely what the state's answers depended on. The Civil Rights Commission and the Court of Appeals each found William Jack's Leviticus message offensive, and they protected the conscience of the baker who refused to spread that message. They did not find a same-sex couple's wedding cake offensive; they were offended by the idea that anyone might have a religious objection. The Court of Appeals analogized Phillips's religious belief to a belief so "irrational" that it could only be a pretext for discrimination.[46] In free speech terms, this is viewpoint discrimination. In free exercise terms, it is neither neutral nor generally applicable. We should protect the conscience of all bakers, not just the ones we agree with.

Nor can this unequal treatment be rationalized on the ground that the protected baker would not make a cake with a derogatory message for anybody. That is just a way of relabel-

45. *Id.* at 285, 288.

46. *Id.* at 282.

ing the clear viewpoint distinction between the messages. Both bakers were in the business of producing custom cakes that say what the customer wants. The baker who refused to produce cakes attacking marriage equality was protected; the baker who refused to produce cakes celebrating marriage equality was not.

III. THE UNDERLYING SOCIAL AND POLITICAL CONFLICT

Masterpiece Cakeshop and similar cases have been polarizing legally because they are polarizing morally and politically. We teach our children that America offers liberty and justice for all, but we're not doing so well on the part about "for all." A Pew Forum survey found the country evenly split on religious exemptions in the wedding-vendor cases, but the scariest thing about that survey is that only eighteen percent could muster at least some sympathy for both sides.[47] More than eighty percent expressed none or not much sympathy for the people they disagreed with. These are not Americans committed to liberty and justice for all; these are two sides looking to crush each other. They're evenly balanced nationwide, but in blue states, one side gets crushed, and in red states, the other side gets crushed. Professor Hamilton's position explicitly,[48] and Professor Marshall's as a practical matter,[49] is that the religious side should just lose. It has no rights; it can be and should be crushed.

To be clear, I think that both sides are equally guilty here. I defend the *rights* of conservative Christians, but I do not defend their frequent intolerance or their views on the issues. I am a secularist, a modernist, and a civil libertarian. I support gay rights and marriage equality because they are essential to the identities of gays and lesbians. And I support religious liberty because it is essential to the identities of people who take religion seriously.

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47. *Where the Public Stands on Religious Liberty vs. Nondiscrimination*, PEW RES. CTR., (Sept. 28, 2016), http://www.pewforum.org/2016/09/28/2-americans-divided-over-whether-wedding-related-businesses-should-be-required-to-serve-same-sex-couples/ [https://perma.cc/MQM7-2GGZ].

48. Marci A. Hamilton, *The Cognitive Dissonance of Religious Liberty Discourse: Statutory Rights Masquerading as Constitutional Mandates*, 41 HARV. J.L & PUB. POL'Y 79, 80 (2018).

49. William P. Marshall, *Extricating the Religious Exemption Debate from the Culture Wars*, 41 HARV. J.L & PUB. POL'Y 67, 69–72 (2018).

Conservative Christians put marriage equality on the ballot to boost voter turnout and crush the idea once and for all. In the process, they gave the idea of marriage equality much greater national prominence than it was achieving on its own.[50] And they lost. Their claims to liberty are impeached by their hostility to liberty for those they disagree with. But individual rights have never depended on the attractiveness of those claiming the right. The law protects free speech for speakers we disagree with,[51] and it should equally protect liberty for religions we disagree with.

We should enforce religious liberty just as we enforce other civil liberties, and that requires judicial enforcement. We don't entrust the enforcement of any other civil liberty or protection for minority rights to the majoritarian branches; it doesn't work.[52] If you look at the exemptions that legislatures have enacted, some of them are quite sensible, and some of them are quite ridiculous. For example, no judge has ever created an exemption to vaccination laws under a general religious liberty provision. But forty-seven state legislatures have enacted exemptions to vaccination laws,[53] despite obvious collective-action problems and risks to public health.[54] And legislators are incapable of exempting the religions that most need protection because they're seriously unpopular. Congress will not enact legislation to protect the Muslim minority in the country, and there will probably be no more exemptions for conservative Christians in blue states. Judicial enforcement of minority

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50. *See generally* TINA FETNER, HOW THE RELIGIOUS RIGHT SHAPED LESBIAN AND GAY ACTIVISM (2008).

51. *See, e.g.*, Matal v. Tam, 137 S. Ct. 1744, 1764 (2017) (plurality opinion) ("[T]he proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting))).

52. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections.").

53. Hope Lu, Note, *Giving Families Their Best Shot: A Law-Medicine Perspective on the Right to Religious Exemptions from Mandatory Vaccination*, 63 CASE W. RES. L. REV. 869, 886 nn.119–20, 914 (2013) (collecting these statutes). California repealed its exemption after Lu compiled her list. 2015 Cal. Legis. Serv. ch. 35, § 4 (West).

54. *See, e.g.*, Dorit Rubinstein Reiss & Lois A. Weithorn, *Responding to the Childhood Vaccination Crisis: Legal Frameworks and Tools in the Context of Parental Vaccination Refusal*, 63 BUFF. L. REV. 881 (2015) (summarizing medical evidence and reviewing legal arguments).

rights is uneven and sometimes inconsistent, in religion cases as with other civil liberties, but it is more reliable than legislative protection and the only hope for protection in many cases. This right should not be different from all other rights.

In the contraception litigation, and in the wedding-vendor cases, government demanded for the first time in American history that our largest religious minorities violate core religious teachings. We never tried that before. Of course that demand produced social conflict. Resistance to civil marriage or other new rights for same-sex couples will be deepest and longest if religious dissenters perceive an existential threat to their own community. The demand that religious dissenters pay for contraception and emergency contraception and that they affirmatively assist with same-sex weddings created that sense of existential threat. There was no conflict over contraception until government demanded that dissenters pay for it, and the legal pursuit of wedding vendors greatly escalated the conflict over same-sex marriage. As the Court recognized in one of its greatest opinions, "[a]ssurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support."[55] And conversely, when rights to personal liberty are demonstrably insecure, there will be more fear and jealousy of government, less willingness to live under it, and less willingness to accept its policies.

Same-sex civil marriage is a great advance for human liberty, but the gain for human liberty will be severely compromised if same-sex couples now force religious dissenters to violate their conscience in the same way that those dissenters, when they had the power to do so, forced same-sex couples to hide in the closet. Until the 2016 election, I thought we were headed towards that result. And in the long run, the social forces generating greater support for same-sex marriage and gay rights are probably unstoppable. But in the near and intermediate term, I now worry as much about progress for the LGBT community being stopped, reversed, or rolled back as I do about religious dissenters being crushed. Two Trump appointments to the Supreme Court would put everything up for grabs.

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55. *Barnett*, 319 U.S. at 636.

We could protect both religious minorities and sexual minorities if we were serious about civil liberties. They make essentially parallel claims on the larger society.[56] First, both same-sex couples and committed religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct.

Second, no person who wants to enter a same-sex marriage can change his sexual orientation by any act of will, and no religious believer can change his understanding of divine command by any act of will. Religious beliefs can change over time; far less commonly, sexual orientation changes over time. But these things do not change because government says they must, or because the individual decides they should; for most people, one's sexual orientation and one's understanding of what God commands are experienced as involuntary, beyond individual control.

Third, both religious and sexual minorities face the argument that their conduct is separable from any claim of protected legal rights, and thus subject to regulation with few limits. Courts rejected a distinction between sexual orientation and sexual conduct because they correctly found that both the orientation and the conduct that follows from that orientation are central to a person's identity.[57] Religious believers face similar attempts to distinguish their religious beliefs from the conduct based on those beliefs. This is the premise of *Employment Division v. Smith*, refusing (with poorly defined exceptions) to protect religiously motivated conduct from burdens imposed by generally applicable laws.[58] But believers cannot fail to act on God's will, and it is no more reasonable for the state to demand that they do so than for the state to demand celibacy of all gays and lesbians.

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56. *See* Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claimants Have in Common*, 5 NW. J.L. & SOC. POL'Y 206, 212–26 (2010); William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in America*, 106 YALE L.J. 2411, 2416–30 (1997).

57. *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 442–43 (Cal. 2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 438 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 885, 893 (Iowa 2009). The distinction is unambiguously rejected, without ever being formally stated, in *Obergefell*, *Windsor*, and *Lawrence*.

58. *See* Emp't Div. v. Smith, 494 U.S. 872, 878–90 (1990).

Fourth, both same-sex couples and religious dissenters seek to live out their identities in ways that are publicly visible and socially acknowledged. Same-sex couples claim the right to participate in the social institution of civil marriage and to live their lives as a couple in public as well as in private. Religious believers likewise claim a right to follow their faith not just in worship services, but in the charitable works of their religious organizations, in their daily lives, and in their professions and occupations.

Finally, both same-sex couples and religious dissenters face the problem that what they experience as among the highest virtues is condemned by others as a grave evil. Where same-sex couples see loving commitments of mutual care and support, many religious believers see disordered conduct that violates natural law and scriptural command. And where those religious believers see obedience to a loving God who undoubtedly knows best when he lays down rules for human conduct, many supporters of gay rights see intolerance, bigotry, and hate. One side sees bigotry; the other side sees sin. Because gays and lesbians and religious conservatives are each viewed as evil by a substantial portion of the population,[59] each is subject to substantial risks of intolerant and unjustifiably burdensome regulation where ever the other side can muster a majority.

The two sides also have very different understandings of what it is they're disagreeing about. The religious liberty claim in the wedding-vendor cases rests on the view that marriage is an inherently religious relationship and therefore that a wedding is an inherently religious ceremony.[60] Even if the couple understands their marriage in wholly secular terms, many religious believers will understand it in religious terms because, for them, civil marriage merely implements the underlying religious relationship.[61] These conscientious objectors refuse to

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59. *See* Laycock, *Religious Liberty and the Culture Wars*, *supra* note 3, at 869–71; Laycock, *supra* note 14, at 414–17.

60. *See, e.g.*, J.A., *Masterpiece*, *supra* note 35, at 157–58 (setting out the individual petitioner's religious understanding of marriage); *id.* at 167 (stating that his refusal to assist with same-sex weddings "*has everything to do with the nature of the wedding ceremony itself*, and about my religious belief about what marriage is and whether God will be pleased with me and my work" (emphasis added)).

61. R.R. Reno, *Government Marriage*, FIRST THINGS, Dec. 2014, at 3, 4 (stating with approval that in "the past, government *recognized* marriage," and complaining

facilitate or recognize a relationship that, in their view, is both inherently religious and religiously prohibited.

The job of the wedding planner, the photographer, and the caterer is to make each wedding the best and most memorable it can be. They are promoting it, and the conscientious objectors say they cannot do that. This creative and promotional role is narrower for bakers and florists, but I think it's sufficiently clear for them as well. Their piece of the wedding is also to be the best and most memorable that it can be.

I would not grant exemptions for refusing to serve gays and lesbians in contexts not directly related to the wedding or the marriage or the sexual relationship. I would not grant exemptions to large and impersonal businesses even in the wedding context. But for very small businesses where the owner will be personally involved in providing any services, we should exempt vendors from doing weddings and commitment ceremonies, so long as another vendor is available without hardship to the same-sex couple.

We should also exempt marriage and relationship counselors. It does nobody any good to pair a same-sex couple with a counselor who thinks the very existence of their relationship violates God's law. Complaints about counselors are not about obtaining counseling; they're about driving conservative Christians from the helping professions.

Opponents of exemptions ask if businesses should be free to refuse service to anyone who has sinned in some other way. Sometimes this is offered as a reductio ad absurdum; sometimes it is offered to show that conscientious objectors are singling out gays and lesbians. But they are not singling out gays and lesbians; they are singling out weddings.

Nearly everyone agrees that the pastor and the church itself do not have to do the same-sex wedding.[62] Why does everyone agree on that? Maybe it's just a concession to political reality.

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that now "the courts have *redefined* rather than recognized marriage" (emphasis added)).

62. Every state that enacted marriage equality by legislation expressly exempted clergy from officiating at weddings. Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. 1161, 1253–54 (2014). I believe that every marriage bill included this exemption when it was introduced. Professor Wilson calls this statutory exemption "hollow" and "illusory," because the clergy were already protected by the Constitution. *Id.* at 1169, 1189.

But the principled explanation is that inside the church itself is a religious context, and the church has to have some capacity to make its own rules. A Catholic or Baptist wedding contrary to Catholic or Baptist teaching would not be a Catholic or Baptist wedding at all. It would be a sham. And government cannot require such a sham because of the constitutional rules against "government interference with an internal church decision that affects the faith and mission of the church itself" and against taking sides in "controversies over religious authority or dogma."[63]

Other forms of perceived immorality, and other purchases by same-sex couples, do not arise in the same context. When same-sex couples, or sexually active but unmarried couples, or divorced and remarried couples, or lawyers who pad their hours, or criminals who have served their time, or any other less than perfect human being, come in to buy a restaurant meal or a new suit or a widget or whatever, they are not asking the seller to assist with their wedding. Exemptions for weddings do not imply a general right to refuse service.

And of course we rarely see these cases outside the wedding context. We don't see businesses refusing to sell to anybody who's led a sexually impure life. It doesn't happen. The market incentives would overwhelm it, and the religious commitments don't speak to it. Very few Christians teach that they should never do anything for those who have led sinful lives. They teach instead that we're all sinners.[64] So the real cases we get are about weddings and things very closely connected to weddings. And I think that those cases are special.

Even in the typical case when another wedding vendor is readily available, same-sex couples understandably complain about the dignitary harm of being turned away and of experiencing the first vendor's moral disapproval.[65] That emotional harm is often real, but it cannot be considered in isolation. We

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63. Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171, 190 (2012).

64. *See, e.g.*, *Romans* 3:23 ("For all have sinned, and come short of the glory of God . . . .").

65. Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2574–78 (2015). For a response, see Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, 125 YALE L.J. FORUM 369, 376–78 (2016).

must also consider the dignitary and emotional harm on the religious side.

Those seeking exemption believe they are being asked to defy God's will—to disrupt the most important relationship in their lives. They believe they're being asked to do serious wrong that will torment their conscience for a long time thereafter. That's an important part of why we have religious liberty guarantees. Viewed in purely secular terms, we have emotional harm on both sides.

We also have a long and clear line of free-speech cases. Preventing offense, preventing emotional harm, or preventing insult is not a compelling government interest.[66] The wedding-vendor cases involve conduct, not speech, but they arise in contexts where state RFRAs or state constitutions—or the federal Constitution if the state civil-rights law is not neutral or not generally applicable—require compelling-interest justification for restricting religious practice.

Finally, there's a way in which the balance of hardships clearly and unambiguously tips in favor of the religious objector. The offended gay couples are referred to another wedding vendor, or readily find one, and they still get to live their own lives by their own values. They will still love each other. They will still be married. They will still have their occupations or professions. But the conscientious objector who is denied exemption does not get to live his own life by his own values. He is forced to repeatedly violate conscience or to abandon his occupation and profession. The harm of regulation on the religious side is permanent loss of identity or permanent loss of occupation, and that far outweighs the one-time dignitary or insult harm on the couple's side.

There may still be places, mostly rural, where every (or the only) wedding vendor in the area objects to assisting with same-sex weddings. Then we have to deny exemptions; it is impossible to protect both sides. A local monopolist, or a unit-

66. *See, e.g.*, Matal v. Tam, 137 S. Ct. 1744, 1763–64 (2017) (plurality opinion) (disparaging trademarks); *id.* at 1767 (Kennedy, J., concurring in part and concurring in the judgment); McCullen v. Coakley, 134 S. Ct. 2518, 2531–32 (2014) (abortion counseling); Snyder v. Phelps, 562 U.S. 443, 458 (2011) (anti-gay hate speech); Texas v. Johnson, 491 U.S. 397, 414 (1989) (flag burning); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50–57 (1988) (intentional infliction of emotional distress); Cohen v. California, 403 U.S. 15, 18–26 (1971) (profanity).

ed oligopoly, cannot be permitted to deny same-sex couples or anyone else access to the market. But in most of the country, we could protect both sides if we cared to do so. It's a matter of tolerance and political will. It's a matter of being serious about liberty and justice—for all and not just for our own side in the culture wars.

EXTRICATING THE RELIGIOUS EXEMPTION DEBATE FROM THE CULTURE WARS

WILLIAM P. MARSHALL*

As Professor Laycock noted in his opening remarks, the debate over religious exemptions has unfortunately devolved to polemics with insults and mischaracterizations being freely levelled by both sides.[1] It was not always this way. Although the question of whether religious believers should be exempt from neutral laws of general applicability has long sparked serious debate, that issue was not historically situated in the epicenter of the culture wars until relatively recently. *Sherbert v. Verner*,[2] the 1963 decision in which a constitutional right to a free exercise exemption was initially recognized, involved the issue of whether a Seventh Day Adventist should be exempt from the availability for work requirements of an unemployment compensation statute.[3] *Employment Division v. Smith*,[4] the 1990 case that held there was no such right, dealt with the claims of Native Americans seeking religious exemptions from laws prohibiting the ingestion of peyote.[5] In neither case was the underlying religious claim socially divisive.

Things have changed. In the current political environment, the question of whether religious believers should be exempt from neutral laws of general applicability is most prominently debated and understood with an eye towards the deeply polarizing issues that underlie the legal claims. Should religious believers be exempt from laws such as the Affordable Care Act that would otherwise require them to offer certain types of con-

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* Kenan Professor of Law, University of North Carolina. An expansion of some of the arguments made in this Article can be found in William P. Marshall, *Bad Statutes Make Bad Law:* Burwell v. Hobby Lobby, 2014 SUP. CT. REV. 71. I am deeply grateful to Josh Roquemore for his research assistance.

1. *See* Douglas Laycock, *The Wedding-Vendor Cases*, 41 HARV. J.L. & PUB. POL'Y 49, 58 (2018).

2. 374 U.S. 398 (1963).

3. *Id.* at 403.

4. 494 U.S. 872 (1990).

5. *Id.* at 878.

traceptive coverage for their employees, as in *Burwell v. Hobby Lobby Stores, Inc.*?[6] Should small businesses, such as bakeries, have to provide wedding cakes to gay couples, when to do so would offend their religious principles, as in *Craig v. Masterpiece Cakeshop*?[7]

Viewing the religious exemption question against a cultural war background, however, tends to distort the underlying legal issues involved. After all, it was Justice Brennan, one of the most prominent liberals in Supreme Court history, who wrote the *Sherbert* opinion allowing for religious exemptions. And, it was Justice Scalia, one of the leading conservative jurists in Supreme Court history, who wrote the *Smith* decision, effectively ending the *Sherbert* regime. Now, however, some liberals vociferously question the granting of religious exemptions, while some conservatives are often the loudest voices in favor of religious exemption claims. Apparently then, to some on both sides of the political spectrum, the position on the advisability of religious exemptions is secondary to their views on the hot-button reproductive and civil rights issues that dominate our public discourse.

It is therefore appropriate to re-examine the religious exemption issue removed from its current highly politicized context in order to return the focus to the religion issues involved. For me, the starting point for that inquiry is Justice Scalia's opinion in *Smith*.[8]

Let us quickly set up the discussion. Pre-*Smith*, a claimant seeking a constitutionally compelled religious exemption under the Free Exercise Clause had to satisfy three threshold elements. First, she needed to show religiosity; that is, that her claim was religious, as deeply held moral or philosophical beliefs were not held to be sufficient to maintain a free exercise challenge.[9] Second, she needed to establish that her claim was

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6. 134 S. Ct. 2751 (2014).

7. 370 P.3d 272 (Colo. App. 2015), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017).

8. *See* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

9. *See* Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 713 (1981).

sincere.[10] Third, she needed to demonstrate that her beliefs were burdened by the challenged state provision.[11] If these elements were established, the burden switched to the state, which then had to demonstrate a government interest sufficiently compelling to override the free exercise challenge.

Justice Scalia's opinion in *Smith* rejected this "compelling interest test" regime. First, and most broadly, he argued that potentially allowing every person's religious belief to be superior to the law would effectively make each person a "law unto himself."[12] As such, he argued, the test would introduce a new element into the criminal law.[13]

Second, Justice Scalia was concerned about the potential breadth of the free exercise assertion. Religious beliefs, after all, can be about anything. They can concern how a person dresses,[14] the days she chooses to works,[15] to whom she rents,[16] and the wages she chooses to pay to her employees.[17] They can even be implicated, as recent Affordable Care Act litigation shows, by requiring a religious believer to file paperwork as a pre-condition for being granted a religious exemption.[18] There is no limit. Consider, for example, one pre-*Smith* decision in which the belief being advanced was the ostensible religious obligation for the individual to dress like a chicken when going to court.[19]

Further, as Justice Scalia explained, because there is no limit on the types of actions that can be ascribed to religious compulsion, this is also no limit on the types of regulation against which a religious exemption claim can be brought. As he stated:

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10. United States v. Ballard, 322 U.S. 78, 88 (1944).

11. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 934 (1989).

12. Emp't Div. v. Smith, 494 U.S. 872, 879 (1990) (citing Reynolds v. United States, 98 U.S. 145, 167 (1878)).

13. *Id.*

14. *See* Goldman v. Weinberger, 475 U.S. 503, 504 (1986).

15. *See* Sherbert v. Verner, 374 U.S. 398, 410 (1963).

16. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 276 (Alaska 1994).

17. Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 291–92 (1985).

18. *See* Zubik v. Burwell, 136 S. Ct. 1557 (2016).

19. State v. Hodges, 695 S.W.2d 171, 171–72 (Tenn. 1985).

> [B]ecause 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The [compelling interest test] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . . .[20]

Third, Justice Scalia contended that because free exercise challenges were potentially limitless, courts would inevitably water down the strength of the compelling interest test.[21] On this point, moreover, he had ample empirical support, as there was little doubt that this is exactly what had happened in the pre-*Smith* line of cases.[22] As virtually every commentator acknowledged, the compelling interest test was not applied in the pre-*Smith* free exercise cases with any of the rigor with which it was applied in other contexts.[23]

Fourth, Justice Scalia was concerned with the thorny issues surrounding the evaluation of the bona fides of the religious claims that the compelling interest test required.[24] How should a court adjudicate the sincerity of religious belief?[25] How should it determine whether a particular belief is burdened?[26] How does a court even define what "religion" is—given that doing so can itself give rise to First Amendment concerns?[27]

Further, there were other reasons to be skeptical of an exemption regime beyond the reasons advanced by Justice Scalia. First, the potential availability of exemptions invited challenges to laws where exclusion from coverage could provide economic advantage to the claimant, such as tax laws or wage and

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20. Emp't Div. v. Smith, 494 U.S. 872, 888 (1990) (citations omitted).

21. *Id.*

22. *See* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1412 (1992).

23. *See, e.g.*, Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992); Michael W. McConnell, *Free Exercise Revisionism,* 57 U. CHI. L. REV. 1109, 1127 (1991).

24. *Smith*, 494 U.S. at 887.

25. *See* United States v. Ballard, 322 U.S. 78, 88 (1944).

26. *See* Lupu, *supra* note 11, at 934–35.

27. United States v. Lee, 455 U.S. 252, 263 (1996) (Stevens, J., concurring).

hour requirements.[28] It therefore encouraged strategic behavior by those seeking economic benefit, a problem exacerbated by the difficulty in determining the bona fides of religious claims.[29]

Second, the test allowed for the mischaracterization of beliefs as religious even when conscious strategic behavior was not at issue. Consider *Thomas v. Review Board of Indiana Employment Security Division*.[30] In that case, the Court held that the claimant had a free exercise right to an exemption from having to work in an armaments factory—even though it was not clear whether the claimant actually knew whether his belief was religiously-based (in which case he would be entitled to an exemption) or morally-based (in which case he would not).[31] Indeed, there may be significant question as to whether it is ever possible for a believer to definitively know the derivation of his specific belief—particularly when, as in the *Thomas* case itself, the belief in question was not based on any formal church tenet or doctrine.[32] Nevertheless, the obvious incentive created in a pre-*Smith* regime is to self-characterize (consciously or unconsciously) the belief as religious even when that might not actually be the case.

Third, the need to distinguish between religious and moral or philosophical beliefs reflected in the *Thomas* opinion raises the question as to whether such a distinction is justifiable. As some writers have contended, the distinction impermissibly privileges religious conscience over non-religious conscience.[33] Is there a sound reason as to why a person should be exempt from working in an armaments factory if his belief is religious-

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28. *E.g.*, Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 293 (1985) (free exercise challenge to minimum wage requirements).

29. *See id.* at 298–99.

30. 450 U.S. 707 (1981).

31. *Id*. at 713.

32. To demonstrate this point, I would invite the reader to consider his or her own beliefs. Presumably, most of us believe that stealing is wrong. But can we definitively state whether this belief is based on moral conviction rather than religious tenet, or vice versa? Perhaps some of us can. But, for many, I would suggest, the answer is highly ambiguous.

33. *See* Micah J. Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1353 (2012); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994).

ly based but not if it is based upon a deeply held moral or philosophical conviction?

Fourth, religious exemptions are also troublesome in that they provide special advantage to religious beliefs in the marketplace of ideas.[34] Religious beliefs, like secular beliefs, compete for hearts and minds. Speech clause jurisprudence accordingly requires that all speech be treated equally.[35] Exempting religious beliefs in circumstances where non-religious beliefs are not exempted, however, violates this central principle.

Despite the many arguments in its favor, however, Justice Scalia's opinion in *Smith* did not persuade the Congress. Rather, the decision triggered a reaction that has not since been replicated in the nation's capital. It brought people and groups from the left and the right together to pass the Religious Freedom Restoration Act (RFRA) and reinstall the compelling interest test[36]—an event that some might have considered a true ecumenical moment. But all was not as it seemed. Rather, as subsequent events unfolded, it became apparent that support for RFRA was based on two different strands of thought that, although complementary at times, were also ripe for conflict.

The first of these strands saw the free exercise claim as primarily a civil rights issue.[37] Under this view, religious exemptions were necessary to protect minorities from majoritarian actions that unfairly disadvantaged them. The second viewed free exercise as primarily designed to protect the substance of religion itself.[38] Religious exemptions were therefore a way to keep religion inviolate.

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34. *See* Marshall, *supra* note 8, at 312–13.

35. *See, e.g.*, Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218 (2015); Widmar v. Vincent, 454 U.S. 263 (1981); Police Dep't of the City of Chi. v. Mosley, 408 U.S. 92 (1972).

36. Some Catholic groups did not join this coalition because of concerns that a new law might allow religious exemptions from anti-abortion restrictions if *Roe v. Wade*, 410 U.S. 113 (1973), were overturned. *See* Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 896 (1994).

37. *See, e.g.*, Editorial, *Congress Defends Religious Freedom*, N.Y. TIMES (Oct. 29, 1993), http://www.nytimes.com/1993/10/25/opinion/congress-defends-religious-freedom.html [https://perma.cc/FD4G-LUQ9].

38. *See, e.g.*, Garrett Epps, *Elegy for a Hero of Religious Freedom*, ATLANTIC (Dec. 9, 2014), https://www.theatlantic.com/politics/archive/2014/12/elegy-for-an-american-hero-al-smith-smith-employment-division-supreme-court/383582/ [https://perma.cc/VZ75-PQT8].

To repeat, these two lines of thought were not, and are not, mutually exclusive; and some in the RFRA coalition were undoubtedly motivated by both of these concerns.[39] Many others, however, strongly favored one rationale over the other, a matter that would later become clear after the Supreme Court struck down the application of RFRA to the states in *City of Boerne v. Flores*.[40] At that point, the coalition once again convened in an effort to resurrect the compelling interest test. By then, however, unity was lost, as those who saw free exercise as primarily a civil rights matter had become concerned that religious exercise protections could be forged to exempt religious believers from civil rights requirements, while those who saw free exercise as primarily concerned with protecting religious belief saw no such concern. Consequently, the only matters the coalition could ultimately agree upon were those dealing with land use restrictions and prisoners' rights. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) was therefore passed addressing only those issues.[41]

The tension between the two strands of thought regarding the advisability of religious exemptions, however, did not go away. *Boerne*, it may be remembered, had invalidated RFRA only with respect to the states, meaning the statute continued to apply to the federal government.[42] A religious claimant, therefore, could still bring an action under RFRA if she could show that a federal law burdened her religious exercise.[43] Accordingly, even after the Congress's failure to enact a new RFRA applicable to the states, there remained the possibility that the conflict could manifest itself in subsequent RFRA litigation.

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39. *See, e.g.*, Ross Douthat, *Questions for Indiana's Critics*, N.Y. TIMES: EVALUATIONS (Mar. 30, 2015, 4:20 PM), https://douthat.blogs.nytimes.com/2015/03/30/questions-for-indianas-critics/ [https://perma.cc/RRF7-P3WC].

40. 521 U.S. 507 (1997).

41. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 804 (2000) (substantially codified at 42 U.S.C. §§ 2000cc–2000cc-5 (2012)).

42. *Boerne*, 521 U.S. at 512.

43. Some states, to be sure, passed their own state RFRAs. *See* Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 467 (2010).

The first case to reach the Court, *Gonzales v. O Centro Espirita Benificente Uniao do Vegetal*, [44] however, did not present this conflict. *Gonzales* involved a RFRA challenge, brought by a small Christian sect against a federal restriction on the importation and use of a hallucinogenic substance (DMT) on grounds that the sect required the use of this ingredient in one of its religious practices.[45] The case thus fit comfortably within both lines of support for RFRA. It involved a small and politically powerless minority religion, and it sought to protect a sacrament that no one disputed was deeply religious. Not surprisingly, the Court ruled unanimously in favor of the RFRA claimant.[46]

Enter *Burwell v. Hobby Lobby*. *Hobby Lobby* involved a RFRA claim brought by two for-profit corporations seeking religious exemptions from portions of the so-called "contraceptive mandate" or "contraceptive coverage requirement" regulations promulgated under the Affordable Care Act on grounds that having to provide coverage for certain types of contraceptives violated their religious belief that life begins at birth.[47]

Unlike *Gonzales*, *Hobby Lobby* brought the RFRA divide to the surface in both the courts and in the populace. On one side were those who saw the ACA requirements as vital provisions designed and necessary to protect women's rights. On the other were those who viewed the case as presenting basic issues of religious liberty. Reflecting this broader divide, the Court split 5-4 along conservative-liberal lines. The five conservatives, led by Justice Alito, voted to grant the religious exemption. The four liberals, led by Justice Ginsburg, strenuously dissented.

There has been much discussion in the literature as to whether *Hobby Lobby* was correctly decided, and it is not my intent to go over well-trod ground here. Nevertheless, it is worth noting that Justice Alito's opinion, whether correct or not, largely ignored the problems in the compelling interest test

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44. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

45. *Id*. at 425–26.

46. *Id*. at 422, 439 (Justice Alito did not participate). That the Court ruled unanimously is also not surprising given that *Smith*, the case that RFRA purported to overrule, had very similar facts. As the *Gonzales* Court stated, "the very reason Congress enacted RFRA was to respond to a decision denying a claimed right to sacramental use of a controlled substance." *Id*. at 436–37.

47. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762–64 (2014).

identified by Justice Scalia in his *Smith* opinion and actually exacerbated those concerns in two important respects. First, Justice Alito's opinion made the burden inquiry self-referential; that is, Justice Alito held that the question of whether a person's belief is sufficiently burdened to trigger RFRA's protections is a matter to be deferred to the claimant herself.[48] Second, Justice Alito ruled that whether the state has a compelling interest is to be adjudged only with respect to the religious claimants seeking exemption.[49] Thus, for example, the question in a case like *Tony and Susan Alamo Foundation v. Secretary of Labor*[50] is not whether the government has a compelling interest in wages and hours regulations generally but whether it has a compelling interest in applying those regulations to only those presenting the specific religious objection.

On one level, both of these assertions are defensible. After all, who knows better than the claimant whether her religious beliefs are, or are not, burdened? If a religious group believes, for example, that its belief is burdened by having to file paperwork in order to receive a religious exemption from having to provide contraceptive coverage, as in the *Zubik v. Burwell*[51] case, who is fit to tell them otherwise? Similarly, the notion that the state's interest must be compelling in relation to only the believers seeking exemption is not an unreasonable reading of the RFRA text, and in any event, was foreshadowed in *Gonzales*.[52]

Nevertheless, the inclusion of these factors, along with the already heavy weighting of the compelling interest test in favor of the religious objector, means that the state would likely win very few cases going forward. The effect of presuming burden based solely the claimant's assertion essentially means that there will be no threshold inquiry before a challenged law is presumed to be unconstitutional as applied to a religious objec-

48. *Id.* at 2778–79.

49. *Id.* at 2779–80.

50. 471 U.S. 290 (1985).

51. 136 S. Ct. 1557 (2016).

52. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006).

tor.[53] The effect of requiring that the state show a compelling interest in applying a particular regulation to only religious objectors, in turn, will impose an almost insurmountable barrier on the state because almost any state interest will be less compelling when applied to only a few religious adherents than when applied to the general population.

Whether, of course, the courts will apply the test this vigorously is the big question. After all, the courts pre-*Smith* had difficulty applying even a less stringent version of the test because of the havoc that would result if religious believers were able to win exemptions from virtually every type of regulation.[54]

But assume for the moment that the courts do take the compelling interest test seriously. If so, we may see a new reign of religious exemption cases coming (and then prevailing) from the other side of the culture wars. Churches and religious believers may claim that they have a right to provide sanctuary and shield illegal immigrants. Religiously owned businesses may claim a religious right to discriminate against those with religious beliefs they perceive to be intolerant. As Justice Scalia foresaw, the list of potential challenges is endless.

Even more likely, we may see, and have already seen, other cases that will test whether the courts are prepared to apply the compelling interest test in the manner *Hobby Lobb*y prescribes and whether the exemptions that result are normatively warranted. Consider, for example, *Iglesia Pentecostal Casa De Dios Para Las Naciones, Inc. v. Johnson*,[55] in which a foreign national sought an exemption from the "ability to pay" requirement for work visa status on grounds that his religious belief and that of his church was that he should "live by faith."[56] Or *United States*

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53. The Court's decision in *Thomas* has already made clear that courts should defer to a claimant's assertion that his belief was religious. *See* Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981). To be sure, after *Hobby Lobby*, a RFRA claimant will still have to show sincerity, but that element is almost always stipulated, in part because of the difficulty in demonstrating that a religious claim is being fraudulently asserted. *See* United States v. Ballard, 322 U.S. 78, 93 (1944).

54. *See generally* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407 (1992).

55. No. 15-CV-2612-DDC-GEB, 2016 BL 234814 (D. Kan. July 21, 2016).

56. *Id.* at *4.

v. Jeffs,[57] in which members of the Fundamentalist Church of Jesus Christ of Latter-day Saints sought exemption against a restriction prohibiting transferring food stamps outside the household unit on grounds that the church's religious beliefs required all members to donate their resources to the Church.[58] As it turns out, the RFRA claimants lost both of these cases.[59] But if the *Johnson* and *Jeffs* courts had seriously applied the compelling interest test in the manner prescribed by *Hobby Lobby*, it is certainly questionable that they should have.

There is a lesson in all this. Before too profusely celebrating (or condemning) the reinvigoration of a jurisprudence of religious exemptions, it might be worthwhile for those on all sides of the culture wars to consider that Justice Scalia may have been right.

57. No. 2:16-CR-82 TS, 2016 BL 379750 (D. Utah Nov. 15, 2016).
58. *Id.* at *3.
59. *Id.*; *Johnson*, 2016 BL 234814, at *1.

THE COGNITIVE DISSONANCE OF RELIGIOUS LIBERTY DISCOURSE: STATUTORY RIGHTS MASQUERADING AS CONSTITUTIONAL MANDATES

MARCI A. HAMILTON*

There is a cognitive dissonance in current religious liberty discourse. On the one hand, there are vulnerable groups emerging as strong rights holders in the culture, including LGBTQ, women, and children. On the other hand, there are the religious believers who cannot or will not fit this new social order into their worldview and, therefore, assert rights against it. In fact, the religious liberty "rights" asserted are not constitutional, but rather statutory.[1] It is critically important that our public debate be built on this fact.

Rights for the vulnerable are under attack by some religious actors who have sought to turn religious liberty into a weapon of exclusion, control, and harm. "Cognitive dissonance" is the "psychological conflict resulting from incongruous beliefs and attitudes held simultaneously,"[2] and is often experienced as discomfort, which can lead the person to choose various routes away from the discomfort, such as denial or action.[3] As politically powerful religious actors experience unease in a culture they no longer control, there has been a multiplication of de-

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1. *See, e.g.*, Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (2012)).

2. *Cognitive Dissonance*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/cognitive%20dissonance [http://perma.cc/3KGY-GCGF] (last visited Aug. 6, 2017).

3. *See* Eddie Harmon-Jones, David M. Amodio & Cindy Harmon-Jones, *Action-Based Model of Dissonance: A Review, Integration, and Expansion of Conceptions of Cognitive Conflict*, *in* 41 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 119, 120–21 (Mark P. Zanna ed., 2009).

mands for extreme religious liberty in the United States,[4] including by law professors as well as national advocacy organizations like the Becket Fund and the Alliance Defending Freedom,[5] who routinely trivialize the costs extreme religious liberty externalizes onto others as their discourse treats all religious liberty as constitutionally required. This is a time of religious triumphalism. The vulnerable are at risk from some religious who insist that their liberty does not end with their own practices but rather expands to include the culture around them. As a matter of public policy, it is necessary to choose between the rights of the vulnerable and the ever-increasing demands—not for liberty, but rather autonomy divorced from responsibility for harm. This is a threat to our peaceful coexistence. For that reason, the United States Commission on Civil Rights' report on religious liberty is correctly titled, "Peaceful Coexistence: Reconciling Nondiscrimination Principles and Civil Liberties."[6] The challenge is to draw the boundary line that squares civil rights for the vulnerable with religious liberty for conduct, and in my view the Report is the best analysis to date, albeit with inadequate attention to the plight of children at risk in religious communities of sex abuse, medical neglect, and educational neglect, as I discussed in my testimony before the Commission.[7]

The recent Supreme Court cases with impact on the religious liberty debate have centered on two of the vulnerable populations: LGBTQ and women. The former was empowered by the Court while the latter were not. According to the Supreme Court, LGBTQ have a right to live lives of love and devotion to

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4. *See, e.g.*, Philip Hamburger, *More is Less*, 90 VA. L. REV. 835, 858–92 (2004); J. Brett Walker, *Free Exercise of Religion: A Right, Not A Luxury*, 66 FLA. B.J. 22, 22–29 (1992).

5. *See* Press Release, Alliance Defending Freedom, ADF Comment on White House Summary of Religious Liberty Executive Order (May 3, 2017), https://www.adflegal.org/detailspages/press-release-details/adf-comment-on-white-house-summary-of-religious-liberty-executive-order [https://perma.cc/N827-K3CH]; Our Mission, BECKET FUND, http://www.becketlaw.org/about-us/mission/ [http://perma.cc/PX4K-RZZE] (last visited Aug. 6, 2017).

6. U. S. COMM'N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES (2016), www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.pdf [https://perma.cc/GHK8-YFWZ].

7. *See* U.S. COMM'N ON CIVIL RIGHTS, BRIEFING: PEACEFUL COEXISTENCE? RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 76–81 (2013).

family on par with heterosexual couples.[8] The response from religious actors has been a doubling down on demands to exclude LGBTQ from any arena in which they are present including employment and the marketplace of goods and services.[9] Although they do not acknowledge the divided culture they seek, their approach is different in degree but not kind to the former religious liberty of South African apartheid,[10] which was an expression of the Dutch Reformed Church.

Some religious actors have long been fighting the rights of women to obtain contraception and abortion,[11] but the fight has progressed from tactics that are intended to deter abortions to those that empower an employer to deny health care coverage that includes reproductive healthcare based on the employer's religious beliefs, even in a for-profit setting.[12] Now, religious actors aggressively seek two ways to further erode women's rights to personal reproductive care through the institution of sweeping prerogatives on the part of employers, a right to refuse to provide care to women,[13] including in pharmacies,[14]

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8. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2600–02 (2015).

9. *See* Jennifer Calfas, *Employment Discrimination: The Next Frontier for LBGT Community*, USA TODAY (July 31, 2015), http://www.usatoday.com/story/news/nation/2015/07/31/employment-discrimination-lgbt-community-next-frontier/29635379/ [http://perma.cc/7G48-Y6PZ]; Crosby Burns & Philip Ross, *Gay and Transgender Discrimination Outside the Workplace*, CTR. FOR AM. PROGRESS (July 19, 2011), http://www.americanprogress.org/issues/lgbt/reports/2011/07/19/9927/gay-and-transgender-discrimination-outside-the-workplace/ [http://perma.cc/3D97-XA9M].

10. *See* Tamara Rice Lave, *A Nation at Prayer, a Nation in Hate: Apartheid in South Africa*, 30 STAN. J. INT'L L. 483, 496–510 (1994).

11. *See, e.g.*, Zubik v. Burwell, 136 S. Ct. 1557, 1559 (2016); *see also* Stephanie Russell-Kraft, *The Right to Abortion—and Religious Freedom*, ATLANTIC (Mar. 3, 2016), http://www.theatlantic.com/politics/archive/2016/03/abortion-rights-a-matter-of-religious-freedom/471891/ [http://perma.cc/V2GD-UQDR].

12. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014); *see also* Ian Millhiser, *Federal Court: Notre Dame Can't Cut Off Birth Control For Its Students*, THINKPROGRESS (May 20, 2015), http://thinkprogress.org/federal-court-notre-dame-cant-cut-off-birth-control-for-its-students-d8c0e1f421a9/ [http://perma.cc/98TK-VW3J].

13. *See Refusal Laws: Dangerous for Women's Health*, NARAL PRO-CHOICE AM., http://www.prochoiceamerica.org/wp-content/uploads/2017/01/1.-Refusal-Laws-Dangerous-for-Womens-Health.pdf [http://perma.cc/9L5G-ULW3] (last visited Aug. 15, 2017) (discussing the history of refusal laws and their impact on women's health).

14. *See, e.g.*, Catherine Pearson, *Pharmacist Allegedly Refused to Fill Teen's IUD-Related Prescription*, HUFFINGTON POST (June 5, 2017), http://www.huffingtonpost.com/entry/

and a right to discriminate against women by permitting an employer to impose a benefits plan that reflects his beliefs without regard to the female employee's health needs or her own faith.[15] These two fronts have preoccupied the religious triumphalists and the larger culture.

The Report does not adequately acknowledge the other vulnerable population to religious triumphalism: children. The seriatim sexual abuse of children within religious organizations has spanned the spectrum: ultra-Orthodox and Orthodox Jews,[16] the Roman Catholic Church,[17] the Fundamentalist Church of Jesus Christ of Latter-Day Saints ("FLDS"),[18] the Children of God,[19] and Tony Alamo's cult,[20] to name a few.

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pharmacist-allegedly-refused-to-fill-teens-iud-related-prescription_us_59357d8ee4b0fa3f6ae63c3d [http://perma.cc/43SE-CZCW].

15. *See* Zubik v. Burwell, 136 S. Ct. 1557, 1559 (2016); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).

16. *See* Elija Wolfson, *Child Abuse Allegations Plague The Hasidic Community*, NEWSWEEK (Mar. 3, 2016), http://www.newsweek.com/2016/03/11/child-abuse-allegations-hasidic-ultraorthodox-jewish-community-brooklyn-432688.html [http://perma.cc/6EXW-7F4X]; *see also* Marci A. Hamilton, *The Plight of Jewish Children in Ultra-Orthodox Jewish Communities and the Failure of Government and Pandering Politicians to Protect Them*, VERDICT (Sept. 15, 2015), http://verdict.justia.com/2015/09/17/the-plight-of-children-at-risk-in-the-ultra-orthodox-jewish-communities-and-the-failure-of-government-and-pandering-politicians-to-protect-them [http://perma.cc/AV7V-9FRP] ("As with the FLDS, the ultra-Orthodox communities have put children at risk due to inadequate medical treatment, educational neglect, and mostly undeterred child sex abuse."); *Public Hearing Into Yeshivah Melbourne and Yeshivah Bondi to be Held*, ROYAL COMM'N INTO INSTITUTIONAL RESPONSES TO CHILD SEX ABUSE (Jan. 30, 2015), http://www.childabuseroyalcommission.gov.au/media-centre/media-releases/2015-01/public-hearing-into-yeshivah-melbourne-and-yeshiva [http://perma.cc/Y8A8-4H3G] (investigations into two religious institutions that are a part of the worldwide Hasidic Judaism sect Chabad, Yeshivah Melbourne and Yeshivah Bondi, uncovered that children had been the victims of abuse at the hand of at least three individuals who were involved in activities run by these institutions, such as martial arts classes, religious programs and overnight youth camps).

17. The most reliable archive on abuse within the Roman Catholic Church is www.bishopaccountability.org. *See also* ROYAL COMM'N INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE, 1 INTERIM REPORT 187 (2014).

18. FLORA JESSOP & PAUL T. BROWN, CHURCH OF LIES 1–3 (2009); CAROLYN JESSOP & LAURA PALMER, ESCAPE 1–3 (2008); ELISSA WALL & LISA PULITZER, STOLEN INNOCENCE: MY STORY OF GROWING UP IN A POLYGAMOUS SECT, BECOMING A TEENAGE BRIDE, AND BREAKING FREE OF WARREN JEFFS 1–3 (2009).

19. *See* Lynne Wallace, *Violent sexual abuse, brainwashing and neglect: What it's like to grow up in a religious sect,* INDEPENDENT (Sep. 1, 2007), http://www.independent.

Specifically, the FLDS forces girls into prophet-mandated polygamous marriages with much older men and abandons the boys who do not fully conform to the group, a move necessary in part to keep the numbers favorable to the men seeking multiple wives.[21] These organizations typically revert to theology and church autonomy rationales to excuse and explain the widespread sexual abuse and trivialization of children.[22] In addition, numerous religious organizations have medically neglected and even let children die or be permanently disabled for religious reasons, including Christian Scientists, the Followers of Christ, and many others.[23]

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co.uk/news/uk/this-britain/violent-sexual-abuse-brainwashing-and-neglect-what-its-like-to-grow-up-in-a-religious-sect-401035.html [http://perma.cc/74EQ-PKHF].

20. *See* Associated Press, *32 Children Seized From Tony Alamo Christian Ministries, Over Alleged Beatings, Sexual Abuse*, FOX NEWS (Dec. 4, 2008), http://www.foxnews.com/story/2008/12/04/32-children-seized-from-tony-alamo-christian-ministries-over-alleged-beatings.html [http://perma.cc/NVX3-65VL].

21. *See* MARCI A. HAMILTON, GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY 73–74 (2d ed. 2014); BRENT JEFFS, LOST BOY 1–3, 201–04 (2009).

22. *See* Marci A. Hamilton, *The "Licentiousness" in Religious Organizations and Why It Is Not Protected Under Religious Liberty Constitutional Provisions*, 18 WM. & MARY BILL RTS. J. 953, 961–68 (2010); Marci A. Hamilton, *The Rules Against Scandal and What They Mean for the First Amendment's Religion Clauses*, 69 MD. L. REV. 115, 118–21 (2009); *see also* Ramani v. Chabad of S. Nev., Inc., 373 P.3d 953 (Nev. 2011); Sharon Otterman & Ray Rivera, *Ultra-Orthodox Shun Their Own for Reporting Child Sexual Abuse*, N.Y. TIMES (May 9, 2012), http://www.nytimes.com/2012/05/10/nyregion/ultra-orthodox-jews-shun-their-own-for-reporting-child-sexual-abuse.html?pagewanted=all&_r=0 [http://perma.cc/4SUC-LK44] (highlighting that members of ultra-Orthodox community were shunned after reporting child molestation by religious leaders, on the basis that there was an ancient prohibition against *mesirah*, the turning in of a Jew to non-Jewish authorities, and that publicly airing allegations against fellow Jews is *chillul Hashem*, a desecration of God's name).

23. *See* HAMILTON, *supra* note 21, at 63–73; PAUL OFFIT, BAD FAITH: WHEN RELIGIOUS BELIEF UNDERMINES MODERN MEDICINE, at ix–xv, 1–18 (2015); *see also* Lundman v. McKown, 530 N.W.2d 807, 813–15 (Minn. Ct. App. 1995), *review denied*, (Minn. May 31, 1995), *cert. denied sub nom.* Lundman v. First Church of Christ, Scientist, 516 U.S. 1092 (1996) (discussing death of child due to untreated diabetes by Christian Scientist); State v. Neumann, 832 N.W.2d 560, 569–72 (Wis. 2013) (highlighting death of child due to untreated diabetes through online faith-healing); Vince Lattanzio, *Faith Healing Churches Linked to 2 Dozen Child Deaths*, NBC PHILA. (May 23, 2013), http://www.nbcphiladelphia.com/news/local/Faith-Healing-Churches-Linked-to-Two-Dozen-Child-Deaths-208745201.html [http://perma.cc/7DPG-T6BG] (discussing deaths of juvenile members of Faith Tabernacle and First Century Gospel Church in Philadelphia); Holly McKay, *Woman who blames parents for health woes looks to shut down faith healers*, FOX NEWS (Apr. 21, 2016), http://www.foxnews.com/us/2016/04/21/idaho-woman-blames-parents-for-health-woes-seeks-change-in-law-protecting-faith-healers.html [http://

Twenty years ago, Professor Douglas Laycock and I squared off at the Supreme Court over the constitutionality of the Religious Freedom Restoration Act, or RFRA,[24] the statute passed by Congress to augment the First Amendment. The Court held that RFRA was unconstitutional as applied to the states,[25] but it also made clear that RFRA is only a statutory standard, not one that is constitutionally mandated.[26] This is the north star for religious liberty debates. Religious liberty advocates frequently like to slip in an insinuation that their "right" to overcome another person's rights is constitutionally compelled.[27] That is illegitimate. The "rights" of the owners of Hobby Lobby were only in a statute, RFRA, and they overcame in effect the Title VII statutory rights of female employees to not be discriminated against based on gender or faith. Those who insist on a "sacred right" not to do business with gay couples, not to include contraception in their healthcare plans, and not to be subject to the employment nondiscrimination laws need statutes to achieve their goals, because the First Amendment does not allow believers to impose their beliefs on others. They have nothing but a statute in their hands. That statute, unlike the Consti-

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perma.cc/N7Q4-CAQW] (discussing story of a young woman and her struggle with a debilitating heart condition due to lack of medical treatment from LDS parents); Cameron Rasmusson, *Idaho's 'Faith' Healing Dilemma,* BOISE WEEKLY (March 16, 2016), http://www.boiseweekly.com/boise/idahos-faith-healing-dilemma/Content?oid=3739400 [http://perma.cc/YM97-L8HV] (highlighting deaths of children in Idaho); Sarah Jane Tribble, *Measles Outbreak In Ohio Leads Amish To Reconsider Vaccines*, NPR (June 24, 2014), http://www.npr.org/sections/health-shots/2014/06/24/323702892/measles-outbreak-in-ohio-leads-amish-to-reconsider-vaccines [http://perma.cc/4YP9-XSDF] (noting that failure of Amish to immunize has led to outbreaks of previously eradicated childhood diseases like measles).

24. The Religious Freedom Restoration Act of 1993 (RFRA provides that the government may not place a substantial burden on one's exercise of religion unless it proves that is in the furtherance of a compelling interest and that it is the least restrictive means of furthering this interest. *See* Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (2012)).

25. City of Boerne v. Flores, 521 U.S. 507, 536 (1997) ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance. The judgment of the Court of Appeals sustaining the Act's constitutionality is reversed.").

26. *See id.* at 532–36.

27. This happened during the question and answer period at the National Student Symposium when a question was posed as though the statutory standard is constitutionally required.

tution, does not trump the civil rights asserted by the vulnerable groups in harm's way. Therefore, it is essential to distinguish the First Amendment's constitutional mandate from the religious liberty statutes' rules.

I. RFRA VS. THE FIRST AMENDMENT

Since 1990, some religious entities and their defenders have demanded near-absolute rights of accommodation, for example, the right never to do business with a same-sex couple based on religious belief[28] or the right to raise children without interference from the state even when the child's life is at stake.[29] The advocates' internal premise is that religiously motivated conduct is virtually unassailable. When the First Amendment did not deliver the strong rights they sought, they pursued statutes like RFRA at the federal and state levels under the assumption that religion can do no harm.

When President William Jefferson Clinton signed RFRA, there was a rosy patina of unity between religious and civil rights groups, who supported supposedly old-fashioned religious liberty. In his signing remarks, President Clinton said:

> We all have a shared desire here to protect perhaps the most precious of all American liberties, religious freedom. Usually the signing of legislation by a President is a ministerial act, often a quiet ending to a turbulent legislative process. Today this event assumes a more majestic quality because of our ability together to affirm the historic role that people of faith have played in the history of this country and the constitutional protections those who profess and express their faith have always demanded and cherished.[30]

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28. *See, e.g.*, Mississippi Religious Freedom Restoration Act, MISS. CODE. ANN. § 11-61-1 (West 2017), *discussed in* Marci A. Hamilton, *The Lessons of the New Mississippi RFRA That Shed Light on the* Hobby Lobby *and* Conestoga Wood *Cases Pending at the Supreme Court*, VERDICT (May 15, 2014), http://verdict.justia.com/2014/05/15/lessons-new-mississippi-rfra-shed-light-hobby-lobby-conestoga-wood-cases-pending-supreme-court [http://perma.cc/YPB9-NNKH].

29. *See* Rasmusson, *supra* note 23.

30. President William J. Clinton, *Remarks on Signing the Religious Freedom Act of 1993, November 16, 1993*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=46124 [http://perma.cc/5DSR-RKUS] (last visited Aug. 8, 2017).

These same groups had lobbied for the bill as though it was a benign addition to the law and a simple return to prior constitutional case law.[31] There was a predominant presumption, though not entirely unchallenged,[32] that religious believers don't harm others.[33] The religious lobbyists' public relations combined with this false sense of safety led members of Congress to believe that there would be no major change in religious liberty protections if RFRA were passed.[34]

In fact, RFRA is a contortion of prior case law, not a return to prior cases. After it was declared unconstitutional, and Congress took up the issue again, there was a new hidden agenda: a drive by conservative Christians to secure a right to discriminate against unmarried couples, single mothers, and eventually same-sex couples in the housing context.[35] Because of its broad and blind scope, RFRA appeared desirable on its surface but in fact put at risk many vulnerable individuals.

According to a majority of the Supreme Court, before RFRA the "vast majority" of the Supreme Court's First Amendment free exercise cases recognized an absolute right to believe what one chooses but an obligation to abide by neutral, generally applicable laws.[36] But laws targeted negatively at a particular religious entity were to be subjected to more searching judicial scrutiny.[37] In other words, in the United States, faith has not justified avoiding laws that apply to every other person taking

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31. *See* HAMILTON, *supra* note 21, at 18–24.

32. *The Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. 372–74 (1992) (statement of Professor Ira C. Lupu).

33. *See* HAMILTON, *supra* note 21, at 31–37.

34. *See id.* at 7–8, 346 (outlining the expanding list of religious liberty tests).

35. *See id.* at 232–36.

36. Emp't Div. v. Smith, 494 U.S. 872, 879–80 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"). While I am persuaded that the Court correctly summarized its jurisprudence, as I discuss in *inter alia,* Marci A. Hamilton, *Employment Division v. Smith at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671 (2011), pre-*Smith* cases also reflect this reading of the Free Exercise Clause. *See, e.g.*, Bowen v. Roy, 476 U.S. 693 (1986); Goldman v. Weinberger, 475 U.S. 503 (1986); United States v. Lee, 455 U.S. 252 (1982); Cantwell v. Connecticut, 310 U.S. 296 (1940).

37. *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533–41 (1993).

the same action. For example, if someone is driving to a religious service and violates the speed limit, there is no religious liberty defense to avoid the speeding ticket even if the process of the police writing the ticket means the driver misses the service altogether. The same analysis applies to a church building that does not have legally-mandated fire prevention measures. In both cases, the neutral, generally applicable law applies to the believer regardless of the involvement of worship.

The First Amendment's doctrine, however, has not only contributed to the neutral rule of law in a religiously diverse society, but also has paved the way for permissive legislative accommodations. When the Court rejected a First Amendment-mandated exemption for the use of an illegal drug, peyote, in 1990, it also pointed to the long tradition of legislative accommodation for specific religious practices.[38] The result was that peyote use was then permitted for religious uses in many states and at the federal level.[39] Religious lobbyists also have not been shy in demanding exemptions to laws that are intended to protect children from harm, for example, faith-healing exemptions to medical neglect laws, exemptions from mandated reporting of child sex abuse (and neglect), and confessional exceptions to a duty to protect a child when the information arrives via a confession.[40]

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38. *Smith*, 494 U.S. at 877–78, 890.

39. *See* Marcia A. Hamilton, Employment Division v. Smith *at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1672, 1690 (2011).

40. *See generally Research*, CHILD WELFARE INFO. GATEWAY, CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVS., CLERGY AS MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 1–3 (2015), https://www.childwelfare.gov/pubPDFs/clergymandated.pdf [https://perma.cc/E3CP-EQC3]; Julie Love Taylor, Parents of Minor Child v. Charlet*: A Threat to the Sanctity of Catholic Confession?*, LA L. REV. (Oct. 22, 2014), https://lawreview.law.lsu.edu/2014/10/22/parents-of-minor-child-v-charlet-a-threat-to-the-sanctity-of-catholic-confession/ [https://perma.cc/4R83-TLM4; CHILD USA, http://www.childusa.org/research/ [https://perma.cc/35JX-LWXG] (last visited July 16, 2017); Marci A. Hamilton, *The Universal Need for the Mandatory Reporting of Child Sex Abuse*, JUSTIA: VERDICT (Nov. 17, 2011), https://verdict.justia.com/2011/11/17/the-universal-need-for-the-mandatory-reporting-of-child-sexual-abuse [https://perma.cc/U96V-EH78]; Jack Jenkins, *Unholy secrets: The legal loophole that allows clergy to hide sexual abuse*, THINK PROGRESS (Aug. 8, 2016), https://thinkprogress.org/unholy-secrets-the-legal-loophole-that-allows-clergy-to-hide-child-sexual-abuse-9a6899029eb5 [https://perma.cc/S4V5-SLN8]; Aleksandra Sandstrom, *Most states allow religious exemptions from child abuse and neglect laws*,

Since the early 1960s, some religious litigants have worked assiduously to avoid the application of laws that are neutral and generally applicable in a wide array of contexts, including social security taxes,[41] child labor laws,[42] and military dress requirements,[43] among others. They sought a doctrine that would presume believers are exempt from any law in conflict with a believer's faith. The Supreme Court routinely interpreted the First Amendment to reject such claims.[44] Then, in 1990, the Court definitively rejected their demands for extreme religious liberty in a case involving the use of an illegal drug during religious services,[45] and the religious entities, who at that time were joined by civil rights organizations, pivoted from the Supreme Court to Congress to provide the hyper-protection for religious liberty against all laws that they had been unable to obtain from the Court.[46] Congress acquiesced, and RFRA was imposed on the United States after President Clinton signed the bill into law.[47]

RFRA layered a statutory, extreme free exercise right onto the First Amendment and the large network of legislative accommodations, and thereby created a presumption that the religious entity should be accommodated in *all* contexts.[48] RFRA imposes an extremely heavy burden on the government to justify all laws, even neutral and generally applicable laws. The result was that religious entities became empowered to harm

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PEW RES. CTR. (Aug. 12, 2016), http://www.pewresearch.org/fact-tank/2016/08/12/most-states-allow-religious-exemptions-from-child-abuse-and-neglect-laws/ [https://perma.cc/VK42-G7DC].

41. United States v. Lee, 455 U.S. 252 (1982) (no First Amendment free exercise right to avoid social security taxes).

42. Prince v. Massachusetts, 321 U.S. 158 (1944) (no First Amendment free exercise right to avoid child labor laws).

43. Goldman v. Weinberger, 475 U.S. 503 (1986) (no First Amendment free exercise right for active military to wear religious headgear).

44. *See Smith*, 494 U.S. at 878–82 (discussing the history of the Supreme Court's Free Exercise Clause jurisprudence).

45. *Id.* at 874, 890.

46. *See* Linda Greenhouse, *High Court Voids a Law Expanding Religious Rights*, N.Y. TIMES (June 26, 1997), http://www.nytimes.com/1997/06/26/us/high-court-voids-a-law-expanding-religious-rights.html [https://perma.cc/32Z3-EUCY].

47. Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES (Nov. 17, 1993), http://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html [https://perma.cc/Y7XE-5FS3].

48. 42 U.S.C. § 2000bb-1 (2012).

others in ways never before contemplated by the First Amendment cases.[49] All the while, there has been persistent verbal slippage that portrays RFRA as though it is a constitutional mandate rather than the sui generis statute that it is.

The issue that finally slowed blind trust in RFRA implicated not children but adults—LGBTQ adults and women in need of reproductive health care. When the RFRA formula revealed itself as a means of discriminating against LGBTQ adults,[50] only then did powerful forces at odds with religious entities on these issues step up to fight new state RFRAs and to amend the federal and state RFRAs to prevent harm to adults. LGBTQ advocates, civil rights organizations, and a significant portion of the business community mobilized to their defense. The Arizona and Georgia RFRAs were vetoed,[51] the Indiana RFRA was scaled back,[52] and the West Virginia RFRA failed.[53] Had the

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49. The history of free exercise in the United States is more fully explained in my book, *God vs. the Gavel: The Perils of Extreme Religious Liberty*. *See generally* HAMILTON, *supra* note 21, at 239–77 (discussing the history of the Supreme Court's jurisprudence regarding free exercise of religion).

50. Marci Hamilton, *Indiana Leads the Way With an Outrageous RFRA Proposal*, JUSTIA: VERDICT (Jan. 21, 2016), https://verdict.justia.com/2016/01/21/indiana-leads-the-way-with-an-outrageous-rfra-proposal-again [https://perma.cc/S4UE-E2AH]; Marci Hamilton, *The Insatiable Demand for Extreme Religious Liberty Under the RFRAs, Part II*, JUSTIA: VERDICT (Mar. 20, 2014), https://verdict.justia.com/2014/03/20/insatiable-demand-extreme-religious-liberty-rfras-part-ii [https://perma.cc/9VKZ-ANU3].

51. The Arizona RFRA, Arizona SB 1062 (amending A.R.S. § 41-1493.01), was vetoed by Governor Jan Brewer who described it as a "'broadly worded' bill that 'could result in unintended negative consequences.'" Catherine E. Shoichet & Halimah Abdullah, *Arizona Gov. Jane Brewer vetoes controversial anti-gay bill, SB 1062*, CNN (Feb. 26, 2014), http://www.cnn.com/2014/02/26/politics/arizona-brewer-bill/ [https://perma.cc/GWV8-XZL3]. The Georgia RFRA, HB 757, was a "[bill] to be entitled an Act to protect religious freedoms . . . so as to provide that religious officials shall not be required to perform marriage ceremonies in violatoin of their legal right to free exercise of religion." *See 2015-2016 Regular Session - HB 757*, GA. GEN. ASSEMBLY, http://www.legis.ga.gov/Legislation/en-US/display/20152016/HB/757 [https://perma.cc/A5N9-HSKD] (last visited July 19, 2017). It was vetoed by Governor Nathan Deal who stated that it did not "reflect Georgia's welcoming image as a state of 'warm, friendly, and loving people.'" Greg Bluestein, *Nathan Deal vetoes Georgia's 'religious liberty' bill*, AJC.COM (Apr. 9, 2016), http://politics.blog.ajc.com/2016/03/28/breaking-nathan-deal-will-veto-georgias-religious-liberty-bill/ [https://perma.cc/XHY6-DE3Q].

52. Indiana's initial religious liberty bill, Indiana S.B. 101, was revised in order to ensure that sexual orientation and gender identity would be protected. Tony Cook et al., *Indiana governor signs amended 'religious freedom' law*, USA TODAY (Apr. 2, 2015), http://www.usatoday.com/story/news/nation/2015/04/02/indiana-religious-

state RFRAs been constitutionally mandated, the push back and vetoes would have been problematic, but they are just statutes.

In the same era this version of "religious liberty" began to look problematic when the for-profit corporation, Hobby Lobby, demanded under RFRA a right to curtail female employee's reproductive health coverage based on the owners' religious rights. Civil rights organizations from the ACLU to Americans United for Separation of Church and State publicly denounced this use of RFRA and began to lobby against the state RFRAs and their application in certain scenarios.[54] In Congress, the Do No Harm Act was introduced to carve out specific elements of RFRA.[55] (It is my view that wholesale repeal of RFRA that

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freedom-law-deal-gay-discrimination/70819106/ [https://perma.cc/7GXX-RWDM]. The law:

> [P]rohibits a governmental entity from substantially burdening a person's exercise of religion, even if the burden results from a rule of general applicability, unless the governmental entity can demonstrate that the burden: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering means of furtherance the compelling governmental interest.

Senate Bill 101, IND. GEN. ASSEMBLY, https://iga.in.gov/legislative/2015/bills/senate/101 [https://perma.cc/3VSL-WSNS] (last visited July 27, 2017).

53. Erin Beck, *WV Senate kills 'religious freedom' bill*, CHARLESTON GAZETTE-MAIL (Mar. 2, 2016), http://www.wvgazettemail.com/news/20160302/wv-senate-kills-religious-freedom-bill [https://perma.cc/3JYZ-48DR].

54. Each of these organizations, which fully supported RFRA at its inception, have now embraced a mission to criticize the state RFRAs and to lobby against religious liberty claims against same-sex couples and LGBTQ individuals. The ACLU has protested the use of religion to discriminate against LGBTQ people, stating that "everyone is entitled to their own religious beliefs, but when you operate a business or run a publicly funded social service agency open to the public, those beliefs do not give you a right to discriminate." *See End the Use of Religion to Discriminate,* ACLU, https://www.aclu.org/feature/using-religion-discriminate [https://perma.cc/7JNG-53FY] (last visited July 19, 2017). The Americans United for the Separation of Church and State launched the "Protect Thy Neighbor" campaign to "prevent the use of religion to discriminate against and otherwise cause harm to individuals including religious objection to marriages and religious-based restrictions on women's healthcare." *See Marriage & Reproductive Rights*, AMS. UNITED, https://www.au.org/issues/marriage-reproductive-justice-other-privacy-issues [https://perma.cc/337N-2M94] (last visited July 27, 2017).

55. The Supreme Court ruled in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014), that the protection of RFRA extended to religious business owners and that therefore, such owners were exempted from providing contraceptives and abortifacients coverage to their employees. The Do No Harm Act, H.R. 5272, was introduced in order to "clarify that no one can seek religious ex-

would leave the First Amendment unfettered is the most humane policy choice, but that option has not yet been politically feasible in the United States, largely due to the pandering of elected officials to politically powerful—and even some not so powerful—religious entities). The push for the Do No Harm Act was almost exclusively for the benefit of the adult issues mentioned above. Child protection was never a priority and had to be brought into the discussion; it was not initially embraced by those at the table.[56] Eventually, in large part due to LGBTQ concerns about the conversion therapy movement, child protection provisions were included.[57] The Do No Harm Act never would have been introduced solely for the protection of children, once again showing how child protection in the religious context is often a second-order concern. It is also unlikely to be passed in a Republican-controlled White House, House, and Senate. After the election of President Donald Trump, right-wing Christians pursued child-endangering extreme religious liberty with a vengeance, introducing bills that permit state-paid believers, whether individuals or organizations, to refuse to provide social services to same-sex couples and gay children.[58]

The alteration of free exercise doctrine by adding on statutory rights but then treating them in the public square as constitutionally required was made possible in part by a retreat from specifics (the lives of children, women, LGBTQ, and other minorities) to banal generalities about constitutional doctrine. Many defended "accommodations" of religion that protected institutions run by adults over their child members, even in

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emption from laws guaranteeing fundamental civil and legal rights." *See* Lauretta Brown, *'Do No Harm Act' Would Forbid Religious Objection to 'Any Healthcare' Service*, CNSNEWS.COM (May 23, 2016), https://www.cnsnews.com/news/article/lauretta-brown/do-no-harm-act-would-amend-rfra-prevent-discrimination-forbid-religious [https://perma.cc/2DBS-XUWC].

56. I was involved in the behind-the-scene discussions and advocated for the Do No Harm Act to include provisions that would protect children against abuse and neglect from religious actors. This principle of child protection caused some consternation because it was a distraction from the leading adult issues.

57. Eventually, the child protection provisions remained in the bill, and finally children had a seat at the table to push back against those who would harm them based on faith.

58. Marci A. Hamilton, *The Children Be Damned . . .*, JUSTIA: VERDICT (Mar. 30, 2017), https://verdict.justia.com/2017/03/30/children-damned [https://perma.cc/LM4L-46J7].

situations involving serious violations of children's human rights.[59] In effect, even some have sided with the perpetrators of trauma against children in the name of religion by supporting a doctrine that they thought protected religion but instead protected religion past the no-harm line.[60] They could not or

59. *See, e.g.*, Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL'Y 821, 835–36 (2012) ("Taken together, the establishment and free exercise holdings of *Hosanna-Tabor* suggest a shift in Religion Clauses jurisprudence from a focus on individual believers to a focus on the autonomy of organized religious institutions. Although the Court never confined the protections of the Religion Clauses to natural persons, opinions gave the impression that, to the Court, religion is essentially a matter between individuals and their God (however conceived). Free exercise cases emphasized individual sincerity and rejected the idea that religious exercise must be rooted in the teachings of a faith community. In some of the parochial school cases, members of the Court gave the impression they regarded the 'inculcat[ion]' of church 'dogma' as a threat to the freedom of individuals to form their own beliefs. Now, however, as interpreted in *Smith* and *Hosanna-Tabor*, the Free Exercise Clause provides far greater protection to the 'faith and mission' of religious institutions than to individual acts of religious exercise, and the Establishment Clause bars the government from interfering in 'ecclesiastical' decisionmaking. Perhaps it is a coincidence, but this shift in emphasis corresponds very roughly to the old divide between individualistic Protestantism and institutional Catholicism and might be the first evident fruit of the new Catholic majority on the Court. The 'freedom of the church' was the first kind of religious freedom to appear in the western world, but got short shrift from the Court for decades. Thanks to *Hosanna-Tabor*, it has again taken center stage." (footnotes omitted)).

60. *See* Gary S. Gildin, *A Blessing in Disguise: Protecting Minority Faiths Through State Religious Freedom Non-Restoration Acts*, 23 HARV. J.L. & PUB. POL'Y 411, 486 (2000) (discussing how state religious freedom laws should be drafted to avoid being declared unconstitutional like RFRA); Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 496–97 (2010) (arguing for the continued drafting and passing of state religious freedom laws); Jennifer A. Marshall, Burwell v. Hobby Lobby*: Protecting Religious Freedom in A Diverse Society*, 10 NYU J.L. & LIBERTY 327, 344–45 (2016) (discussing the importance of RFRA for protecting religious liberty after the Supreme Court's decision in Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014)); John Witte, Jr. & Joel A. Nichols, *"Come Now Let Us Reason Together": Restoring Religious Freedom in America and Abroad*, 92 NOTRE DAME L. REV. 427, 435, 450 (2016) (discussing the history and importance of protecting religious liberty in the United States); *see also* Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1115–16 (explaining the concept of the "No-Harm Doctrine" in relation to RFRA and free exercise of religion); Marci A. Hamilton, *North Dakota's Religious Freedom Restoration Act (RFRA) Signals Religious Lobbyists' New and Disturbing Approach to Statute-based Free Exercise Rights*, JUSTIA: VERDICT (May 3, 2012), https://verdict.justia.com/2012/05/03/north-dakotas-religious-freedom-restoration-act-rfra-signals-religious-lobbyists-new-and-disturbing-approach-to-statute-based-free-exercise-rights [https://perma.cc/2FRG-65BN] (explaining the "dark underside" and harm caused by RFRA, specifically against children).

did not see that by protecting accommodations for religion they were protecting adult institutional leaders to the detriment of vulnerable children.

The one-size-fits-all-cases rhetoric introduced in the last twenty years through the introduction of religious liberty statutes like RFRA and state counterparts[61] has treated all religious actors as rights-deserving, and all contexts as equally legitimate for consideration of accommodation—regardless of the harm they may impose. Why? In no small part because the constitutional undertone of the statute-based discourse treats religious believers as ascendant and all others as second order citizens.

There has been lip service paid to concerns about harm to third parties in some cases,[62] but in others the harm to others has been ignored or trivialized.[63] That has meant that the religious actor is treated as rights-deserving without consideration of the effect on others, even if harm occurs. The discourse that accompanies such reasoning treats religious liberty as a constitutionally-required right in all iterations, whether the claim is based on a constitutional or a statutory base.

This expression in constitutional terms about statutory rights creates cognitive dissonance in public discourse. The cure for the cognitive dissonance of religious liberty dialogue is to call a right what it is: constitutional or statutory. A constitutional right overcomes conflicting statutes, persists, and requires a constitutional amendment to overturn it. In contrast, a statuto-

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61. HAMILTON, *supra* note 21, at 19–20, 340–42; *see also* Marci A. Hamilton, *Indiana Leads the Way With an Outrageous RFRA Proposal Again*, JUSTIA: VERDICT (Jan. 21, 2016), https://verdict.justia.com/2016/01/21/indiana-leads-the-way-with-an-outrageous-rfra-proposal-again [https://perma.cc/P8M4-NTKT]; Marci A. Hamilton, *RFRA, Zubik v. Burwell, and the Do No Harm Act*, JUSTIA: VERDICT (May 19, 2016), https://verdict.justia.com/2016/05/19/rfra-zubik-v-burwell-no-harm-act [https://perma.cc/EX8F-KZR4].

62. *See* Zubik v. Burwell, 136 S. Ct. 1557, 1561 (2016) (Sotomayor, J., concurring) ("Requiring standalone contraceptive-only coverage would leave in limbo all of the women now guaranteed seamless preventive-care coverage under the Affordable Care Act. And requiring that women affirmatively opt into such coverage would 'impose precisely the kind of barrier to the delivery of preventive services that Congress sought to eliminate.'" (citation omitted)).

63. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Ginsburg, J., dissenting) ("No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect").

ry right is capable of being shaved back, amended, and repealed when harm becomes apparent. Therefore, there is a great deal at stake in accurately categorizing religious liberty rights.

II. CONCLUSION

The First Amendment's contours have been clouded by overreaching for religious liberty that it does not protect. That is unfortunate, because the Free Exercise Clause provides the clearest signal that the correct default position is that religious actors are accountable to the law and that accommodation should only occur legislatively after there is deliberate weighing of an accommodation and potential harm. Moreover, the Establishment Clause establishes that there are intended limits on religion and its believers. Taken together, the Religion Clauses are the foundation for a society rich in religious liberty, fairness, and diversity.

The statutory cloud of religious liberty with its sly insinuation that religious liberty rights are really constitutionally required is intended to mislead and to increase the power of religious actors—without bound. That power in turn has been used to undermine the fairness principle of the First Amendment and to moot the power of the Establishment Clause. The end result is elevation of the religious rights holder above all others.

The better discussion begins just as the Commission's Report did: with a frank concession that the religious liberty rights to discriminate are not constitutional mandates, combined with a refusal to treat a claim simply because it is religiously motivated as superior. That is the formula that brings the vulnerable back into focus and treats them as equal human beings, and not as second-class citizens.

A NOT QUITE CONTEMPORARY VIEW OF PRIVACY

RICHARD A. EPSTEIN*

Oftentimes the way in which a writer defines a problem will give powerful clues as to how he thinks it is best solved. This Symposium, dedicated to the "First Amendment in Contemporary Society," states the problem in what I think is the wrong way. The use of the term "contemporary" carries the not-too-subtle implication that the solutions that we need to respond to major problems of First Amendment law today are somehow qualitatively different from those applicable, for example, at the time of the Founding. There are, of course, many technological developments that can be easily invoked to support that position. But in general, whether one is an originalist or not, it is best to take such claims of theoretical novelty with a grain of salt.

I am generally predisposed to take this skeptical stance because my intellectual grounding, after these many years, is still in Roman law and English common law. My continued work[1] in these areas has led me to think that the opposite is often true—the solutions to the major problems of today can be found in the enduring principles of the past. Some years ago, I wrote an essay titled "The Static Conception of the Common Law,"[2] in which I took the position that the fundamental legal

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1. For a few examples of my continued work in these areas, see Richard A. Epstein, *For a Bramwell Revival*, 38 AM. J. LEG. HIST. 246 (1994); Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699 (1992); Richard A. Epstein, *Defenses and Subsequent Pleading in a System of Strict Liability*, 3 J. LEG. STUD. 165 (1974); Richard A. Epstein, *Intentional Harms*, 4 J. LEG. STUD. 391 (1975); Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973); Richard A. Epstein, *The Reflections and Responses of a Legal Contrarian*, 44 TULSA L. REV. 647 (2009); Richard A. Epstein, *The Roman Law of Cyberconversion*, 2005 MICH. ST. L. REV. 103; Richard A. Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253 (1980).

2. *See* Richard A. Epstein, *The Static Conception of the Common Law*, *supra* note 1.

relations developed in early times concerning the acquisition of property, the law of tort, and the law of contract had great durability, such that many of the self-conscious changes in modern legal doctrine introduced judicial or legislative mischief by creating rules that, even by any modern standard of social welfare, worked less well than the Roman or common law rules they displaced.[3]

One such misguided reform was the doctrine of unconscionability as applied to contracts of sales and leases.[4] Another was the rule of occupier liability as applied to residential properties.[5] The very same risk of overzealous modernization also applies in modern constitutional law. For instance, the (relatively) narrow reading of the Commerce Clause that (roughly speaking) restricted its scope to interstate transactions was as sound in the New Deal Period as when it was first announced in *Gibbons v. Ogden*[6] in 1824. Modern technology has brought us automobiles, steamships, jet planes, telephones, and the internet, but the line between local and interstate commerce does not vary with the type of technology involved. Moving from an interstate journey into local commerce is the same over time, whether by horse-drawn carriage or taxi. So if there was no reason to junk the principle of enumerated powers in 1824, there was none in 1937 either.[7] In both cases, the central task of the federal government was to keep open the arteries of inter-

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3. *Id.* at 258–65 (discussing such changes of law in the doctrines of "Negligence and Strict Liability," "Privity and Freedom of Contract," "Assumption of Risk," and "Landlord Tenant").

4. For examples of these mistakes, see *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), and *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

5. *See, e.g.*, Rowland v. Christian, 443 P.2d 561 (Cal. 1968).

6. 22 U.S. (9 Wheat.) 1 (1824). Chief Justice Marshall announced this position:

> Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description.

Id. at 194–95.

7. *See* NLRB v. Jones & Laughlin Steel, 301 U.S. 1 (1937); *see also* Wickard v. Filburn, 317 U.S. 111 (1942).

state commerce to facilitate competition among the states. The nationalization of commerce that leads to cartelization is as dangerous in the twenty-first century as it was at the time of the Founding.[8]

When I think of the term "contemporary," therefore, I think of it in the same way that I did in 1960 when I took the standard first-year sequence in Contemporary Civilization at Columbia College.[9] As students, our study of contemporary work began with the writings of the Greek philosophers, where our responsibility was to figure out which of their arguments carried over to modern times, and which of them faltered. On this view, the great thoughts of the ancients are always contemporary, and anyone who cuts themselves off from earlier studies removes one of the pillars on which proper analysis rests.

I. THE WARREN AND BRANDEIS SYNTHESIS

The proposition that the term "contemporary," properly understood, includes the best of the past holds, I believe, across all fields of law. But regrettably this position is far too often neglected in favor of modern advances. For the purposes at hand, let us consider the law and privacy. It is instructive in this regard to begin with the most famous article on the subject, Samuel Warren and Louis Brandeis's *The Right to Privacy*.[10] To get some sense of the sweep and grandeur that they brought to the subject (and for which they have been frequently and extravagantly praised),[11] it is worth quoting the opening passages:

> That the individual shall have full protection in person and in property is a principle as old as the common law; but it

8. *See* Richard A. Epstein, *The Cartelization of Commerce*, 22 HARV. J.L. & PUB. POL'Y 209 (1998).

9. For the readings assigned in this course, see COLUMBIA UNIV., MAN IN CONTEMPORARY SOCIETY: SOURCE BOOK PREPARED BY THE CONTEMPORARY CIVILIZATION STAFF OF COLUMBIA COLLEGE (1955).

10. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

11. *See, e.g.*, Dean Andrew Mazzone, Louis D. Brandeis: A Life*, By Melvin I. Urofsky (Panthean Books, 2009); 976 Pages*, 93 MASS. L. REV. 411 (2011) (book review) (acclaiming *The Right to Privacy* as "one of the most singularly influential law review articles of all time.").

> has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession—intangible, as well as tangible.
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> Thus, with the recognition of the legal value of sensations, the protection against actual bodily injury was extended to prohibit mere attempts to do such injury; that is, the putting another in fear of such injury. From the action of battery grew that of assault. Much later there came a qualified protection of the individual against offensive noises and odors, against dust and smoke, and excessive vibration. The law of nuisance was developed. So regard for human emotions soon extended the scope of personal immunity beyond the body of the individual. His reputation, the standing among his fellow-men, was considered, and the law of slander and libel arose.[12]

One seductive feature of this article is how it indulges in what I like to call "imagined history." Warren and Brandeis write very much in a whiggish tradition, which is characterized by a view "that holds that history follows a path of inevitable progression and improvement and which judges the past in light of the present."[13] The passage quoted from Warren and Brandeis portrays just this historical arc. This vision of history allows for no false steps, no backward movements, no unex-

12. *See* Warren & Brandeis, *supra* note 10, at 193–94 (internal citations omitted).

13. *Whiggish*, Merriam-Webster Online Dictionary 2017, https://www.merriam-webster.com/dictionary/Whiggish [https://perma.cc/7VNS-KB58] (last visited Aug. 12, 2017).

pected ambiguities, and no corrupting influences. There is just an inexorable progression in which the law "grows" so that gaps left by an earlier generation are filled by the far-sighted innovations of the next. Privacy, which had had an imperfect and unrealized history up to 1890, is next on the runway for full legal protection as an apparently worthy successor to all the previous notable advances.[14]

It is important to note how Warren and Brandeis set up this system. Their perspective contains no room for any kind of moral skepticism. Instead, the world begins with this large truth: the protection of person and property has been timeless. The article reinforces that impression by mentioning not a single date on which any particular doctrine began, and by giving no details about or how, when, or why any particular doctrine developed. Everything is written in such a grand, magisterial fashion—careful to proclaim only universal truths—as if, as long as nothing is specified, the account cannot be wrong. But let the reader try to figure out exactly what the critical arguments are and how they develop, and the story gets a lot muddier, making it that much harder to anticipate the next major step.

It is therefore necessary to unpack some of this inexorable progression. What I plan to do, therefore, is draw from my Roman and medieval background to explain which legal transitions make sense, and which do not. The point of the exercise is to see what can be learned about the right of privacy by a closer examination of the various transitions between earlier states of the law. At this point, the first analytical mistake of Warren and Brandeis is that they start from an implicit assumption that it is always easy, if not inevitable, to expand the set of rights without adverse social consequences. But they never confront the quid pro quo that is implicit when rights are expanded: exactly what correlative duties are imposed on various individuals and why. On that crucial question, Warren and Brandeis are silent.

In this discussion, I do share with Warren and Brandeis the useful assumption that we are talking about general rules, so that we do not have to worry, at least initially, about special-

14. *See* Warren & Brandeis, *supra* note 10, at 193–94.

ized relationships such as those between a doctor and a patient, or a seller and a buyer, which in practice often fall on the contract side of the tort-contract line.[15] This point is of great importance because, under any general rule, all individuals have both rights against others and correlative duties to them. Once it is recognized that individuals are necessarily *both* bound and benefited, then the articulation of the correct set of rights is harder to come by, given the constant trade-offs that have to be made with each new adjustment to the underlying rules. What any individual gains in the role of a future claimant is offset by what that person loses in the role of a future defendant. For the system to work well, the recognition of a particular claim against others must produce a net benefit for all individuals. And where it does not, then the net advantage lies in increasing the freedom of action that all persons enjoy in their role as future defendants.

Of course there are variations among persons, which is why the usual construct of Adam Smith's ideal observer[16] or John Rawls' veil of ignorance[17] takes over as the analytical framework in which libertarian (and other) approaches to rights are generated. The analysis tends to ignore fine differences that cannot be measured, concentrating instead on persons located toward the middle of the distribution, which is why terms like "reasonable person" or "reasonable expectations" exert such a powerful hold within this framework. They are a way of eliminating troublesome idiosyncratic variations from the basic calculation, at least on the initial cut, leaving open the possibility that any pesky variations can be brought into the system later when the time comes to flesh out its details.

Warren and Brandeis's opening gambit draws its power because it takes a strong leaf from the libertarian playbook, which, normatively, still offers the best approach for under-

15. *Id.* at 197 (explaining their general approach as considering "whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is").

16. *See* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (A. Miller et al. eds., 1971); Roderick Firth, *Ethical Absolutism and the Ideal Observer*, 12 PHIL. PHENOMENOLOGICAL RES. 317, 345 (1952).

17. *See* JOHN RAWLS, A THEORY OF JUSTICE (Harvard Univ. Press rev. ed. 1999).

standing individual rights in ordinary two-party interactions. The universal protection of person and property puts a perimeter of rights around all individuals that no other person is allowed to breach, except in conditions of necessity. The cases that Warren and Brandeis put forward fit well within this framework. Thus the initial protection against the use of force—*vi et armis*—confronts all individuals with the stark choice: would you rather have the right to commit random violence against others, or give up that right in order to be protected against the violence of others? The reason why *vi et armis* is so powerful is that the question answers itself, and it does so with the same clarity today that it did so many years ago.

In good whiggish form, Warren and Brandeis then declaim that the protection against assault—the offer of force against the person—came later. Historically that is not true; the action for assault in *I. de S. & Wife v. W. de S.*[18] shows this tort dates at the latest from 1348. Indeed, there is absolutely nothing in that brief opinion that suggests that the action for assault was the slightest bit novel at the time. The inevitable progression that Warren and Brandeis seek to narrate—from protection against mere battery to protection against battery and assault—turns the ebbs and flows of history into something of a morality play. But a moment's reflection should make it clear that it is virtually impossible to think of a world in which protection is given against the use of force, but none is supplied against the threat of force. The same social forces that lead us to protect against both today worked equally well many years ago.

With a tort like nuisance, the situation is a little bit more complex. In one sense the tort is an obvious outgrowth of the tort of trespass, and there is little doubt that, at least in cases of substantial nuisances, we know the answer to this question: would you subject yourself to the stenches of others so long as you could do the same to them? Very few people will answer that basic question in the affirmative. Nonetheless, nuisances are much more complicated than simple trespasses. In so many

18. *See* YB Liber Assisarum, 22 Edw. 3, fol. 99, pl. 60 (1348 or 1349), https://www.bu.edu/phpbin/lawyearbooks/page.php?volume=5&first_page=109&last_page=109&id=11809 [http://perma.cc/63TF-V8NM]. For an English translation of this case, see VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 37–38 (12th ed. 2010).

cases both sides are better off with a "live-and-let-live" rule whereby low-level nuisances on both sides are ignored, precisely because all individuals value their freedom of action more than they value the right to be free of such trivial insults. Baron Bramwell articulated the logic in favor of this position in the famous 1862 decision of *Bamford v. Turnley*,[19] which hits at the appropriate theme:

> It is as much for the advantage of one owner as of another for the very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live.[20]

There is thus every reason to believe that this line works as a useful first approximation on the kinds of nuisances that are tolerated and those that are not. And this balance is far more common with nuisance than it is with trespass to land, where the privileges are much more circumscribed. Yet in dealing with casual physical contact between persons on public streets, the same live-and-let-live rule that dominates nuisances has a precise analogue. There are no lawsuits when people accidentally jostle each other; an "excuse me" is usually quite sufficient. On the other hand, if the harm is deliberate or serious injury ensues, then the rights of action will come quickly. Yet once again there is no need for some elaborate theory of social evolution to explain these refinements. It is part of the everyday morality that lies at the root of so much of the basic norms of common law, making the whiggish notion of benevolent evolution unnecessary. There is no need for triumphant evolution if we are already there.

The same logic applies to the tort of defamation, which also fits squarely within the libertarian framework. In the basic case, *A* makes a false statement about *B* to *C*, who in turn refuses either to do business with or associate with *B*.[21] The interest here

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19. Bamford v. Turnley (1862) 122 Eng. Rep. 25.

20. *Id.* at 33.

21. *See* RESTATEMENT (SECOND) OF TORTS § 559 (AM. LAW INST. 1977) ("A communication is defamatory if it tends so to harm the reputation of another as to

is not physical, but for these purposes it does not matter. Defamation picks up on the second half of the libertarian prohibition against force and fraud, and does so in a context where the risk is very great. If *A* lies to your face, you have simple means of self-help, namely, a healthy dose of skepticism. But if *A* lies to a third person, that third person does not have your interest at heart, and could easily decide that it is better to take her business somewhere else than take the risk that these statements are true. So the tort in fact has a very early origin,[22] far earlier than any tort of privacy, and for good reason. The law of defamation is much older than the law of privacy precisely because those false statements about another individual could lead to their political demise, their lawful execution, or their murder. So defamation was well understood in very early times as a very serious offense.[23]

Needless to say, here too there are complications. Thus, a general false statement to the world in the form of group defamation is in general not actionable, for the reason that people have enough general information to discount the false statements instead.[24] The point here is not that the statements are harmless; they are often anything but. Rather, the point is that forceful social counter-speech is cheaper and does not raise the dangerous specter of trying to reargue political differences in a legal forum.

It should be noted that the same approach applies in each of these cases. The typical case of the wrong is established, and then the same question is brought to bear to define exceptions to the rule—do you gain more as a plaintiff than you would lose as a defendant? The common cases give generally clear answers, enabling us to live with the inevitable ambiguities presented by difficult, but usually infrequent, litigation.

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lower him in the estimation of the community or to deter third parties from associating or dealing with him.").

22. *See* Van Vechten Veeder, *The History and Theory of the Law and Defamation*, 3 COLUM. L. REV. 546, 547 (1903).

23. *See* R.C. Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99, 100 (1949).

24. *See, e.g.*, Khalid Abdullah Tariq Al Mansour Faissal Fahd Al Talal v. Fanning, 506 F. Supp. 186, 187 (N.D. Cal. 1980) ("If the court were to permit an action to lie for the defamation of such a multitudinous group we would render meaningless the rights guaranteed by the First Amendment to explore issues of public import.").

II. THE COUNTER-REVOLUTION IN PRIVACY

So how does this program play out in connection with the right to privacy championed by Warren and Brandeis? The answer is that the whiggish progression is far from inevitable. Indeed, in the case which they address—prying reporters giving lurid accounts of celebrity events—Warren and Brandeis were stopped in their tracks by what came to be known as the newsworthiness privilege that essentially swallowed the tort.

One early case that announced this position was *Sidis v F.R Publishing Corp*.[25] On facts that could hardly be more favorable to the plaintiff, a one-time mathematical prodigy who became something of an eccentric had his every foible—including his collection of streetcar transfers—mercilessly dissected in an unsigned *New Yorker* story probably written by the talented humorist James Thurber.[26] There was no pressing event that triggered the story, but it appealed to the morbid curiosity of many. This was surely the ideal case in which to declare a general right to be let alone. Nonetheless, the newsworthiness privilege, adopted in opposition to the "eminent opinion" of Warren and Brandeis, upended the central claim of privacy put forward by these Boston Brahmins:

> Regrettably or not, the misfortunes and frailties of neighbors and 'public figures' are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day.[27]

And many other cases follow in the same vein.[28] Indeed, the stable synthesis appears to be reached in Section 652D of the Restatement (Second) of Torts:

> **§ 652D. PUBLICITY GIVEN TO PRIVATE LIFE**
>
> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

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25. Sidis v. F.R Publishing Corp., 113 F.2d 806 (2d Cir. 1940).
26. *See* DANIEL J. SOLOVE ET AL., PRIVACY, INFORMATION, TECHNOLOGY 6 (2006).
27. *Sidis*, 113 F.2d at 809.
28. *See, e.g.*, Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993).

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.[29]

It seems that the two qualifications typically swallow the rule. The public has a legitimate concern in just about everything, and there are few statements that are highly offensive to the reasonable person. So long as someone is or (as in *Sidis*) has been a public figure, the scope of the tort is quite narrow. Nor is there any reason to regret the result, for the trade-off would be enormous. To protect the expanded notion of privacy, it would be necessary to give a very limited protection to freedom of speech about matters of public interest and concern. Indeed, the broad phrase that marks the Warren and Brandeis article, "the right to enjoy life, and the right to be let alone," could be construed to impose enormous correlative duties on others. Does "the right to be let alone" mean that everyone else is required to step aside so that Warren and Brandeis can enjoy life in the closeted environment to which they wish to become accustomed? Without constraint, such a statement would surely impose impossible correlative duties. Indeed, it is precisely this overbreadth that makes the narrower common law proposition that one cannot trespass or defame the more attractive, even if imperfect, alternative, because the correlative duties are appropriately limited.

Similarly, the right to be let alone cannot mean that no one is entitled to comment on a wedding, even after a public announcement of the event. It is not plausible to let any individual exert such powerful control over the speech or thought of others. No one really thinks that the claim goes this far, which is why the general claim of Warren and Brandeis has never been accepted. The path of progress inevitably contains some unanticipated bends in the road.

III. PRIVACY THE HARD WAY—BY ANALOGICAL EXTENSION

Yet at this point, the hard work comes in. Surely the concept of a right to privacy has some purchase to it that is not fully captured in the law of trespass, assault, and defamation. The question is how to isolate that key component in a way that

29. RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

runs more narrowly than the unspecified correlative duties in Warren and Brandeis's formulation.

A. Contract: Confidentiality and Disclosure

One way to understand the reach of the doctrine is to switch from tort to contract and to think of the importance that confidentiality agreements have in all areas of life. Thus, to take the simplest situation, if I tell you something in confidence, you are not free to disregard that restriction on the further distribution of that information. There may, of course, be situations in which it is imperative that you disclose the information—it could be the knowledge that would prevent the commission of a crime or save a person in distress. But these counterexamples do not establish the proposition that there is no duty of confidentiality. Instead, they fold this particular branch of law into the general theory of contract law, where nonperformance of the duty is prima facie evidence of breach subject to excuses and justifications that would be worked out in this branch of contract law as in all others.

Of course, the situation can become more complex as the contractual terms concerning disclosure become more refined. I may disclose some information to you for certain purposes and not for others, and it would be a breach of promise to make an unauthorized use. However, these limitations are difficult to enforce, so the initial promise of confidentiality may be coupled with various monitoring obligations to assure the promisee that the information is used solely in the permitted fashion. This rule—allowing the use of information subject to confidentiality restraints—applies to everything from medical records, to trade secrets, to legal advice, to national security, and beyond. Similarly, information may be released to one person with an eye towards future sharing of information with third parties, often under further limits and duties of confidentiality. For instance, the company that receives a valuable customer list may be allowed to use it only a limited number of times—and that list may well be salted with fake names to allow its owner to detect overuse. Or the law firm that gets information from its client may well be able to show it, or some portion of it, to secretarial and computer staff or expert witnesses.

At this point, the rules for the use and transfer of information start to resemble, in broad form, the parallel rules that are used

to deal with the bailment of chattels or the leasing of real property. And these arrangements are not subject to objections that parallel those to the right to be left alone with one caveat: the enforcement regime is more complex because information is partible, and thus can be retained and shared at the same time, complicating the remedial system that needs to be established. For example, the sale of a customer list from *A* to a competitor *B* might carry with it the covenant that *A* cannot resort to that list after the sale, or sell it a second time to anyone else.

These difficulties become still greater when someone receives information that he knows is not intended for him. Given that knowledge, the rule is that he cannot look at the information at all, but should, if possible return it unopened.[30] Similarly, if it is read by mistake, then whatever information was collected should be disregarded, unless there is some justification for keeping it. This issue becomes acute when newspapers and other media outlets receive information that they know is stolen from some private or governmental source. The received wisdom often lets the third party publish this information with impunity.[31] But this creates a rule for information that is obtained in bad faith—that is, with knowledge that it is stolen—that is at odds with the general rule that offers no protection to any person who receives property in bad faith, and which has been extended to apply to tippees in insider trading cases.

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30. With these comments, I disagree with the comments of Steven Coll on the responsibilities of journalists who receive stolen information:

> Generally, when you come up to the threshold of a risky decision, everybody's in the room. If it's a healthy organization, the editor makes the final decision. And I would say, in general, unless it is an urgent matter of public interest or something deep at the heart of the mission, the decision will be just seven-eighths of what it is that it looks like you could defend.

Steven Coll, Dean & Henry R. Luce Professor of Journalism, Columbia Journalism Sch., Privacy and Freedom of the Press Panel at the Thirty-Sixth Annual Federalist Society National Student Symposium on Law and Public Policy (Mar. 15, 2017), *available at* http://www.fed-soc.org/multimedia/detail/privacy-and-freedom-of-the-press-event-audiovideo [https://perma.cc/9G62-FZJG] (last visited Aug. 15, 2017).

31. *See, e.g.*, Pearson v. Dodd, 410 F.2d 701, 705–06 (D.C. Cir. 1969) (holding that when a plaintiff claims that private information concerning himself has been published, the question of whether that information is genuinely private or is of public interest should not turn on the manner in which it has been obtained); *see also* Bartnicki v. Vopper, 532 U.S. 514, 534 (2001); New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

This constructive trust relationship is routinely imposed on third parties who receive chattels or land that they know to be, or of which they have constructive knowledge is, owned by someone else. There is no implication that they have voluntarily assumed any fiduciary duties to the true owner of the property. Quite the opposite: it is well known that they have no such intentions at all. But the obligation of a fiduciary is to preserve the asset value for the beneficiary. That same duty should be imposed under a theory of unjust enrichment against any party who is in possession of stolen information that he knows is not his. Hence the constructive trust is imposed to force him to act *as if* he were a trustee, which means that he must make restitution of the monies received (and any gains derived from their use) to their rightful owner.[32]

The same logic applies with equal force to journalists in the insider trading context.[33] In dealing with information known to be stolen, there should be an obligation not to use it, the temptation will be otherwise, and the hard question is whether there is some privilege that allows for the free or limited use of that information. In my view, no media outlet should take it upon itself to use the stolen information as it sees fit. The rule should apply to information that one likes, as well as to information that one does not like. It makes no sense to allow the obligation to vary with the perception that a newspaper editor has of its salience to public debate. Such a standard could lead to inconsistent judgments between different media outlets at one time and the same media outlet over time. Far better is a hard-and-fast rule that no private recipient of stolen information, in or outside the press, should arrogate unto itself the decision of whether or not to publish a story based on that information. Instead, that information should be kept unopened and unread until some independent public official, whether an administrator or a court, passes on whether it could be used or disclosed. There are hard questions about when some public interest priv-

32. Richard A. Epstein, *Returning to the Common-law Principles of Insider Trading After* Newman v. United States, 125 YALE L.J. 1482, 1506 (2016). See also United States v. O'Hagan, 521 U.S. 642 (1997), which I discuss at length.

33. *See generally* Carpenter v. United States, 484 U.S. 19 (1987) (discussing the misappropriation of insider information by a journalist from his newspaper supported conviction for participation in an insider trading scheme).

ilege should attach. But I shall not attempt to answer those questions here, except to note that while these issues require the closest attention, they do not give rise to the same kind of extravagant claims that can stem from the "right to be left alone."

B. Tort: Trespass, Assault, and Defamation

The question of extension is not limited to movement on the contract side. There is also the question of the extent to which the traditional categories of tort law could be tweaked in way that extends their range to cover privacy.[34] In this regard, there are three categories worthy of note: trespass, intrusion upon seclusion, and defamation.[35]

1. Trespass

The tort of trespass requires some contact with the person or some entry upon his property.[36] But the relationship between trespass and invasion of privacy is complex, as there are many trespasses that are not invasions of privacy and many invasions of privacy that are not trespasses. Thus when someone takes a shortcut across another person's field, there is a trespass but no invasion of privacy if his intention is merely to reach the other side. Yet when someone shines a searchlight into a window while standing on a public street, there is an invasion of privacy, but not a trespass. There are also cases in which there is a trespass incident to the invasion of the privacy, as when someone stands on the property of another and then uses a searchlight to examine what is going on inside a closed house.

The physical trespass is an insecure peg on which to hang any liability for the information uncovered by these activities. No one has ever been able to come up with a compelling account that distinguishes the case just given from one in which

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34. *See* RESTATEMENT (SECOND) OF TORTS § 652A cmt. b (AM. LAW INST. 1977) ("[T]he invasion of the right of privacy has been a complex of four distinct wrongs, whose only relation to one another is that each involves interference with the interest of the individual in leading . . . a secluded and private life, free from the prying eyes, ears and publications of others.").

35. *See id.* § 652A (listing the four specific torts grounded in the right of privacy).

36. *See, e.g., id.* § 158 (defining trespass of land); § 217 (defining trespass to chattel).

the person steps back a few feet to a public street and uses a stronger searchlight to discover the same information. And what is true with respect to visual searches applies to aural searches as well. The person who overhears a conversation by entering a room is not materially different from one who steps on to the public street or hangs from the eaves to recover that same information. The tort law on the invasion of privacy recognizes the closeness of the two situations.[37] Much of the complex Fourth Amendment law speaks of a reasonable expectation of privacy,[38] rejecting, for example, the government's claim that placing a tap on the outside of a public telephone booth did not amount to a search or seizure because the electronic device did not commit a common law trespass in virtue of the fact that the tap "did not happen to penetrate the wall of the booth."[39]

The expectation in this case is clear, and the argument is not circular in my view. The purpose of reasonable expectations is to figure out how to maximize the net gains from various interactions between large numbers of strangers. A rule that requires one not to eavesdrop reduces the need for individuals to take self-help protections. But it does not spare them from the loss of informational privacy if they speak loudly in public places. Here the phone booth signals the request for privacy that can be easily honored by not peeking in. The test for what is a search is the same for government officials as it is for private people, and both should understand this drill well enough to maintain the correct distance. The same rule applies, for example, to dinner conversations at restaurants; potential eavesdroppers are not allowed to crane their necks to hear private conversations, and the parties know to speak quietly to limit the risk of being overheard.[40] Obviously, where the information

37. *See* Roach v. Harper, 105 S.E.2d 564, 568 (W. Va. 1958) (finding liable a landlord who set up a listening device in a tenant's apartment and listened from his own apartment).

38. *See* Katz v. United States, 389 U.S. 347, 351 (1967) (noting that what one "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected").

39. *Id.* at 353.

40. *See, e.g.*, A. M. Swarthout, Annotation, *Eavesdropping as Violating Right of Privacy*, 11 A.L.R. 3d 1296, 2 (2017) (listing "ample authority to support the conclusion that conduct which amounts to 'eavesdropping[]' . . . may, under the

is highly sensitive, it becomes too risky to speak about it in any public place. But a telephone booth should be immune from prying.

2. Assault

Expanding from the core case of assault, the modern law speaks about the tort of "intrusion upon the plaintiff's seclusion or solitude, or into his private affairs."[41] The word "intrusion" is softer than the term "invasion," and "seclusion or solitude" cover more than threats to bodily integrity brought about by an offer of force, which is the essence of an assault.[42] But how far beyond the core cases do these terms go? The answer is not very much. On the one hand, it seems clear that there is an intrusion on seclusion by shadowing people on the public street,[43] or by hounding them on those same streets, where there is a lurking risk of some physical contact and a constant sense of intimidation, as happened with Jacqueline Kennedy Onassis.[44] On the other hand, the tort of intrusion does not go so far as to cover cases in which a person's house is photographed as part of the general project of Google Maps.[45] These distinctions seem perfectly sensible, but there is no way in which the right "to be left alone" can capture the relevant distinctions because of this now familiar methodological flaw: it does not take into account the interests of freedom of motion and observation on the other side. What is needed in all these cases is a balance of interests, and that is the one inquiry that is

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proper circumstances, constitute such an invasion of the victim's privacy that he can maintain a civil action against the eavesdropper.").

41. Troncalli v. Jones, 514 S.E.2d 478, 482 (Ga. Ct. App. 1999).

42. *See* RESTATEMENT (SECOND) OF TORTS § 21 (AM. LAW INST. 1977) (including putting one "in apprehension" of contact as part of the definition of assault).

43. *See* Nader v. Gen. Motors Corp., 255 N.E.2d 765, 771 (N.Y. 1970) ("[I]t is manifest that the mere observation of the plaintiff in a public place does not amount to an invasion of his privacy. But, under certain circumstances, surveillance may be so 'overzealous' as to render it actionable.").

44. *See* Galella v. Onassis, 487 F.2d 986, 992 (2d. Cir. 1973) (providing examples of Galella's unlawful conduct).

45. *See* Boring v. Google Inc., 362 Fed. App'x 273, 279 (3d Cir. 2010), *cert. denied*, 562 U.S. 836 (2010) ("[W]hat really seems to be at the heart of the complaint is not Google's fleeting presence in the driveway, but the photographic image captured at that time. The existence of that image, though, does not in itself rise to the level of an intrusion that could reasonably be called highly offensive.")

not made in the Warren-and-Brandeis analysis. The Restatement (Second) of Torts tries to draw the appropriate line:

> **§652B. INTRUSION UPON SECLUSION**
>
> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.[46]

The parallels to Section 652D, dealing with the revelation of highly sensitive information, are close.[47] In this context as well, use of the words "highly offensive" is meant to take out the acute uneasiness that is commonplace with various forms of asocial behavior, and the term "reasonable" is intended to rule out the reactions of those persons who are peculiarly sensitive.[48] There are always marginal cases, but this set of accommodations seems to have lasted for a long time. I see no reason why any contemporary issue should lead to a reconsideration of this basic point.

3. Defamation

The next area of tort is defamation. The modern tort of placing individuals in a false light stems from the law of defamation and is therefore subject to the same types of limitation.[49] For example, in the context of public figures, actual malice is required.[50] Indeed, the insertion of the "highly offensive" requirement in this area seems inappropriate given that the dam-

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46. RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977).

47. *See id.* § 652D ("One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person . . .").

48. *See id.* cmt. c (explaining that because of the words "highly offensive" and "reasonable man," even "minor and moderate annoyance . . . is not sufficient to give [a person] a cause of action under the rule stated in this Section").

49. *See id.* § 652E cmt. b ("In many cases to which the rule stated here applies, the publicity given to the plaintiff is defamatory, so that he would have an action for libel or slander . . .").

50. *See id.* cmt. d (explaining the holding of *New York Times Co. v. Sullivan* "was later extended to public figures").

age in question is to reputation rather than to hurt feelings.[51] It is not surprising, therefore, that after one splashy debut in *Time, Inc. v. Hill*,[52] the tort has largely vanished because it does not have much territory of its own to cover.[53]

C. Commercial Appropriation

One area of growth in privacy law that was not appreciated at all by Warren and Brandeis involves those cases in which the gist of the claim against the plaintiff is for the defendant's commercial misappropriation of the name and likeness of the plaintiff.[54] The origins of this tort are murky but stem from the decision of the New York Court of Appeals in the 1902 case of *Robertson v. Rochester Folding Box Co.*[55] In *Robertson*, the plaintiff, a religious woman, objected to the use of her image on a lithographic print, circulated widely in warehouses and saloons, which portrayed her as the "Flour of the Family," in a commercial for Franklin Mills Flour.[56] The primary claim was for defamation, on the ground that the picture made it appear to her circle of friends and social acquaintances that she would stoop to such vulgar activities.[57] In my view, that claim is still good

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51. *See id.* cmt. c ("The plaintiff's privacy is not invaded when the unimportant false statements are made, even when they are made deliberately. It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man . . . .").

52. 385 U.S. 374 (1967).

53. *See* Gary T. Schwartz, *Explaining and Justifying a Limited Tort of False Light Invasion of Privacy*, 41 CASE W. RES. L. REV. 885, 888–90 (1991) (explaining modern dissatisfaction with a cause of action for false light and a return to defamation); *see also* Diane L. Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364, 366–67 (1989) (discussing how false light was expected to supplant defamation as a cause of action, but the opposite has occurred).

54. *See* Daniel Gervais & Martin L. Holmes, *Fame, Property, and Identity: The Purpose and Scope of the Right of Publicity*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J., 1, 186 (2016) ("It was not clear at first whether the right to privacy would include a cause of action for the commercial misappropriation of a person's name or likeness.").

55. 64 N.E. 442 (N.Y. 1902).

56. *See id.* at 442.

57. *See id.* at 442–43. ("[H]er grievance is that a good portrait of her, and, therefore, one easily recognized, has been used to attract attention toward the paper upon which defendant mill company's advertisements appear. Such publicity, which some find agreeable, is to plaintiff very distasteful . . . .").

today. But in rejecting that claim, Judge Parker ridiculed the position of Warren and Brandeis by noting:

> The so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise. While most persons would much prefer to have a good likeness of themselves appear in a responsible periodical or leading newspaper rather than upon an advertising card or sheet, the doctrine which the courts are asked to create for this case would apply as well to the one publication as to the other.[58]

It is with the last qualification that Judge Parker gives up the game. The social interest is not of equal power in the two cases. For purposes of general social discourse, the dissemination of public information is far more important than the use of a person's likeness in an advertisement. It should be possible to allow general conversation to take place while letting individuals decide for themselves whether to participate in the advertisement market and (if so) with whom and on what terms.

The establishment of a property interest in name and likeness is an enormous commercial boom, for reasons that largely escaped Warren and Brandeis. Giving persons control over their name and likeness allows for the creation of an active market in advertisements wherein the owner of each name or likeness gets to coordinate different uses so as to form a coherent whole or "brand," which would never happen if anyone could use anyone else's name or image for commercial purposes. Hence, the accommodation reached in the New York Civil Rights Law contains a durable solution when it provides:

> **§ 50. RIGHT OF PRIVACY**
>
> A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or pic-

58. *Id.* at 443.

> ture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.[59]

A remedial provision then folds in the usual rules on damages, injunctions and fines.[60] There are, of course, complex cases: name and likeness can and should be extended to such fanciful depictions of people with robots.[61] It could be argued that the provision should be continued after people have died on the grounds that the need for coherent advertisement remains, but the point is much disputed.[62] Yet for these purposes, the incremental approach seems to work well, given the relative stability of this body of law in the years since the protection of name and likeness first emerged.

IV. CONCLUSION

Let me briefly conclude on the note with which I began. It is important to understand the limitations of looking at a subject through a breathless contemporary lens. There is no doubt that major technological innovation will always spark a rethinking of how property rights and tort liability should be organized. There is no need to develop sensible rules dealing with upper airspace until the airplane indicates that the *ad coelum* rule has costs that are not incurred when that space is incapable of commercial exploitation. There is no need to develop an elaborate law of copyright until copying becomes cheap enough that it is worthwhile to steal someone else's literary or visual works. And the law of patent only becomes important when the mass production of various goods and services becomes possible. In all of these cases, the argument is never that these advances should be ignored. Rather, it is that the best way in which to deal with these new areas of law is to find the *minimum* extent to which the modification of existing rules and practices elimi-

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59. N.Y. CIV. RIGHTS LAW § 50 (McKinney 1992 & Supp. 2003).

60. *Id.* § 51.

61. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992).

62. *Compare* Factors Etc. Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978) (allowing the right to descend), *with* Memphis Dev. Found. v. Factors Etc., 616 F.2d 956 (6th Cir. 1980) (rejecting the right to descend).

nates the difficulties that the new circumstances raise.[63] In effect, the constructive use of the past becomes an indispensable tool for successful innovation in the future. That was the lesson that I took from my Contemporary Civilizations course at Columbia, and I think that it works well in all areas of intellectual endeavor.

63. For my defense of this approach in connection with intellectual property, see Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455 (2010); Richard A. Epstein, *What Is So Special About Intangible Property? The Case for Intelligent Carryovers*, *in* COMPETITION POLICY AND PATENT LAW UNDER UNCERTAINTY: REGULATING INNOVATION 42 (Geoffrey A. Manne & Joshua D. Wright eds., 2011).

GAWKING LEGALLY

IRINA D. MANTA*

Does the United States need new regulations to defend individual privacy in a world where Internet news spreads like wildfire? The first step to answering that question is to understand the incommensurability problem inherent in alleviating the tension between freedom of expression and privacy. Weighing values such as privacy against ones like national security or free speech is difficult.[1] It is even more complex to have conversations and debates about these balancing acts. How many people can define their own utility function regarding the relative value of privacy as opposed to speech, much less defend that function against the competing versions of other individuals? Even an individual who has a fairly clear grasp of his own vision and who possesses strong argumentative and rhetorical skills will struggle to convince others because, in addition to disagreements regarding important empirical questions and the best tools of measurement in that area, eventually a clash of prior values will emerge. The most straightforward path from there is an emphasis on crafting regulations that maximize individual choice and on having the modesty to admit when the common law is better able to do so than new statutes.

I. ADOPTING AN INDIVIDUAL CHOICE FRAMEWORK

As evidenced by many facts, including the most recent presidential election and its aftermath, America is a value-

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1. *See generally* Irina D. Manta, *Choosing Privacy*, N.Y.U. J. LEGIS. & PUB. POL'Y (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2925660 [https://perma.cc/R5CM-96Q6]; Irina D. Manta & Cassandra Burke Robertson, *Secret Jurisdiction*, 65 EMORY L.J. 1313 (2016).

pluralistic society.[2] And the following scenario is likely even in the best case in a society like ours when two people of good faith and with a high degree of commitment to reaching the correct result converse about policy. They argue regularly, sometimes for years, about the pros and cons of a particular policy. Let us assume that they manage to iron out any logical inconsistencies in each other's arguments, agree on a common system of epistemology, overcome the significant challenges of cognitive bias, and arrive at a similar approach to resolving empirical questions. After all this, they continue to disagree once they have crystallized the heart of the dispute, which is that the prior values they chose or were taught do not mesh with the other person's. At the end of the day, these priors are largely arbitrary, and that is why the conversation cannot continue at that stage.[3]

Recognizing the arbitrariness of individuals' values militates toward adopting a framework in which we simply let people make as many choices as possible about their own lives. The maximization of individual choice thus becomes the North Star when it comes to evaluating the costs and benefits of existing or new regulations.[4] Using choice is a matter of epistemological and ethical agnosticism. Like any value system, one that bases itself on choice cannot help but rely itself on some assumptions, but it minimizes the number of these assumptions and holds the promise of creating a world in which individuals can coexist more easily than in alternative systems.

II. APPLYING THE INDIVIDUAL CHOICE FRAMEWORK TO PRIVACY AND SPEECH

The reports of the death of privacy may be exaggerated. We did not transition from a world in which individuals were able to keep all information about themselves secret to one in which

2. *See generally* David W. Scott, *The Problem with Pluralism*, POSTS FROM THE FRONTIER (July 7, 2011, 3:55 PM), http://blogs.bu.edu/dscott/2011/07/07/the-problem-of-pluralism [https://perma.cc/TSN2-URGP].

3. *See Manta*, *supra* note 1, at 4.

4. *See id.*

everything is fair game.[5] New technologies have certainly changed the landscape by modifying the types and extent of the harms that can be inflicted on people when spreading negative information about them. That said, the level of privacy that the average person has at her disposal underwent rises and falls rather than a steady decline.

Consider a person who lived in a small village centuries ago. If he did anything embarrassing or shameful, his entire world—as defined by the people with whom he would interact daily—could find out about it and remember it for a long time, even for life. Mobility used to be more limited, and so that individual might be stuck with the negative repercussions forever, with little way out. There was no enforceable "right to be forgotten" of the type recognized in the European Union where one can ask to have information about oneself removed from (today Google) search.[6] In the past as now, the right to privacy did not mean that one had the right to be liked by everyone, and knowledge about one's actions could lead to a life sentence of exclusion.

It is only with modern urbanization that society became more anonymous and the landscape of individual choice changed. People had the choice to engage in some types of anti-social behaviors in villages, but then others had the choice to engage in ostracism of varying severity in response. In an urban setting, however, the choice to engage in anti-social behaviors existed and in fact was potentially easier to hide at times. Even if the culprit was later caught, the ability to ostracize someone in a larger as opposed to smaller community is reduced. Part of the reason for this is that information is much less likely to trickle to everyone in a larger community. This increases the ability to choose of some individuals who want to behave anti-socially, but it reduces the ability of others to make informed decisions about those with whom they are

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5. *See* Greg Ferenstein, *Why People Probably Won't Pay to Keep Their Web History Secret*, ATLANTIC (Feb. 23, 2015), https://www.theatlantic.com/technology/archive/2015/02/why-people-probably-wont-pay-to-keep-their-web-history-secret/385765 [https://perma.cc/96D3-627Z].

6. *See generally Factsheet on the "Right to be Forgotten" ruling*, EUR. COMMISSION, http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf [https://perma.cc/GF5X-9ZAN] (last visited Sept. 21, 2017).

dealing to minimize, for instance, the risk of being misled or cheated in some way.

With this background in mind, how should we view websites that either produce news, such as Gawker, or aggregate information contributed by various individuals? On the news-production side, the case that famously made waves concerned a sex tape depicting professional wrestler Hulk Hogan having an affair with his best friend's wife.[7] Gawker publicized a 101-second excerpt from the half-hour tape[8] that Hogan's best friend had filmed.[9] Hogan sued Gawker for invading his privacy, and the key question that the courts had to resolve under the common law was whether the disclosed materials were newsworthy.[10] The trial court decided that Hulk Hogan had indeed been harmed and that the tape excerpt was not newsworthy, and it awarded him $140 million.[11] It is rather questionable whether this decision would have been upheld on appeal, but as so often, we will never know because the case settled rather than making its way into higher levels of the court system.[12] This court battle and settlement nevertheless played a major role in financially sinking Gawker.[13]

The current laws, and the ways in which courts already potentially interpret them in overly broad ways—as may have occurred here at the trial level—can have a deep impact on news sites.[14] Creating additional regulations runs the risk of increasing possible chilling effects, which reduce the ability to

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7. *See* Julia Greenberg, *Court Orders Gawker to Pay Hulk Hogan $115M for Posting His Sex Tape*, WIRED (Mar. 18, 2016), https://www.wired.com/2016/03/jury-awards-hulk-hogan-115-million-gawker-sex-tape-post/ [https://perma.cc/3ACDDKUT].

8. *Id.*

9. Nick Madigan & Ravi Somaiya, *Hulk Hogan Awarded $115 Million in Privacy Suit Against Gawker*, N.Y. TIMES (Mar. 18, 2016), https://www.nytimes.com/2016/03/19/business/media/gawker-hulk-hogan-verdict.html [https://perma.cc/99SU-WXSP].

10. Danny Cevallos, *Is Hulk Hogan's sex tape newsworthy?*, CNN (Mar. 15, 2016), http://www.cnn.com/2016/03/15/opinions/hulk-hogans-sex-tape-newsworthy-opinion-cevallos/index.html [https://perma.cc/A99A-JFXV].

11. Madigan & Somaiya, *supra* note 9.

12. *See* Sydney Ember, *Gawker and Hulk Hogan Reach $31 Million Settlement*, N.Y. TIMES (Nov. 3, 2016), https://www.nytimes.com/2016/11/03/business/media/gawker-hulk-hogan-settlement.html [https://perma.cc/T3D9-DNYD].

13. *See id.*

14. *See generally* RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253 (2014).

choose to speak and the ability to receive the information being spoken. The counter is that increased regulations can maximize the choices of individuals in Hulk Hogan's situation to engage in the behaviors they desire. The existing newsworthiness doctrine, however, already seeks to mediate in the area of who will be protected and for which activities.[15]

III. WHY NOT MORE PRIVACY FOR HULK HOGAN?

Not all possible sexual interactions of Hulk Hogan's would be treated the same way. These potential interactions lie on a spectrum even for celebrities. On the one hand, if Hulk Hogan had sex with his own wife at home, that would clearly not be considered newsworthy, and the publication of a tape depicting it would be found to be a violation of his privacy. On the other end of the spectrum, Hulk Hogan having sexual intercourse with a prostitute in the middle of the town square and a site like Gawker publishing a sex tape showing the act would be legally protected. The case that took place in real life is between these two extremes on the spectrum, and reasonable minds may differ on whether the event was newsworthy and hence Gawker had the right to publicize the tape excerpt.

To some, the public's interest in this story is prurient and essentially constitutes rubbernecking. Yet, to others Hulk Hogan was a positive figure to whom a significant number of individuals looked up historically, and he is one of the most requested celebrities of all times for the Make-a-Wish Foundation, which grants wishes to terminally ill children.[16] The fact that a celebrity of this stature appeared in a sex tape under the circumstances at bar, combined with the racist and homophobic remarks that he allegedly made on the tape, shocked many and led Mattel to withdraw its Hulk Hogan action figures.[17] As mentioned

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15. *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 581 (2d ed. 2011).

16. Gavin Evans, *25 Things You (Probably) Didn't Know About Hulk Hogan*, COMPLEX (July 24, 2015), http://www.complex.com/sports/2015/07/25-hulk-hogan-facts/ [https://perma.cc/4DTC-GYFP].

17. Brian Fritz, *WWE Reportedly Tells Mattel to Scrap Production of Hulk Hogan Action Figures*, BETWEEN THE ROPES (July 27, 2015), http://www.betweentheropes.com/2015/07/27/wwe-reportedly-tells-mattel-scrap-production-hulk-hogan-action-figures-17-things-we-learned-san-diego-comic-con/ [https://perma.cc/WH9Y-RZ9S].

above, the right to privacy does not entail the right to be liked, and within the frameworks of choice and of current law, the public's interest in factual information about one of its idols may have outweighed his interest in keeping that information to himself.

Situations of this sort are intensely sensitive to factual distinctions, which makes them prime candidates for the imposition of standards rather than rules. A rule in this area could provide greater clarity, especially if it states something along the lines that a news site may never disclose sexually explicit materials without the consent of the individuals involved. Would we want that applied to a situation in which a politician who speaks out against homosexual rights was filmed having same-sex intimate relations, however? Given that a picture can be worth a thousand words, a written summary of the event may not provide the same information as the actual footage and may leave more room for misinterpretation of what truly took place. The application of standards under the newsworthiness doctrine has a better chance to promote the public interest under such circumstances.

Law students, lawyers, and judges are frequently frustrated by the real difficulties in applying precedent in these areas.[18] This is compounded by the significant impact that such cases can have on the lives of the individuals involved. The newsworthiness doctrine undoubtedly makes for complex application, but some areas of the law are messy because they must be so, and the battle between speech and privacy interests will likely rage on indefinitely.

IV. THE TREATMENT OF INFORMATION AGGREGATORS

Before closing, it is worth noting how sites that aggregate information fit into the question of new regulations. The Communications Decency Act shields several types of Internet intermediaries from liability for publishing defamatory content.[19] This certainly produces some unsavory outcomes, such as when individuals see incorrect information about themselves

18. *See generally* Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1 (2016).
19. 47 U.S.C. § 230 (2012).

on websites like reportmyex.com.[20] While it is worth investigating the robustness of individuals' ability to pursue legally those who make false, defamatory statements against them, there are strong arguments for continuing to provide safe harbors to intermediaries.

At first blush, such websites are a privacy nightmare in that the sexual details of any individual's life can be displayed for public viewing.[21] Nonetheless, one must keep in mind that the Internet can provide not only tools to anonymize oneself but also weapons to fight back against the cloak of urban and other anonymization. An unethical individual armed with Tinder in a large city can harm an untold number of people through a variety of scams, including financial ones.[22] Dating apps and social networking tools, for all their benefits, open the doors to exploitation in unprecedented ways, and platforms that allow for the reporting of unethical or dangerous behaviors provide a partial way to fight back.[23] In doing so, they enable individuals to make choices with their eyes opened more widely.

V. CONCLUSION

Websites like Gawker and reportmyex.com can wreak havoc on individuals' lives. They have the ability, however, to provide more than just juicy gossip to entertain the bored. In many situations, they engage in or publish speech that is precisely of the type that the Constitution intended to protect: that which properly informs the political process or individual decision-

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20. REPORT MY EX, http://www.reportmyex.com [https://perma.cc/TK5Y-CHTF] (last visited Nov. 11, 2017).

21. *See* Charlotte Alter, *'It's Like Having an Incurable Disease': Inside the Fight Against Revenge Porn*, TIME (June 13, 2017), http://time.com/4811561/revenge-porn/ [https://perma.cc/LLS7-R9RT].

22. *See* Matt Novak, *These Stories of People Who Got Scammed on Tinder Are Heartbreaking*, GIZMODO (Oct. 26, 2016), https://gizmodo.com/these-stories-of-people-who-got-scammed-on-tinder-are-h-1788207405 [https://perma.cc/VXF8-Z5MK]; *Online Dating Can Be Dangerous*, ABC NEWS (June 16, 2007), http://abcnews.go.com/GMA/story?id=3285863&page=1 [https://perma.cc/HQR3-RT3G].

23. *See, e.g.*, ROMANCE SCAMS NOW, http://romancescamsnow.com [https://perma.cc/5GNZ-D4H9] (last visited Nov. 11, 2017).

making.[24] Shrinking courts' ability to apply standards in an area fraught with difficult trade-offs would likely foreclose more choices than it would create.

24. *E.g.*, Hannah Gold, *Clinton Campaign Manager Says Trump Might be Putin "Puppet,"* GAWKER (Aug. 21, 2016), http://gawker.com/clinton-campaign-manager-says-trump-might-be-putin-pupp-1785563561 [https://perma.cc/Q6K3-LW74].

"NOTHING TO SEE HERE": MODEL RULE OF PROFESSIONAL CONDUCT 8.4(G) AND THE FIRST AMENDMENT

ROBERT N. WEINER*

There is a story about a Texan driving his Cadillac, with big bullhorns on the hood, in rural Vermont. He stops to talk with a Vermont farmer, who tells him, "That's my farm; it goes from here all the way over to there." The Texan says, "Well, I have a ranch in Texas, and if I start driving at the east end, I won't even reach the west end by the end of the day." The Vermont farmer thinks for a minute and responds, "Yep, I had a car like that once too."

Like the Texan's ranch, the American Bar Association's new Model Rule of Professional Conduct 8.4(g) does not warrant the hype. Four points establish this proposition. *First*, Rule 8.4(g) is not unprecedented. It is not a dramatic expansion of the law. It is not even all that new. *Second*, although Rule 8.4(g) reaches speech, its primary focus is conduct—discrimination and harassment. That predominance affects the First Amendment standards. *Third*, the hypothetical horribles that critics have paraded are remote and implausible. Were they to arise, there would be a remedy: an as-applied challenge. The imaginative misapplications of Rule 8.4(g) conjured up by critics cannot sustain an argument about chilling First Amendment rights. And *fourth*, remitting these issues to state employment laws is an ill-advised approach to regulation of the legal profession.

As to the first point, in the overall regulatory scheme, Model Rule 8.4(g) is neither new nor anomalous. Twenty-four states and the District of Columbia address discrimination in their

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Rules of Professional Conduct.[1] In another twelve states, the proscription appears in the official comments to the rules.[2] Though arguably more inclusive than any single rule, Rule 8.4(g) draws its elements from these precursors.[3] Provisions prohibiting discrimination beyond the context of representing a client, for example, appear in at least ten states.[4] In some jurisdictions, the Rules of Professional Conduct specifically focus on discrimination in employment.[5]

Nor is it novel for Model Rule 8.4(g) to regulate the business side of law practice. The Rules of Professional Conduct already cover many aspects of the legal business, for example, payments by a law firm to a deceased partner's estate,[6] terms of law firm compensation or retirement plans,[7] and the purchase

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1. 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. LEG. ETHICS 196, 198, 208 (2017).

2. *Id.* at 197.

3. In addition, the Model Code of Judicial Conduct provides that:

> A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

ABA MODEL CODE OF JUDICIAL CONDUCT r. 2.3(B) (AM. BAR. ASS'N 2011). Judges also must require lawyers before the court to refrain from such conduct. *Id.* at r. 2.3(C).

4. *See, e.g.*, IND. RULES OF PROF'L CONDUCT r. 8.4(g); OHIO RULES OF PROF'L CONDUCT r. 8.4(g); N.J. RULES OF PROF'L CONDUCT r. 8.4(g); MD. RULES OF PROF'L CONDUCT r. 8.4(e); MINN. RULES OF PROF'L CONDUCT r. 8.4(g)–(h); WIS. RULES OF PROF'L CONDUCT r. 8.4(i); FLA. RULES OF PROF'L CONDUCT r. 8.4(d); N.Y. RULES OF PROF'L CONDUCT r. 8.4(g); IOWA RULES OF PROF'L CONDUCT r. 8.4(g); WASH. RULES OF PROF'L CONDUCT r. 8.4(g).

5. *See, e.g.*, D.C. RULES OF PROF'L CONDUCT r. 9.1; VT. RULES OF PROF'L CONDUCT r. 8.4(g).

6. MODEL RULES OF PROF'L CONDUCT r. 5.4(a)(1) (AM. BAR. ASS'N 2016) [hereinafter MODEL RULES] (permitting an agreement between a lawyer and a firm, partner, or associate to "provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified person").

7. *Id.* at r. 5.4(a)(3) (permitting law firms to include non-lawyer employees in their compensation or retirement plans).

of a law practice.[8] Further, the Rules regulate the names of law firms,[9] as well as supervisory relationships within firms.[10]

It also breaks no new ground for the Rules of Professional Conduct to apply to a lawyer's professional life outside the courtroom or client relationships. For example, the Rules prohibit a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation—at any time, in any context.[11]

Finally, it is not new for the Rules of Professional Conduct to regulate lawyers' speech. Rule 1.6 forbids disclosure of clients' confidential information.[12] The Rules prohibit lawyers from saying certain things to people who are not their clients.[13] Rule 3.6 imposes duties with regard to trial publicity,[14] and Rule 7.2 governs advertising.[15] These strictures have been on the books for many years.

My second major point is that the explicit and primary focus of Model Rule 8.4(g) is conduct. The provision is, after all, part of the Rules of Professional *Conduct*. The title of Rule 8.4 is, "Mis*conduct*."[16] Subsection (g) is part of a list that follows the lead-in sentence: "It is professional mis*conduct* to . . . ."[17] To be sure, the Rule specifically refers to verbal conduct, which gen-

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8. *Id.* at r. 1.17 (regulating the sale of law practices).

9. *Id.* at r. 7.5 (regulating firm names and letterheads).

10. *Id.* at r. 5.1 (identifying the responsibilities of a partner or supervisory lawyer); *id.* at r. 5.2 (identifying the responsibilities of a subordinate lawyer); *id.* at r. 5.3 (identifying responsibilities regarding nonlawyer assistance).

11. *Id.* at r. 8.4 (b)–(d).

12. *Id.* at r. 1.6(a) ("A lawyer shall not reveal information relating to the representation of the client" unless the client consents expressly or by implication, or other exceptions apply).

13. *Id.* at r. 4.3 ("In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested . . . . The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel" if there is a possible conflict with the interests of the client).

14. *Id.* at r. 3.6(a) ("A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.").

15. *Id.* at r. 7.2.

16. *Id.* at r. 8.4 (emphasis added).

17. *Id.* (emphasis added).

erally entails speech. Indeed, it would be impossible to regulate the profession without roping in speech. Most of what lawyers do involves speech. But limiting speech is not the primary focus of Model Rule 8.4(g). The primary focus is harmful verbal or physical conduct that manifests bias or prejudice towards others, and harassment through derogatory or demeaning verbal or physical conduct, sexual advances, and requests for sexual favors—in other words, invidiously disparate *treatment* and abusive or predatory *behavior*.[18] To the extent that items in this litany do or can involve speech, the involvement is largely incidental to the point of the prohibition. Primarily, speech is evidence of the discrimination. For speech to serve that function is neither unusual nor impermissible, so long as speech is not the sole gravamen of the prohibition.[19]

The comments to Rule 8.4 suggest that the "substantive law of anti-discrimination and anti-harassment statutes and case law" give content to these prohibitions.[20] Those sources cover a far broader array of conduct than public advocacy that gives offense. Under *Broadrick v. Oklahoma*,[21] the sweep of the legitimate applications of a statute affects the First Amendment standard.[22] The Supreme Court in *Broadrick* upheld a law barring state employees from engaging in partisan political activities.[23] The Court refused to apply the overbreadth doctrine, which invalidates laws that may seek to cover conduct, but encompass, and thereby chill, a significant measure of protected speech.[24] The Court held that for a statute to violate the First Amendment on that basis, "the overbreadth . . . must not only be real, but substantial as well, judged in relation to the stat-

18. MODEL RULES, *supra* note 6, at r. 8.4(g).

19. *Cf.* Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993) (relying on the evidentiary use of speech to determine that the defendant attacked the victim based on race); Whitaker v. Thompson, 353 F.3d 947, 953 (D.C. Cir. 2004) (determining that the First Amendment permits "the evidentiary use of speech" in criminal law). Were speech, in an individual case, to be the sole gravamen of charges brought under the broad prohibition, the attorney could challenge the Rule as applied.

20. MODEL RULES, *supra* note 6, at r. 8.4(g) cmt. 3.

21. Broadrick v. Oklahoma, 413 U.S. 601 (1973).

22. *Id.* at 612

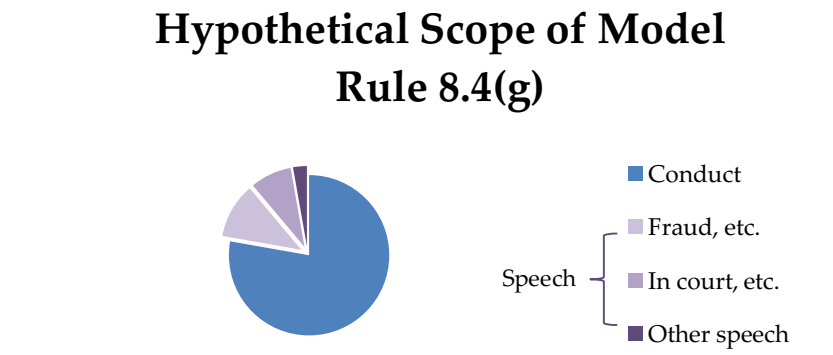
23. *Id.* at 602.

24. *Id.* at 618.

ute's plainly legitimate sweep."[25] The alleged overbreadth with regard to Rule 8.4(g) is not substantial in relation to the Rule's plainly legitimate sweep.

Turning now to my third point—to the extent that Model Rule 8.4(g) affects speech, it does not raise the First Amendment concerns that critics hypothesize. My conclusion regarding the validity of Rule 8.4(g) under the First Amendment does *not* rest on an assessment of the social value of particular speech. Although perhaps not a First Amendment purist in the mold of Justice Black, I lean toward an expansive view of First Amendment rights and disagree with those who distinguish between high-value and low-value speech. To rely on such distinctions requires that someone in authority assess the value of the speech and determine whether or not it is protected. In my view, the First Amendment should forbid such determinations. But they are beside the point here, because Model Rule 8.4(g) does not reflect or require value judgments about particular content or speakers or types of speech. It is not a speech code.

To show that, I will flesh out the comparative exercise discussed above with respect to *Broadrick*, and derive some additional conclusions. If we assume some common-sense proportions to illustrate the point, a pie chart that reflects the coverage of Rule 8.4(g)might look like this:



25. *Id.* at 615; *see also* Virginia v. Hicks, 539 U.S. 113, 119–20 (2003) (for overbreadth doctrine to apply, "a law's application to protected speech [must] be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications"); New York v. Ferber, 458 U.S. 747, 767–74 (1982) (rejecting overbreadth challenge to child pornography statute).

The majority of the pie chart, shaded blue, is conduct, such as sexual advances, discriminating in promotions or allocation of work, and treating people unfairly. Discrimination by and large is disparate treatment, not disparate words. A smaller portion of the pie is speech, denoted by the various shades of purple. This speech, however, must be subdivided, because there can be no legitimate dispute that it is appropriate to regulate some speech occurring in court proceedings and in the context of representing a client (such as revelation of client confidences). So a part of the small purple slice is lighter to represent that relatively safe harbor for regulation. Further, there is little if any dispute that courts or bar disciplinary authorities can regulate some speech by lawyers occurring outside court and not in the representation of a client, such as speech in furtherance of a fraud. That is another shade of purple. What is left is a thin sliver of dark purple on the pie chart, constituting speech beyond what is indisputably subject to regulation, the speech that critics say is exposed to the hypothetical speech police. We could debate the appropriate width of the sliver, but eliminating conduct plus the other categories of speech makes it hard to contend that the remaining speech represents a major part of what the Rule covers. And it likewise would be hard to contend that a Rule so tangential to protected communication is a speech code. Therefore, the question is whether to invalidate the significant predominance of legitimate applications of Rule 8.4 based on possible abuses pertaining to *some* speech within the small sliver.

Notwithstanding the holding in *Broadrick* about the other legitimate subjects a regulation might cover, should we be concerned that the coverage intersecting with this sliver will have an outsize impact on speech? That is a fair question, because the premise underlying the overbreadth doctrine dictates vigilance. First Amendment rights are so important that we need to depart from the normal rule allowing litigants to challenge only restrictions directly affecting them—here, restriction of their own speech.[26] Limitations on speech not directly applicable to

26. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("It has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected

the litigant could deter, or "chill," others from speaking, inflicting broad First Amendment harms that otherwise would be difficult to challenge.[27] But chill arises from realistic possibilities of enforcement based on reasonable interpretations of the law, not on speculation about potential misapplications.[28] Thus, for example, Professor Eugene Volokh raises the specter of lawyers being subject to discipline for advocating against same-sex marriage, or lawyers facing harassment claims based on innocent or harmless innuendo or banter.[29] But by and large, his examples do not come from bar disciplinary proceedings under the existing anti-discrimination Rules of Professional Conduct. Even if they did, it would violate the First Amendment for an attorney disciplinary system to punish speech in these key scenarios, and Rule 8.4(g) does not go there. There is a difference between advocating discrimination and discriminating, just as, for example, there is a difference—dispositive of First Amendment claims—between advocating conversion therapy and engaging in conversion therapy.[30] If a lawyer engaged in the type of conduct hypothesized, if a speaker at a bar function, for example, asserted that Milo Yiannopoulos is a

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speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes."); Gooding v. Wilson, 405 U.S. 518, 521 (1972) ("The transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" (quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965))).

27. *See, e.g.*, Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002) ("The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere."); *Gooding*, 405 U.S. at 518 ("Persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.").

28. *Cf. Broadrick*, 413 U.S. at 615 ("[Although laws,] if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.").

29. *See* Eugene Volokh, *A speech code for lawyers, banning viewpoints that express 'bias,' including in law-related social activities*, WASH. POST: VOLOKH CONSPIRACY (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/4G3Z-FXVV].

30. *See* Pickup v. Brown, 740 F.3d 1208, 1223 (9th Cir.), *cert. denied*, 134 S. Ct. 2781 (2014), *and cert. denied*, 134 S. Ct. 2881 (2014).

saint, or praised a foreign legal system that subordinated women, it would be unreasonable, based on that conduct alone, to charge a disciplinary violation under Rule 8.4(g)—unreasonable *and* highly unlikely.

To be clear, I am neither proposing nor endorsing a "trust us" argument, a plea to rely on the good faith and judgment of bar authorities to apply an unacceptably vague or otherwise unconstitutional rule prudently so as not to restrict disfavored speech. The constitutionality of a law cannot turn on our estimation of the people who enforce it.[31] But it can and should turn on our evaluation of the text, structure, and purpose of the rule. On those measures, the examples offered are hypothetical hyperbole, not realistic concerns.

The introductory discussion of Scope in the Rules of Professional Conduct seeks to stave off such speculative approaches, describing the ethical prescriptions that follow as "rules of reason" that must be interpreted "with reference to the purposes of legal representation and of the law itself."[32] Particularly when viewed with that perspective, the text, structure and purpose of Rule 8.4(g) debunk the critics' concerns. The Rule appears in a section entitled "Maintaining the Integrity of the Profession."[33] That statement of purpose should guide interpretation of the Rule.[34] The acts covered by the other subsections of the Rule—for example, criminal acts, dishonesty, conduct prejudicial to the administration of justice—also should inform the interpretation of Rule 8.4(g).[35] Looking at those other subsections, Professor Volokh characterizes subsection (g) as a major departure. That is a topsy-turvy mode of interpretation. That Professor Volokh interprets subsection (g) as a major de-

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31. *See* Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J. concurring) ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . ."); Florida Cannabis Action Network, Inc. v. City of Jacksonville, 130 F.Supp.2d 1358, 1362 (M.D. Fla. 2001) ("The whim, self-restraint, or even the well-reasoned judgment of a government official cannot serve as the lone safeguard for First Amendment rights.").

32. MODEL RULES, *supra* note 6, at pmbl. ¶ 14.

33. *Id.* at r. 8.4

34. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 217 (2012) (Canon 34: "A preamble, purpose clause, or recital is a permissible indicator of meaning."); *id.* at 221 (Canon 35: "The title and headings are permissible indicators of meaning.").

35. *Id.* at r. 8.4(a)–(f).

parture strongly suggests that his interpretation is wrong. A proper interpretation is the one that, to the extent the language of the provision permits, avoids such dissonance.[36] When we assess Rule 8.4(g) in context, including the Rule's other provisions and its role in the overall regulation of the legal profession, it is clear that advocating against same-sex marriage or for a religious test for immigration—while in my view wrong and even shameful—is not a disciplinary violation.

Public advocacy lies at the heart of the First Amendment.[37] Rule 8.4(g) does not address the substance of a lawyer's advocacy in the public forum of a hypothetical CLE course or bar debate, be the topic immigration or same sex marriage or any other controversy. In some contexts, the Rule may address *how* the lawyer advocates the point, and, subject to limitations, the First Amendment allows such regulation. But under the well-established doctrine of constitutional avoidance, we cannot interpret Rule 8.4(g) as raising a constitutional problem, before any effort, or even any threat, to apply it in an unconstitutional manner has occurred.[38]

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36. *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (acknowledging the Court's duty "to construe statutes, not isolated provisions" (quoting Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 290 (2010))); Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2563 (2013) ("That these three provisions appear adjacent to each other strongly suggests" that operative phrases "should be read in harmony"); Jones v. United States, 526 U.S. 227, 234 (1999) ("If a given statute is unclear about treating such a fact as element or penalty aggravator, it makes sense to look at what other statutes have done, on the fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so."); New Cingular Wireless PCS, LLC v. Finley, 674 F.3d 225, 249 (4th Cir. 2012) ("adjacent statutory subsections that refer to the same subject matter should be read harmoniously" (quoting United States v. Broncheau, 645 F.3d 676, 685 (4th Cir. 2011))).

37. *See* Schenk v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 358 (1997) (recognizing that commenting in the public forum on "matters of public concern" lies "at the heart of the First Amendment"); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995) (noting that "handing out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression"); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776-77 (1978) (finding speech about a tax referendum to be "at the heart of the First Amendment's protection").

38. NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 500 (1979) (explaining that statutes "ought not be construed to violate the Constitution if any other possible construction remains available"); *see also* Holder v. Humanitarian Law Project, 561 U.S. 1, 60 (2010) (holding that "the principle of constitutional avoidance demand[ed]" interpreting the statute to include a *mens rea* requirement); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568,

Further, Model Rule 8.4(g) expressly provides that the provision does not preclude "legitimate advice or advocacy."[39] There is no reason to interpret "advocacy" as restricted to the courtroom, particularly given the force of the doctrine of constitutional avoidance. Beyond that safeguard, Model Rule 8.4(g) has a *mens rea* requirement: a lawyer violates the Rule only if he or she "knows or reasonably should know" that the conduct at issue is discrimination or harassment. When that *mens rea* requirement is linked to, for example, the definition of discrimination in the rule—which requires that the lawyer's conduct actually be harmful—liability under Rule 8.4(g) would be quite unlikely unless the lawyer knew or should have known that his or her conduct was harmful, but did it anyway.[40] Violation of the Rule does not turn on whether a sensitive listener perceives a statement as discriminatory or otherwise takes umbrage. It turns on the lawyer's knowledge that he or she is engaging in harmful conduct, i.e., in discrimination as defined by the Rule.

No doubt, someone could misapply Rule 8.4(g) in a manner that infringes on legitimate advocacy, just as someone could misapply the prohibition of fraud and misrepresentation,[41] the requirement of candor to the tribunal,[42] and the duty to maintain client confidences.[43] If such a First Amendment violation occurred, the remedy would be to challenge it then, rather than to anticipate a possible, but unlikely misapplication. The ostensible chill on protected speech is too attenuated to move First Amendment policy here. The checks identified above diminish the plausibility of the horribles the critics parade, and that in turn diminishes the prospect of chilling protected speech.

A finding of chill, moreover, generally comes from the judicial gut. It is a prediction based on no empirical evidence. But here, twenty-four states have barred discrimination as part of

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575 (1988) ("[C]ourts will . . . not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.").

39. MODEL RULES, *supra* note 6, at r. 8.4(g).

40. Although the *mens rea* requirement is not expressly applicable to harassment, the term "harassment" generally entails both intentionality and repetition or extended duration.

41. MODEL RULES, *supra* note 6, at r. 8.4(c).

42. *Id.* at r. 3.3.

43. *Id.* at r. 1.6.

the ethical obligations of counsel. The types of laws vary. Some cover employment, and some do not. Some are broad. Others are tightly focused. The states, as Justice Brandeis envisioned, are fulfilling their generative role as laboratories of democracy.[44] If these longstanding provisions chilled speech, these state laboratories should have produced some empirical evidence of it. If such evidence is out there, I have not seen it.

This is not to suggest that *litigants* raising First Amendment challenges should have to present empirical evidence to support an alleged chilling effect. Litigation is not at issue here. The issue is whether individual states should adopt the Model Rule proposed by the ABA. The critics arguing against the proposed Rule on the ground that it chills protected speech ought to offer evidence to support their speculation. They have not.

Rule 8.4(g) deals with a very real problem in the profession. I have seen attorneys in depositions and other contexts use racist and sexist insults for tactical advantage, or just gratuitously. If the perpetrator of this conduct had the requisite *mens rea*, in particular, actual knowledge that the conduct would cause harm, it would raise a legitimate issue about his fitness to practice law. The conduct is properly within the scope of the Rules of Professional Conduct.

Finally, I want to address whether employment law is the proper vehicle for regulation of discrimination by lawyers. Our system largely allows the legal profession to regulate itself. As the comments to the Rules of Professional Conduct observe, the profession in each state is largely self-governing. In return for regulating itself effectively, the profession receives a number of benefits. It has a monopoly; non-lawyers cannot practice law. Lawyers get access to compulsory process. And the profession is answerable to the courts rather than to the legislature.[45] Vesting oversight in the courts helps maintain the independence of

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44. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

45. *See* MODEL RULES, *supra* note 6, at pmbl. ¶ 10:

> The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

the profession—under the aegis of the courts, lawyers can more readily represent unpopular clients and put the interests of clients first, no matter the partisan currents.[46] If the legal profession is to keep this level of independence and to avoid regulation by legislatures, lawyers need to show that the profession is regulating itself *effectively*. The *sine qua non* of effective self-regulation is public as well as judicial confidence, which go hand in hand. And the *sine qua non* of that confidence is representativeness, fairness, and legal compliance. That is a good reason to have a rule against discrimination. Relying on employment laws to regulate additional aspects of lawyers' activities, or to be the sole check on lawyers' discriminatory conduct, would invite state legislatures to assert more authority over lawyers. That development could undermine important values of the profession.

Any system of regulation poses a risk of abuse. Such risk arises whether discrimination and harassment cases are handled through the disciplinary system or through employment laws. But there are reasons why, if anything, the risk of abuse is lower in the disciplinary system. First, the disciplinary rules, unlike the employment laws, are not focused on compensation. Outside the context of defalcation, there is little monetary incentive for putatively injured parties to initiate proceedings. Second, complainants do not get to prosecute the case themselves. They must persuade the disciplinary authorities to proceed with a complaint. And third, the standard of proof the disciplinary authorities bear is generally clear and convincing evidence, a higher burden than individuals usually must satisfy in malpractice or discrimination cases.[47]

I am a defense lawyer—including the defense of lawyers in disciplinary proceedings. My first concern upon learning of this proposed change to the Model Rules was whether it

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46. *Id.* at pmbl. ¶ 11:

> Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

47. *See In re* Barach, 540 F.3d 82, 85 (1st Cir. 2008) (noting that "most jurisdictions require clear and convincing evidence" in attorney disciplinary proceedings).

weaponized the Rules of Professional Conduct for exploitation by particularly contentious litigants. But closer study persuaded me that abuse of the Rule, including its use as a speech code for lawyers, is very unlikely because of the barriers and safeguards described above. If transgressions against First Amendment rights occur, there are well-established pathways to deal with them. We can bring First Amendment challenges to unlawful applications of the Rule. We can defend lawyers against unwarranted disciplinary charges. And we can insist to censors of every ilk that the First Amendment does not permit regulation based on disapproval of protected speech.

But, without evidence that existing rules barring discrimination have chilled free speech, without a textual or historical basis to expect the new rule to mutate into a speech code, there is no justification for displacing this important weapon against discrimination in and by the legal profession.

CAMPAIGN FINANCE AND FREE SPEECH: FINDING THE RADICALISM IN *CITIZENS UNITED V. FEC*

BRADLEY A. SMITH*

I want you to envision that you're in the United States Supreme Court. Some of you have probably been there; you've seen the room: it's got the marble engravings behind it and so on, and the Justices are up there in their black robes. Malcolm Stewart, Deputy Solicitor General, a very experienced man who's argued campaign finance cases before, is in the Supreme Court. He's arguing a case called *Citizens United v. Federal Elections Commission*.[1] There are a couple questions presented, but basically, it comes down to this: can the government prohibit a corporation from paying for a broadcast ad that mentions a candidate within sixty days of an election?[2] Here, the ad in question is one for a rather hackneyed documentary called *Hillary: The Movie*.[3] *Hillary* refers to—well, you know.

And during oral argument, Justice Alito finally leans over and asks if the authority to ban this broadcast ad might also apply to the Internet?[4] To DVDs that might be distributed?[5] Could it be applied to providing the same mention of a candidate in a book?[6] And Malcolm Stewart, I think, realized that he was in trouble because, while we may be amenable in the United States to prohibiting a corporation from spending a lot of money on a broadcast ad, we don't burn books. (Actually, there are a lot of people in America who would like to burn books,

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1. 558 U.S. 310 (2010).

2. *Id.* at 362.

3. *Id.* at 319.

4. Transcript of Oral Argument at 26–27, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205).

5. *Id.*

6. *Id.*

but we don't like to think of ourselves as people that want to burn books).

Eventually, under repeated questioning from Justice Alito, Mr. Stewart says that the Constitution would permit Congress to apply the law to a book.[7] And there's this pregnant pause there in the courtroom. Then Justice Alito just says softly, "That's pretty incredible."[8] And he goes on. He asks if a corporation that is a publisher could be prohibited from selling a book.[9]

And again, after quite a bit of hemming and hawing and saying the statute doesn't actually apply to books, and Alito saying, yeah, but what does the Constitution allow, Stewart says, yes, the government's reasoning could apply to banning a book.[10]

The bench begins to erupt, and Justice Kennedy asks, "Just to make it clear, it's the Government's position that under the statute, if this Kindle device"—remember, this is 2009, seven years ago, and Supreme Court justices aren't always known for being on top of the tech world—"if this Kindle device had a book, it could be prohibited under the Constitution, and perhaps under this statute?"[11]

And again, Stewart says, essentially, yes.[12] Although, he did point out that a corporation could form a PAC, a political action committee, collect voluntary contributions from its employees and managers, and use the PAC to publish the book.[13]

At this point, Chief Justice Roberts specifically gets in to ask about banning a book: "So, it's a 500-page book, and at the end, it says 'so vote for x'; the government could ban that?"[14] And again, after some hemming and hawing and insisting that the statute didn't really apply to books, and being challenged in

7. *Id.*
8. *Id.* at 27.
9. *Id.* at 27–28.
10. *Id.*
11. *Id.* at 28.
12. *Id.* at 28–29.
13. *Id.* at 29.
14. *Id.*

response about what the Constitution allows, Malcolm Stewart again says, "Yes."[15]

And Chief Justice Roberts says, "Suppose a sign was held up in Lafayette Park"—this is a park across from the White House—"saying 'vote for so and so.' Under your theory of the Constitution, the prohibition of that sign would be constitutional?"[16] And again, noting that, "Of course, you could form a PAC," Stewart concedes that "otherwise, the answer would be yes."[17]

So, Justice Souter chimes in. Justice Souter says, "Well, what if the union were to hire somebody to write a book or a pamphlet, and then later it was published close to an election, within sixty days of an election. Would it be constitutional to forbid that?"[18] And Stewart says again, "I think it would be constitutional to forbid that."[19]

That is the case of *Citizens United*. That is the case in which the Supreme Court said, we don't think that's constitutional.[20] And that is the case that has people all over the country horribly upset and thinking this is a crime against the Constitution and the common man.

Let's back up and go back to the beginning. Campaign finance law is a very complex realm of law. I have found that it has become so complex that, really, I can no longer talk to students about it—not even law students, not even good law students like you folks, and especially trying to talk to undergrads and high school students. You almost can't do it. I remember years ago, I was at the FEC, and we had a visiting delegation in from China; we were working through interpreters. And finally, the interpreter said to me, "You have to stop, because I cannot explain this anymore; I am out of words to define the difference between an 'electioneering communication' and speech 'for the purpose of influencing of an election' and speech 'relative to a candidate' and 'generic electioneering.'" She said, "There's no way to keep slicing this in my vocabulary."

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15. *Id.* at 29–30.
16. *Id.* at 33.
17. *Id.* at 30–33.
18. *Id.* at 37.
19. *Id.* at 37–38.
20. *Citizens United*, 558 U.S. at 365.

At the oral argument in *McCutcheon v. FEC*,[21] a case from a couple years ago, Justice Scalia actually said at oral argument—and Justice Scalia was a reasonably smart justice—"This campaign finance law is so intricate that I can't figure it out."[22] And he's not alone; he's only more honest than the other justices. During the same oral argument, Justice Kagan dismissed part of McCutcheon, the plaintiff's, argument by offering various hypotheticals.[23] McCutcheon's counsel responded by pointing out that even if the Court ruled in favor of McCutcheon, the hypotheticals suggested by Justice Kagan would still be illegal earmarking—a person still couldn't do those things.[24] And Justice Kagan responded that she did not think any FEC would say that that is earmarking.[25] I remember sitting there thinking, "That's very interesting because I voted at least four times to find earmarking in that situation, along with the majority of the commission, and I was 'Mr. Deregulation' on the commission." I've seen that kind of error from other Justices in other campaign finance cases as well.[26] So it's a complex area of law.

So let's set out a few basics. Prior to 1974, there was almost no campaign finance regulation in the United States.[27] The earliest federal laws with a ban on corporate contributions to candidates date from 1907.[28] There were some laws at the state lev-

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21. 134 S. Ct. 1434 (2014).

22. Transcript of Oral Argument at 17, McCutcheon v. FEC, 134 S. Ct. 1434 (2014).

23. *Id.* at 6–13.

24. *Id.*

25. *Id.* at 10.

26. *See e.g.*, Transcript of Oral Argument at 141–42, McConnell v. FEC, 540 U.S. 93 (2003) (No. 02-1674) (Chief Justice Rehnquist incorrectly interpreting law as allowing business PACs to solicit general public for contributions); Transcript of Oral Argument at 24–30, FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001) (No. 00-191) (Justices Souter and Breyer repeatedly basing questions on incorrect understanding of law regulating "earmarking," and offering as a "practical example" something that had never before occurred in twenty-five years under the law).

27. *See* Jaime Fuller, *From George Washington to Shaun McCutcheon: A brief-ish history of campaign finance reform*, WASH. POST: THE FIX (Apr. 6, 2014, 9:15 AM), https://www.washingtonpost.com/news/the-fix/wp/2014/04/03/a-history-of-campaign-finance-reform-from-george-washington-to-shaun-mccutcheon [https://perma.cc/8ESR-KG85].

28. Tillman Act, ch. 420, 34 Stat. 864 (1907).

el that predate that by a decade or so.[29] But there wasn't much, and for the most part there was no viable enforcement mechanism for these laws.[30] Essentially, there was nothing that limited the ability of a person to do what he wanted.[31] So a person could walk in and contribute whatever he wanted—in theory, millions of dollars—directly to a candidate campaign. And that's the system under which we elected Coolidge and Roosevelt and Truman and Eisenhower and Kennedy and so on, and that's the system under which we, you know, beat the Nazis and passed the Civil Rights Act and the Voting Rights Act and did all that sort of insignificant stuff.

In 1974, Congress passed amendments to the Federal Election Campaign Act, sweeping amendments that provided for limitations in both contributions and expenditures.[32] Now particularly of interest is the limitation that was passed on expenditures.[33] Expenditures are defined as when you spend money but you don't give it directly to the candidate or to the candidate's campaign.[34] You're just spending money on your own to voice your political beliefs, your political opinions. And Congress passed a law limiting those expenditures to $1000.[35] There are two parts to the statute. One part defines expenditures as anything "relative to" a candidate for office,[36] and another part talks about expenditures being anything "for the purpose of influencing" an election.[37]

Well, you can see those terms, of course, could apply to almost anything. They could apply to what we're talking about today; it might arguably be for the purpose of influencing an election if some of you are convinced to vote for or against cer-

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29. *See* Comment, *Loophole Legislation—State Campaign Finance Laws*, 115 U. PA. L. REV. 983, 983 (1967).

30. *See* Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL'Y REV. 279, 282 (1991).

31. *See id.*

32. R. SAM GARRETT, CONG. RES. SERV., THE STATE OF CAMPAIGN FINANCE POLICY: RECENT DEVELOPMENTS AND ISSUES FOR CONGRESS 3–4 (2011).

33. The Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, sec. 101, 88 Stat. 1263, 1263–67 (1974).

34. *Id.* sec. 102(d), § 591(f), at 1270–71.

35. *Id.* sec. 101(b)(1), § 608(a)(1), at 1263.

36. *Id.* sec. 101(a), § 608(e)(1), at 1265.

37. *Id.* sec. 102(d), § 591(f)(1), at 1270.

tain candidates based on their campaign finance position. Relative to a candidate? You know, well, okay: Donald Trump. There. Now I've spoken relative to a candidate. We're on the hook, potentially, right? Because he's running for office. The thousand-dollar limit would have applied to groups like the National Education Association, the Sierra Club, the National Rifle Association, and the U.S. Chamber of Commerce. They would be limited to spending $1000 "relative to" a candidate or to "influence" an election. But how far does $1000 go these days? I don't think it goes too far.

So the Court was faced with this law. Plus, the statute as passed placed limits on what you could contribute directly to a candidate's campaign.[38] The Court took up the issue in several ways. First, it dealt with a fairly simple issue—one that still comes up and so is worth reviewing. This first question is, is money speech?[39] Sometimes, people say, "well, money isn't speech." Once you think about it, however, you realize very quickly that, sure, money isn't speech, but money isn't a lawyer either, and if you said to people, "well, you can't pay any money to hire a lawyer," we'd have some problems under the Constitution with your right to counsel.

Similarly—and it doesn't matter whether you're pro-*Roe v. Wade*[40] or anti-*Roe v. Wade*—if a legislature passed a law saying it shall be illegal to spend any money to procure or provide abortion services, I think most of us would recognize that that would infringe on any right that might exist to obtain an abortion. If we pass a law saying no money shall be spent to construct a Methodist church or a Muslim mosque, it would certainly raise a First Amendment problem regarding freedom of religion. In other words, if you try to limit the money to get at the underlying activity, we recognize that that's often, if not usually, a constitutional problem.[41]

So we've got a fundamental right that's being infringed, the First Amendment right, and for the legislature to do that re-

38. *Id.* sec. 101(a), § 608(b)(1), (3), at 1263.

39. *See* Buckley v. Valeo, 424 U.S. 1, 15 (1976).

40. 410 U.S. 113 (1973).

41. *See, e.g.*, McConnell v. FEC, 504 U.S. 93, 251–54 (Scalia, J., concurring in part and dissenting in part).

quires a compelling governmental interest.[42] The government offered up two. One is that we want to promote equality, and the other is that we want to prevent corruption.[43] On the equality side, the Court responded that while there may be a lot to be said for political equality—it's a great thing; we like it in the United States—in the end, the First Amendment is built around the idea that the government cannot regulate speech, and it can't do it on some kind of excuse like promoting equality.[44] It's hard to envision any law that one could not argue, at some level, is intended to promote equality and make the system a little more fair for some particular speaker or speakers. The Court recognized that this is exactly what the First Amendment addresses.[45]

The kinds of laws and pre-publication prohibitions and so on that the Founders were concerned about would not have not been justified if the King had said, "Well, we're trying to make sure that everybody's equal, that people are heard properly." We recognize that that's a recipe for government abuse, and so that can't last. In one of the most famous passages of the case called *Buckley v. Valeo*,[46] the Court says, "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[47]

But the government offered the second interest, preventing corruption, and the Court, acting in the immediate aftermath of Watergate, declared that to be a compelling government interest.[48] We can't have people essentially taking bribes. And to the argument that campaign contributions aren't bribes, the Court said, in essence, well, they're not bribes, but sometimes they're going to get awfully close.[49] It's very tough to tease out. Most campaign contributors aren't trying to bribe anybody, but it's pretty tough to tease out the person who says, "Because you

42. *See Buckley*, 424 U.S. at 24–25.
43. *See id.* at 25–26.
44. *See id.* at 54.
45. *See id.* at 48–49.
46. 424 U.S. 1 (1976).
47. *Id.* at 48–49.
48. *See id.* at 26–28.
49. *See id.*

support this tariff that really benefits my industry, I'm going to give your campaign a bunch of money," from the guy who says, "If you support this tariff, I'm going to give you a bunch of money," and we're concerned about that latter case.

So the Court allowed limits on contributions, because contributions to a candidate or his campaign offers that opportunity, where people will talk directly to one another, for that sort of direct *quid pro quo*.[50] Most contributors never talk to the candidates directly, of course, but still, the Court allowed this sort of prophylactic blanket limiting the size of contributions.[51] And it should be noted that the Court really views that issue as a bit less of a speech issue and more of an association issue.[52] As long as you can have independent expenditures, you can speak as much as you want, and the Court strikes down limits on independent expenditures.[53] It says you can't limit people speaking. That, the Court says, you just cannot do. And people who are just making expenditures independently, by definition, don't have that opportunity to discuss favors with the candidates.

So the Court makes that split: you can limit contributions, but you cannot limit expenditures, and that's the basic framework.[54] The Court looks on that contribution as more of an associational issue.[55] It reasons that even if there are limits on contributions, you can still associate with people; you can still join together in a group, contribute your $1000 or whatever your limit is, and if you really want to speak more, you can go speak independently.[56]

Now, although the plaintiffs in *Buckley* included various corporations, the plaintiffs had not specifically challenged the provision prohibiting corporations from making expenditures; they just challenged the general limit on the amount of expenditures.[57] So the FEC—and here I think the Agency was inten-

50. *See id.* at 26–27.
51. *See id.* at 27–29.
52. *See id.* at 23.
53. *See id.* at 51.
54. *See id.* at 143.
55. *See id.* at 23.
56. *See id.* at 28.
57. *See id.* at 11.

tionally frustrating the Supreme Court's intent—continued to enforce the limit on corporate expenditures.[58]

But in fact, it really didn't matter much, because there was a pretty easy workaround; if you were at all good, you could work around it without too much trouble.[59] This is because the Court had also said that the statutory phrases, "for the purpose of influencing the election" and "relative to" a candidate—were way too vague.[60] Who knows what that means? "Relative to a candidate," who knows what that is? It is way too vague. So the Court said, unless you're specifically advocating for the election or defeat of a candidate, it's not going to be regulated.[61]

This meant that you could run some interesting ads—and some of you may remember these. You don't see these as much anymore, but if you're a little bit older, you might remember these. They'd begin typically with dark cello music, you know, playing a single low note, like just before someone is murdered in a slasher movie, so you knew that this was a very serious event. And then somebody would come on, and they would say, "Judge Sullivan has been called an *ass* by a major daily paper. He's known to steal Social Security checks out of mailboxes and hates small dogs. Call Judge Sullivan and tell him we don't need his agenda in Washington." And you'd be like, "Whoa, I'm not going to vote for him," right? But that was in fact not a campaign ad; you were never told to vote for or against him, only to give him a call. So corporations and unions could fund those kinds of ads.[62]

These were cut off in 2002 by a law called the Bipartisan Campaign Reform Act,[63] more commonly known as McCain-Feingold, and that's the law that said, if an ad even mentions a candidate in the sixty days before an election, then it cannot be

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58. *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 203 (2003).

59. *See* Daniel B. Roth, *Campaign Finance Reform, Electioneering Communications, and the First Amendment: Resuscitating the Third Exception*, 38 J. MARSHALL L. REV. 1315, 1326 (2005).

60. *Buckley*, 424 U.S. at 41.

61. *See id.* at 44

62. *See id.*

63. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

funded by corporate funds.[64] They would have to—as Malcolm Stewart emphasized repeatedly—form a PAC and do it through their PAC. So that's what set the stage for *Citizens United*.

By the time of *Citizens United*, the law had become incredibly complex. In that case, I organized a group of former Federal Election Commissioners to file a brief on the side of Citizens United.[65] We noted in the course of this brief that the FEC had separate rules regulating seventy-one different types of people or entities that might participate in politics,[66] and regulating thirty-three different types of speech that people might engage in.[67] How many combinations can you get from seventy-one entities and thirty-three types of speech? It's 7422.

It's been said by Alfred North Whitehead that all Western philosophy consists of a series of footnotes to Plato's *Republic*.[68] Well, the Federal Election Campaign Act is 244 pages; the regulations alone are 568 pages.[69] This is before you get to all the FEC interpretations and guidelines and advisory opinions. Just the regulations and the statutes themselves are approximately seventy-five percent longer than Plato's *Republic*, the rock of all Western philosophy.

It's worth looking at the background of *Citizens United*. In 2004, some of you remember, a filmmaker—he's still around; Michael Moore—made a documentary called *Fahrenheit 9/11*.[70] And he said openly that he hoped it would help to defeat George W. Bush, and it was a very critical documentary of President Bush.[71] People complained to the Federal Election

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64. *Id.* sec. 201(a), § 434(f)(3)(A)(II)(aa), at 89.

65. Brief Amici Curiae of Seven Former Chairmen & One Former Commissioner of the FEC Supporting Appellant on Supplemental Question, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 2349018.

66. *See id.* at *11–12.

67. *See id.* at *15 n.10.

68. ALFRED NORTH WHITEHEAD, PROCESS AND REALITY 39 (The Free Press 1978) (1929).

69. Federal Election Campaign Act of 1971, Pub.L. 92–225, 86 Stat. 3 (1972).

70. FAHRENHEIT 9/11 (Dog Eat Dog Films 2004).

71. Martin Kasindorf & Judy Keen, *"Fahrenheit 9/11": Will it change any voter's mind?*, USA TODAY (June 24, 2004), https://usatoday30.usatoday.com/news/politicselections/nation/president/2004-06-24-fahrenheit-cover_x.htm [https://perma.cc/GSZ4-RWE7].

Commission about this, and we dodged these complaints on a number of bases.[72] But in the end, the fact is that, legal reasons aside, we mainly dodged them because I think we all thought, "Look, we're just not going to sensor a movie by a major filmmaker. We're just not going to do that." So we gave Michael Moore and the various corporations that worked to produce and distribute his film an administratively created exemption for business, like if you want to sell t-shirts—you know, "Make America Great Again!"—you can sell t-shirts and that's not considered a campaign finance violation.[73] So that's what we did.

So next along comes this organization, Citizens United, a group that people join specifically to advocate for their political ends. And they say, well, we produced a movie, and it's called *Celsius 41.11*,[74] and it's a rebuttal of *Fahrenheit 9/11*. I'm told—I don't know this to be true—that Celsius 41.11 is the temperature at which the human brain melts. So that was their theory, and it was an anti-Kerry documentary that was supposed to support George W. Bush. And we at the FEC got it and said, you can't do that; you're not really filmmakers. I mean Michael Moore, he's won at the Cannes Film Festival and stuff. But you, Citizens United, you're just an advocacy group.

So Citizens United said, okay, we'll show you. And they spent the next four years making documentary movies. You name a subject that people want to get going about on talk radio, and they probably made a documentary about it—the United Nations, immigration, whatever it is.[75] And they come up in 2008 and they said, so now we've got a movie, and we call it *Hillary: The Movie*, and we want to publicly show this movie, and we want to run ads for this movie. And the FEC said, nope, you can't do that, because we still don't really think you're filmmakers. By the way, Citizens United had even en-

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72. *See, e.g.*, Citizens United v. Moore, MUR Case #5467 (2004), http://eqs.fec.gov/eqsdocsMUR/00001764.pdf [https://perma.cc/EAX7-THUZ].

73. The Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, sec. 102(d), § 591(f)(4)(D), 88 Stat. 1263, 1269 (1974).

74. CELSIUS 41.11 (Citizens United 2004).

75. *See, e.g.*, BROKEN PROMISES: THE UNITED NATIONS AT 60 (Citizens United 2005); BORDER WAR: THE BATTLE OVER ILLEGAL IMMIGRATION (Citizens United 2006).

tered some of their films in film festivals. They won an award in the Best Documentary category at, I think it was the Houston Film Festival.[76] I'm not in the industry, I don't think that's one of the big ones, but still, they could honestly say they were award-winning filmmakers. So they were doing pretty good. And this was how the case comes to the United States Supreme Court.

What is amazing to me is, in the days before that decision, I got these calls from journalists, and they'd say, "Is it going to be five-four? Is Kennedy the swing vote?" They were very excited; you know, you could tell just by their voices. This is a little bit of a digression, but it's interesting. "Is Kennedy the swing vote?" they'd ask. It just shows how journalists think, right? Kennedy's always the swing vote, so he's got to be the swing vote in this case. And I'd say something like, "Look, Kennedy's been on the court for a quarter-century and has voted against the government in every campaign finance case.[77] He is not the swing vote. If there's a swing vote, it's not him." It just shows how the press analyzes things.

But here's where I was wrong. I'd tell the journalists, this will be a nine-zero; maybe it'll be eight-one. I said there will be different opinions, and some of the Justices would go much further than others. But none of the Justices are going to say you cannot run a documentary movie about a presidential candidate in an election year; no Justice is going to say that's a permissible statute under the First Amendment. But in fact, four of them did.[78] Four Justices of the Supreme Court said that the United States government can ban a documentary movie about a political candidate in an election year if at any point in the process of production or distribution or sales there's a corporation involved—as there always is, as there's been in every mov-

76. *See Remi Award Winning Entries for the 44th Annual WorldFest*, WORLDFEST, https://worldfest.org/remiwinners/2011.xls [https://perma.cc/CC42-Z5YW] (last visited Aug. 21, 2017).

77. There is one exception, *FEC v. Beaumont*, 539 U.S. 146 (2003), a relatively low stakes case in which he concurred in the judgment on the grounds that Court was following its clear precedents, while suggesting that perhaps that precedent was wrong. *Id.* at 163–64 (Kennedy, J., concurring). He was not the decisive vote in the case.

78. *See* Citizens United v. FEC, 558 U.S. 310, 316 (2010).

ie you've ever seen in your life, except home movies. And that's *Citizens United*.

In conclusion, I think the decision is wholly welcome, wholly within the norms of First Amendment law, and quite clearly correct. Yet that's the controversy that has roiled the world for the last several years.

CAMPAIGN FINANCE, FREE SPEECH, AND BOYCOTTS

CIARA TORRES-SPELLISCY*

Today I'm going to talk about free speech, money and politics, and the right to boycott. This [referring to slides in my PowerPoint] is a picture of my father.[1] He was a sculptor and a very creative thinker, and when I was a youngster, he used to say to me, "Ciara, remember to ask the big questions." The big question that I'm going to ask today is: Will fear of harassment prevent us from having a transparent democracy?

Now I would submit to you that at the heart of campaign finance is a desire for accountability,[2] and in a democracy, we cannot have accountability without a certain degree of transparency.[3] If you look online, you can find a lot of information about people's political speech and their political expenditures and their contributions to candidates.[4] And whether you think this is a good or a bad thing usually depends on your prior notions about campaign finance. On the good side, having all of this data online really democratizes access.[5] It means that eve-

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1. *John Torres, Jr. photograph (photographed by Peter A. Juley & Son)*, SMITHSONIAN, *available at* https://www.si.edu/object/siris_jul_37139 [https://perma.cc/ZNG6-7ES9] (last visited Nov. 11, 2017).

2. *See generally* Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443 (2014); *Campaign Finance and Transparency*, SUNLIGHT FOUND., https://sunlightfoundation.com/policy/municipal_campaign_finance/ [https://perma.cc/XZW5-YU88] (last visited Aug. 2, 2017).

3. *See* Gary D. Bass et al., *Why Critics of Transparency Are Wrong*, BROOKINGS INST. 6 (Nov. 24, 2014), https://www.brookings.edu/wp-content/uploads/2016/06/critics.pdf [https://perma.cc/AX2C-AK5R].

4. *See About Our Data*, NAT'L INST. ON MONEY IN ST. POLS., https://www.followthemoney.org/our-data/about-our-data/ [https://.perma.cc/FX8Z-E57S] (last visited Nov. 11, 2017); *About the Site*, OPEN SECRETS, https://www.opensecrets.org/about/tour.php [https://perma.cc/FM28-NBGS] (last visited Aug. 2, 2017).

5. *See* Michael Kang, *Campaign Disclosure in Direct Democracy*, 97 MINN. L. REV. 1700, 1706 (2013).

ryday citizens can look up who's giving money to their senator, to the candidates for president, to candidates for Congress, and it allows for the press to write their follow-the-money stories. On the downside, it could lead to harassment,[6] which is one of the things I want to focus on today.

I want to pause here. This is Rick Santorum getting glitter-bombed.[7] I do not endorse harassment of any type, including glitter-bombing Rick Santorum. But the fear of harassment is one of the things that people who object to campaign finance disclosure regimes often point to.[8] And usually when they are litigating campaign finance disclosure law, saying that it is unconstitutional, one of the things that they will point to is the *NAACP v. Alabama*[9] line of cases.[10] And they will make the argument that *NAACP* allows for anonymous political spending.[11] I think that's wrong on a number of fronts, including that it wasn't a case about campaign finance.

Another reason why I worry about this is I think it's just an ahistorical use of this case. So what did they actually do in the case? The Supreme Court was looking at the NAACP's request to keep their membership list confidential from the state of Alabama in the 1950s.[12] This case, in its time, was rightly decided, and if anything, the Supreme Court underplayed the risk faced by individuals who were known to be members of the NAACP. One of the things that the Supreme Court pointed out is that members of the NAACP faced the threat of physical coercion.[13]

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6. *See id.*

7. Elahe Izadi, *A brief history of politicians getting glitter-bombed*, WASH. POST: THE FIX (Mar. 6, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/03/06/a-brief-history-of-politicians-getting-glitter-bombed [https://perma.cc/Z8BQ-UQAG].

8. *See* Kang, *supra* note 5; David M. Primo, *Full Disclosure: How Campaign Finance Disclosure Laws Fail to Inform Voters and Stifle Public* Debate, INST. FOR JUSTICE 7 (Oct. 2011), http://www.ij.org/images/pdf_folder/other_pubs/fulldisclosure.pdf [https://perma.cc/77NJ-4XG4].

9. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

10. *See, e.g.*, Dale E. Ho, NAACP v. Alabama *and False Symmetry in the Disclosure Debate*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 405 (2012); Thomas B. Edsall, *In Defense of Anonymous Political Spending*, N.Y. TIMES (Mar. 18, 2014), https://www.nytimes.com/2014/03/19/opinion/edsall-in-defense-of-anonymous-political-giving.html [https://perma.cc/MD4Y-D4LT].

11. *See, e.g.*, Edsall, *supra* note 10.

12. *Patterson*, 357 U.S. at 466.

13. *Id.* at 462.

The reason why I think that they undersold that is, actually, during the '50s and '60s, you could be killed for your participation in the NAACP. And so what do I mean by that? I mean it literally.

I'm from Florida. This is a Christmas Day bombing in Florida that killed a member of the NAACP and his wife on Christmas Day.[14] That's '51. Then George Washington Lee, who was an NAACP leader in Mississippi, is killed in '55.[15] Thomas Brewer, an NAACP leader, is killed in Georgia in '56.[16] One of the few ones I may mention today that you've already heard of, Medgar Evers, is killed in Mississippi in '63.[17] But the killings go on after that. Vernon Dalmer is killed when his house and car are firebombed in '66.[18] And Wharlest Jackson was also killed in a car bombing in '67.[19]

So why doesn't this chapter of dark history explain what the Supreme Court should do in a campaign finance case? Partially, I think—I hope—that this type of racially and politically motivated violence is something that is in our past. But I think what motivated the Supreme Court in looking at campaign finance law is this other different dark chapter in American history. Between *Buckley v. Valeo*[20] and the Roberts Court, the approach of the Supreme Court when looking at campaign finance laws was the fear of another Richard Nixon.[21] And one

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14. *See* Josh Sanburn, *NAACP Bombing Evokes Memories of Civil Rights Strife*, TIME (Jan. 7, 2015), http://time.com/3658470/naacp-bombing-terrorist-attack-hate-crime/ [http://perma.cc/5Y89-VNGF].

15. *See* David T. Beito & Linda Royster Beito, *The Grim and Overlooked Anniversary of the Murder of the Rev. George W. Lee, Civil Rights Activist*, HIST. NEWS NETWORK (May 5, 2005), http://historynewsnetwork.org/article/11744 [https://perma.cc/5MT3-GK5Q].

16. *See Thomas H. Brewer*, EMORY UNIV.: THE GEORGIA CIVIL RIGHTS COLD CASES PROJECT (Aug. 14, 2014), https://scholarblogs.emory.edu/emorycoldcases/thomas-h-brewer/ [https://perma.cc/9TT7-EYQV].

17. *See* David Stout, *Byron De La Beckwith Dies; Killer of Medgar Evers Was 80*. N.Y. TIMES (Jan. 23, 2001), http://www.nytimes.com/2001/01/23/us/byron-de-la-beckwith-dies-killer-of-medgar-evers-was-80.html [https://perma.cc/TUF6-RAT2].

18. *See Justice Revisited*, NEWSWEEK (Mar. 6, 1994), http://www.newsweek.com/justice-revisited-186146 [https://perma.cc/4ZCS-A7MJ].

19. *See id.*

20. 424 U.S. 1 (1976).

21. *See* Jeffrey Toobin, *Money Unlimited*, NEW YORKER (May 21, 2012), http://www.newyorker.com/magazine/2012/05/21/money-unlimited [https://perma.cc/28FY-JBYZ].

of the things that came out in the Watergate hearings around Richard Nixon was his secretive fundraising and his illegal fundraising.[22] There was an enormous amount of illegal corporate contributions that came in to his campaign.[23]

Now, as a result of Watergate and Nixon, we got the FECA, the Federal Election Campaign Act, in '74.[24] There are many different aspects of FECA that Mr. Smith already alluded to, but one additional part of FECA is that it requires disclosure,[25] and that part of FECA was also challenged in the *Buckley* case.[26] In the *Buckley* case, the Supreme Court distinguishes *NAACP v. Alabama*, finding that there are three governmental interests that justify disclosure of money in politics.[27] They are the voter informational interest, the anti-corruption interest, and the anti-circumvention interest.[28] They do carve out an exception within *Buckley* itself—*Buckley* is a hundred pages long. It's a long and ornate opinion. There is an exception for minority parties if they would be subject to the type of harassment that the NAACP was subject to back in the '50s.[29]

Disclosure also is improved at the federal level in BCRA, otherwise known as McCain-Feingold.[30] In BCRA, the law covers disclosure of who is funding electioneering communications.[31] This has been challenged repeatedly,[32] and the Supreme

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22. *See* Jill Abramson, *Return of the Secret Donors*, N.Y. TIMES (Oct. 16, 2010), http://www.nytimes.com/2010/10/17/weekinreview/17abramson.html [https://perma.cc/TFM9-YU36].

23. *See* Ciara Torres-Spelliscy, *How Much is an Ambassadorship? And the Tale of How Watergate Led to a Strong Foreign Corrupt Practices Act and a Weak Federal Election Campaign Act*, 16 CHAPMAN L. REV. 71, 84–86 (2012).

24. *See* Jaime Fuller, *From George Washington to Shaun McCutcheon: A brief-ish history of campaign finance reform*, WASH. POST: THE FIX (Apr. 3, 2014, 9:15 AM), https://www.washingtonpost.com/news/the-fix/wp/2014/04/03/a-history-of-campaign-finance-reform-from-george-washington-to-shaun-mccutcheon/ [https://perma.cc/YJ4V-X6JX].

25. *Buckley*, 424 U.S. at 7.

26. *Id.* at 11.

27. *Id.* at 66–68, 69–70.

28. *Id.* at 66–68.

29. *Id.* at 123.

30. *See* Norman J. Ornstein & Thomas E. Mann, *Myths and Realities About the Bipartisan Campaign Reform Act of 2002*, BROOKINGS INST. (May 7, 2002), https://www.brookings.edu/articles/myths-and-realities-about-the-bipartisan-campaign-reform-act-of-2002/ [https://perma.cc/7RSJ-9HJZ].

31. *See id.*

Court has upheld disclosure both in *McConnell v. FEC*[33] and in *Citizens United v. FEC*,[34] eight to one. But the argument that harassment should be the exception that swallows the rule of disclosure has been one that has been litigated again and again and again.[35] One of the cases where this came up was a case called *ProtectMarriage.com v. Bowen*.[36] This arose out of the Prop. 8 fight in California, and the judge in that case upheld campaign finance disclosure in part because he felt like the plaintiffs who were trying to keep their political contributions secretive were trying to be able to speak; they were spending money to support Prop. 8.[37] But they didn't want anyone to respond back to them. The judge in that case also said that disclosure prevents the wolf from masquerading in sheep's clothing.[38]

Citizens United also made this argument, that to name their donors would subject them to a risk of harassment.[39] But the Supreme Court rejected this, noting that their donors had been disclosed in the past and there is no actual evidence of harassment of those donors.[40]

This harassment argument was also brought up in a case called *Doe v. Reed*.[41] *Doe v. Reed* is a case where the fight was whether petition signatures would be disclosed or not.[42] And again, the argument was if we disclose the signatories, they will be subject to harassment.[43] But in *Doe v. Reed*, the Supreme Court once again sides with disclosure,[44] including Justice Scal-

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32. *See* Katherine Shaw, *Taking Disclosure Seriously*, YALE L. & POL'Y REV.: INTER ALIA (Apr. 3, 2016, 4:30 PM), http://ylpr.yale.edu/inter_alia/taking-disclosure-seriously [https://perma.cc/4D69-Q222].

33. 540 U.S. 93, 105, 108, 140 (2003).

34. 558 U.S. 310, 367 (2010); *see also* Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limit*, N.Y. TIMES (June 21, 2010), http://www.nytimes.com/2010/01/22/us/politics/22scotus.html?pagewanted=all [https://perma.cc/625B-GNMU].

35. *See* Kang, *supra* note 5, at 1700.

36. 599 F. Supp. 2d 1197, 1204 (E.D. Cal. 2009).

37. *Id.* at 1217.

38. *Id.* at 1209.

39. *Citizens United*, 558 U.S. at 370.

40. *Id.*

41. 561 U.S. 186, 193 (2010).

42. *Id.* at 191.

43. *Id.* at 193.

44. *Id.* at 199.

ia, who has an oft-quoted concurrence in *Doe v. Reed*.[45] Justice Scalia says, "[H]arsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."[46]

One of the reasons that I want better disclosure is if we're going to have corporations in our politics—and I fully expect that we will have that for at least another half century if not longer—then I want to know this as a citizen, I want to know it as a consumer, and I want to know it as an investor. Here's an example of what informed political spending can do: Target spends in a gubernatorial race in 2010, and when the public learns about this, it is boycotted.[47] Some of the imagery from that boycott is still available online.[48]

But it's worth remembering that boycotts are American as apple pie, and they are legal. Some of our Founding Fathers ran boycotts trying to protest slavery.[49] Benjamin Franklin actually encouraged what we would now call a "boycott."[50] Franklin was trying to get people to buy maple syrup as an alternative to slave-grown cane sugar.[51] Boycotts were also instrumental in the Civil Rights Movement.[52] And finally, in '82, the Supreme

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45. *Id.* at 228 (Scalia, J., concurring).

46. *Id.*

47. Meena Hartenstein, *Target boycotted for donating $150,000 to MN right-wing Republican Tom Emmer's campaign for governor*, N.Y. DAILY NEWS (Aug. 3, 2010), http://www.nydailynews.com/news/national/target-boycotted-donating-150-000-mn-right-wing-republican-tom-emmer-campaign-governor-article-1.200635 [https://perma.cc/D4ZF-3WKH]; Ciara Torres-Spelliscy, *Citizens Get United*, ADVOCATE (Mar. 24, 2011), http://www.advocate.com/news/news-features/2011/03/24/citizens-get-united [https://perma.cc/K2KT-7TEW].

48. *See, e.g.*, Hartenstein, *supra* note 47.

49. *See* Theresa J. Lee, *Democratizing the Economic Sphere: A Case for the Political Boycott*, 115 W. VA. L. REV. 531, 555–65 (2012).

50. *See* LAWRENCE B. GLICKMAN, BUYING POWER: A HISTORY OF CONSUMER ACTIVISM IN AMERICA 63 (2009).

51. *Id.*

52. *See* Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 47–48 (1994); Sascha Cohen, *Why The Woolworth's Sit-In Worked*, TIME (Feb. 2, 2015), http://time.com/3691383/woolworths-sit-in-history/ [https://perma.cc/GY8P-7A38].

Court recognizes that political boycott is also protected First Amendment activity.[53]

Now we can see some money in politics. There are really great resources if you're interested in this. Go to followthemoney.org or opensecrets.org. If you look at those sources, you can find publicly traded-company spending in our elections, using their *Citizens United* rights.[54] Our good friend Chevron was the big spender in 2012.[55] They were back in the midterm election, though they were no longer the biggest spender.[56] They were back at the top of the pile in 2016, and they had a lot of company.[57]

Those last couple of slides showing publicly traded company spending in federal elections likely understate the amount of corporate spending that is done at the federal level because we have this dark money problem.[58] There has been about three-quarters of a billion dollars in dark money spent over the past six years.[59] This has worried not just election lawyers, but also corporate lawyers. So corporate lawyers have asked the Securities and Exchange Commission for a new rule that would require transparency of corporate political spending,[60] and over a

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53. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 914, 933 (1982); *see also* GARY MINDA, BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND (1999).

54. FOLLOWTHEMONEY.ORG, https://www.followthemoney.org/ [https://perma.cc/99QV-8TVN] (last visited Aug. 7, 2017); OPEN SECRETS, https://www.opensecrets.org/ [https://perma.cc/H6VC-VLER] (last visited Aug. 7, 2017).

55. *Top Donors, 2012 Cycle*, OPEN SECRETS, https://www.opensecrets.org/outsidespending/contrib.php?cmte=C00504530&cycle=2012 [https://perma.cc/T2H5-4DUR] (last visited Aug. 7, 2017).

56. *Top Donors, 2014 Cycle*, OPEN SECRETS, https://www.opensecrets.org/outsidespending/contrib.php?cycle=2014&cmte=C00504530 [https://perma.cc/6JDR-G7TD] (last visited Aug. 7, 2017).

57. *Top Donors, 2016 Cycle*, OPEN SECRETS, https://www.opensecrets.org/outsidespending/contrib.php?cycle=2016&cmte=C00504530 [https://perma.cc/9T7B-K6GG] (last visited Aug. 7, 2017).

58. *See generally* Ciara Torres-Spelliscy, *Dark Money as a Political Sovereignty Problem*, 28 KING'S L.J. 239 (2017).

59. *Political Nonprofits (Dark Money)*, OPEN SECRETS, https://www.opensecrets.org/outsidespending/nonprof_summ.php [https://perma.cc/H859-RNCS] (last visited Aug. 7, 2017).

60. Letter from Comm. on Disclosure of Corporate Political Spending Petition for Rulemaking, to Elizabeth Murphy, Sec'y, U.S. Sec. & Exch. Comm'n (Aug. 3, 2011), *available at* http://www.sec.gov/rules/petitions/2011/petn4-637.pdf [https://perma.cc/Y9G6-L4QF].

million members of the public have written in to the Securities and Exchange Commission asking for them to adopt such a rule.[61] But the SEC is working against the same political background that all of us are working under, which is an increasing polarization on partisan lines.[62]

My good friends at Pew have found that there used to be a lot more overlap between Republicans and Democrats, but they are pulling farther and farther and farther apart.[63] To wit: according to Pew, and this is a couple years ago in 2014, 27% of Democrats see the Republican Party as a threat to the nation's wellbeing; not to be outdone, 36% of Republicans see the Democratic Party as a threat to the nation's wellbeing.[64] It is as if we can no longer stand one another. And add into this mix a question put to voters on the eve of not this last election but the previous one. Voters were asked, "Would you change your buying behavior based on a corporation's political spending?"[65] And a staggering 79% said they would.[66]

And of course, there's technology; there's an app for that. If you want to know more about the brands you're buying and the stances that that corporation has taken, there are at least three apps: Buycott, Buypartisan, and 2ndVote.[67] And this election has not helped our bipartisan problem—or partisan problem, depending on how you want to think of it. My favorite boycott was Trump supporters calling for a boycott of *Hamil-*

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61. *Comments on Rulemaking Petition: Petition to require public companies to disclose to shareholders the use of corporate resources for political activities*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/comments/4-637/4-637.shtml [https://perma.cc/4SB3-KRJT] (last visited Nov. 11, 2017).

62. *See Political Polarization in the American Public*, PEW RES. CTR. 6 (June 12, 2014), http://assets.pewresearch.org/wp-content/uploads/sites/5/2014/06/6-12-2014-Political-Polarization-Release.pdf [https://perma.cc/JGN9-FP9H].

63. *See id.*

64. *Id.* at 11.

65. *See* Ciara Torres-Spelliscy, *Shooting Your Brand in the Foot: What* Citizens United *Invites*, 8 RUTGERS U. L. REV. 1295, 1328 (2016).

66. *Id.*

67. *See* Al Kamen & Colby Itkowitz, *Want to stop enriching people whose politics you hate? There's an app for that.*, WASH. POST (Aug. 12, 2014), https://www.washingtonpost.com/politics/want-to-stop-enriching-people-whose-politics-you-hate-theres-an-app-for-that/2014/08/12/bcf68d42-2251-11e4-86ca-6f03cbd15c1a_story.html [https://perma.cc/9Z4E-3TGN].

ton[68]—maybe the rest of us can get tickets. But I think the second part is a little bit more disturbing. This is a real CNN headline: "Trump supporters call to boycott Pepsi over comments the CEO never made."[69] So, in this maelstrom, you're likely to get some innocent companies being targeted with boycotts. From the other side, there has been this effort called "Grab Your Wallet" targeting Trump-branded products and retailers that sell Trump-branded products.[70] And there's already a new app for this called "Boycott Trump" if you can't keep where you need to boycott straight.[71]

So I think we're going to see more fights like the one we just witnessed between Nordstrom and Ivanka Trump,[72] and if you want to learn more, you can read about it in my book.[73]

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68. *See* Seth Kelley, *Donald Trump supporters call for 'Hamilton' boycott in defense of Mike Pence*, BOS. HERALD (Nov. 20, 2016), http://www.bostonherald.com/entertainment/arts_culture/2016/11/donald_trump_supporters_call_for_hamilton_boycott_in_defense_of [https://perma.cc/95ZD-ZRA9].

69. Shannon Gupta, *Trump supporters call to boycott Pepsi over comments the CEO never made*, CNN (Dec. 6, 2016), http://money.cnn.com/2016/11/16/news/companies/pepsi-fake-news-boycott-trump/index.html [https://perma.cc/V9LF-2D4A].

70. Sarah Halzak, *The woman behind the boycott that is pressuring retailers to dump the Trumps*, WASH. POST (Feb. 13, 2017), https://www.washingtonpost.com/news/business/wp/2017/02/13/the-woman-behind-the-boycott-that-is-pressuring-retailers-to-dump-the-trumps/ [https://perma.cc/G9ZR-BWCB].

71. *See* Maryam Louise, *Boycott Trump App Ranks Among Top 10 in App Store*, INQUISITR (Dec. 1, 2016), http://www.inquisitr.com/3758132/boycott-trump-app-ranks-allegedly-among-top-10-in-app-store/ [https://perma.cc/Y8GU-DZWR].

72. *See* Kim Bhasin, *Nordstrom Is Winning the War over Ivanka Trump*, BLOOMBERG (May 7, 2017), https://www.bloomberg.com/news/articles/2017-03-07/backlash-over-ivanka-trump-didn-t-hurt-nordstrom [https://perma.cc/9SLG-7CFT].

73. CIARA TORRES-SPELLISCY, CORPORATE CITIZEN? AN ARGUMENT FOR SEPARATION OF CORPORATION AND STATE (2016).

FREE EXPRESSION ON CAMPUS: MITIGATING THE COSTS OF CONTENTIOUS SPEAKERS

SUZANNE B. GOLDBERG*

> "If you're afraid to offend, you can't be honest."
>
> "If you offend me, I can't hear what you're trying to tell me."
>
> — overheard on campus

The debate over how colleges and universities should respond to contentious guest speakers on campus is not a new one. A quick look back to the early 1990s, among other times, shows commentators squaring off much as they do today about the tensions between protecting free expression and ensuring meaningful equality.[1]

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1. As Mark Graber summarized the debate at the time with respect to public forums more generally:

> Contemporary progressives who oppose restrictions on bigoted expression insist that government respects all citizens equally when all citizens are allowed to express their beliefs. Contemporary progressives who favor some restrictions on bigoted expression insist that government respects all persons equally when officials forbid speech that states or clearly denies that some citizens are not worthy of equal concern or respect.

Mark A. Graber, *Old Wine in New Bottles: The Constitutional Status of Unconstitutional Speech*, 48 VAND. L. REV. 349, 353 (1995). He also described similarities with decades-earlier debates about the costs and benefits of unfettered expression in a variety of settings. *Id.* at 372. *Cf.* Chris Quintana, *Even in Fascism's Heyday, Anti-Fascists on Campus Were Controversial*, CHRON. HIGHER EDUC. (Apr. 12, 2017),

Perhaps not surprisingly, the issues that contested speakers address are also much the same as they have been for several decades—government action and inaction on various issues, the rights and social status of identity-based groups, and conflicts within political territories and regimes, among others. And, I would predict, questions about how institutional leaders

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http://www.chronicle.com/article/even-in-fascism-s-heyday/239761 [https://perma.cc/44C9-XA98] (discussing student protests of speakers during the 1930s).

During the early 1990s, debate focused especially on codes that sought to regulate "hate speech" on campuses. *See, e.g.*, ROBERT M. O'NEIL, FREE SPEECH IN THE COLLEGE COMMUNITY 3 (1997); J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399 (1991); Arthur L. Coleman & Jonathan R. Alger, *Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campus*, 23 J.C. & U.L. 91, 96 (1996); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 434; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Evan G.S. Siegel, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351, 1398 (1990).

More recently, commentators have engaged questions about the relationship between free speech and equality with a focus on issues other than formal speech codes. *See, e.g.*, GREG LUKIANOFF, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE (2012); Nina Burleigh, *The Battle Against 'Hate Speech' on College Campuses Gives Rise to a Generation that Hates Speech*, NEWSWEEK (May 26, 2016), http://www.newsweek.com/2016/06/03/college-campus-free-speech-thought-police-463536.html [https://perma.cc/HP4Z-XKG9]; Jonathan R. Cole, *The Chilling Effect of Fear at America's Colleges*, ATLANTIC (June 9, 2016), https://www.theatlantic.com/education/archive/2016/06/the-chilling-effect-of-fear/486338/ [https://perma.cc/8B5Z-AAAZ]; *see also Free Expression on Campus: A Survey of U.S. College Students and U.S. Allies*, KNIGHT FOUND. 4 (2016), https://www.knightfoundation.org/media/uploads/publication_pdfs/FreeSpeech_campus.pdf [https://perma.cc/2SWN-4CHA] (noting that many students "believe colleges should be allowed to establish policies restricting language and behavior that are intentionally offensive to certain groups, but not the expression of political views that may upset or offend certain members of groups"). Several new books, published after this article was written, also take up some of the issues discussed here. *See, e.g.*, ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS (2017); JOHN PALFREY, SAFE SPACES, BRAVE SPACES: DIVERSITY AND FREE EXPRESSION IN EDUCATION (2017).

Beyond the campus context, the government's role in regulating hate speech both domestically and globally has long been debated, with a generally greater willingness to tolerate government regulation outside the United States than within. *See generally* ALAN BROWNSTEIN & LESLIE GIELOW JACOBS, GLOBAL ISSUES IN FREEDOM OF SPEECH AND RELIGION (2009) (reviewing various countries' free-expression law and doctrine); JEREMY WALDRON, THE HARM IN HATE SPEECH (2012) (arguing that Americans should give greater consideration to the harm caused by hate speech).

should respond to these speakers will still be quite pressing twenty or thirty years from now.

My aim in this brief essay is not to rehash the familiar debates but rather to consider whether and how schools ought to mitigate harms that may occur as a result of these speakers presenting their views on campus. That is, I start from the premise that, for both non-consequentialist and pragmatic reasons, colleges and universities should allow invited speakers to give their remarks on campus and should undertake serious efforts to minimize and prevent disruption.[2] I also begin with the premise that some of these talks may come with real costs for individuals and groups within the community, for the school community as a whole, and for those who encounter these speakers and their views in non-campus settings.[3]

My point is that it is both unhelpful and inaccurate to characterize these premises as being in zero-sum tension—as though free expression must supersede any concerns about harm and that harms, if any, can be remedied only by more speech. Instead I argue that institutions can and should recognize the costs that can accompany unfettered speech by guest speakers and take steps to recognize and mitigate those costs.

I begin by discussing the reasons underlying the premise that schools must allow invited speakers to give their talks. I then review the legal and policy landscape that reinforces the need

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2. As I will elaborate below in Part II.A, this premise anticipates that schools can and should impose reasonable time, place, and manner restrictions on any speaker who comes to campus. On heckling, see *infra* note 13 and accompanying text.

Although a full discussion of incitement of violence is beyond the scope here, I do not intend to argue that the "all speakers" policy extends to those whose speech lacks protection under the First Amendment. *Cf.* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (excluding from First Amendment protection speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *see also infra* note 26.

Another important question, also beyond the scope of this brief essay, concerns the steps a school might appropriately take to reduce the likelihood that invitations will be extended to speakers whose message is of little educational value.

3. By "costs," I mean to encompass a wide range of potential costs, including the diminishment of learning or participation that students might experience if they sense themselves or their communities to be the targets of negative or hostile remarks as well as the demands on institutional resources that might otherwise be expended elsewhere and the enhancement of a speaker's reputation or ideas that may result from addressing a college or university community. *See infra* Part III for detailed discussion.

for schools to take steps to address the costs that may arise from this commitment. With these points in hand, I turn to the central inquiry here and offer a tentative pairing of costs and potential mitigation strategies.

I. A STARTING PREMISE: THE SPEAKER MUST GO ON

My inclination has not always been to embrace an "allow all invited speakers to speak" rule. To the contrary, perhaps because my work has focused on barriers to equality,[4] I have frequently been moved by concerns about the costs to individuals and groups who might be negatively affected by the speaker's remarks. Yet I have come to embrace the rule as the much better alternative to a rule that would allow speakers to be barred from college and university campuses based on the reputation or role of speaker[5] or the content of their planned remarks.[6] Although the arguments for each position are familiar, a quick review of some of the central justifications for a content-neutral rule may be helpful background for the discussion below.[7]

First, as a normative matter, higher education institutions are the quintessential site for contestation of ideas. One might argue that safeguarding this space, where views can not only be expressed but also challenged, takes on special importance at a time when surrounding communities are polarized and many people are increasingly reluctant to engage with views contrary

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44. *See, e.g.*, Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011); Suzanne B, Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004); Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087 (2014).

5. By "role," I mean the individual's service as an elected official, dignitary, or representative of a government or organization.

6. It bears repeating here that this position does not encompass speakers invited to incite violence or otherwise express messages unprotected by the First Amendment. *See supra* note 2.

7. In addition to the normative and consequentialist arguments here, First Amendment viewpoint discrimination doctrine also constrains public colleges and universities from making viewpoint-based decisions about speakers. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (stressing the value of "wide exposure to [a] robust exchange of ideas"). *See generally* Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 169 (1996).

For the purposes of this Article, I will explore the arguments that apply to all schools, including those that are not bound by or have not voluntarily accepted First Amendment constraints.

to their own.[8] Even apart from times of political polarization, debates about society's received wisdom have played an important role in moving ideas from the periphery to the mainstream and in transforming the ways we understand ourselves and our surroundings.[9]

Although college and university campuses are hardly the only forums where vigorous debate can take place, they remain among the few locations in American society today where those debates occur in person.[10] Importantly, too, campuses are

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8. *See Political Polarization in the American Public*, PEW RES. CTR. (June 12, 2014), http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/ [https://perma.cc/T7NR-XLWP] (noting that "Republicans and Democrats are more divided along ideological lines—and partisan antipathy is deeper and more extensive—than at any point in the last two decades"); *see also* Catherine Rampbell, *Political polarization among college freshmen is at a record high, as is the share identifying as "far left,"* WASH. POST (May 2, 2017), https://www.washingtonpost.com/news/rampage/wp/2017/05/02/political-polarization-among-college-freshmen-is-at-a-record-high-as-is-the-share-identifying-as-far-left [https://perma.cc/PBM4-UG7X].

9. For discussion of how various civil rights debates have enabled changes in American society over time, see William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006). Contestation of mainstream ideas has similarly produced changes in understandings and acceptance of facts, policy, and theory regarding the environment, the economy, education, and innumerable other arenas. *See, e.g.*, STEVEN L. ROBINS, FROM REVOLUTION TO RIGHTS IN SOUTH AFRICA: SOCIAL MOVEMENTS, NGOS & POPULAR POLITICS AFTER APARTHEID (2008); Jedediah S. Purdy, *The Long Environmental Justice Movement*, ECOLOGY L.Q. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2778776 [https://perma.cc/UB7A-ZN2U]; James Ryan, *Strategic Activism, Educational Leadership and Social Justice*, 19 INT'L J. LEADERSHIP EDUC. 87 (2016); Joseph E. Stiglitz, Information and the Change in the Paradigm in Economics, Nobel Prize Lecture (Dec. 8, 2001), http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2001/stiglitz-lecture.pdf [https://perma.cc/HUS3-S5FY].

10. Constructive engagement on controversial political issues has become rarer in other forums, such as social media. *See* Keith Hampton et al., *Social Media and the "Spiral of Silence*," PEW RES. CTR. (Aug. 26, 2014), http://www.pewinternet.org/2014/08/26/social-media-and-the-spiral-of-silence/ [https://perma.cc/D43Q-F2SA]. Although there has been active engagement by constituents at congressional town halls in recent years, that has in large part been confrontational rather than a deliberative exchange of ideas. *See* Patrik Jonsson, *Tea Party, Reversed? How GOP Town Halls Look from the Inside*, CHRISTIAN SCI. MONITOR (Feb. 15, 2017), https://www.csmonitor.com/USA/Politics/2017/0215/Tea-party-reversed-How-GOP-town-halls-look-from-the-inside [https://perma.cc/RC9G-ZM7C] (noting that both Democrats and Republicans have faced hostility at town halls in recent years); Susan Milligan, *Trouble in the Town Hall*, U.S. NEWS (Apr. 17, 2017), https://www.usnews.

uniquely situated to protect speakers' ability to get their point across even if someone else in the room is louder or has more supporters nearby.[11]

Further, since the typical contentious speaker on campus aims to present to students rather than to a faculty workshop, it bears noting that allowing speakers to share their ideas fits directly within the mission of higher education to expand students' knowledge of the world and their critical thinking skills. This is not to say that all speakers are equally educational—indeed, some of the most contentious debates have occurred regarding invitations to speakers for whom provocation may be an end in itself.[12]

Yet even for deliberately provocative speakers, there is value in maintaining frameworks that require students to express disagreement with a speaker's views by means other than shouting over or otherwise disrupting a speaker who is in the midst of addressing an audience.[13] In part, there is educational benefit to students having to formulate questions or comments that express their points of disagreement, which is a different

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com/news/the-report/articles/2017-04-17/lawmakers-lose-when-it-comes-to-town-hall-meetings [https://perma.cc/EEH9-U6A5].

11. Many congressional town halls, for example, have faced interruptions by protestors. Trip Gabriel et al., *At Town Halls, Doses of Fury and a Bottle of Tums*, N.Y. TIMES (Feb. 21, 2017), https://www.nytimes.com/2017/02/21/us/politics/town-hall-protests-obamacare.html [https://perma.cc/B595-NU54]; Alex Isenstadt, *Town halls gone wild*, POLITICO (July 31, 2009, 4:30 AM), http://www.politico.com/story/2009/07/town-halls-gone-wild-025646 [https://perma.cc/K8X8-KMRZ]. While disruption occasionally happens on college campuses as well, *see e.g.*, *infra* notes 54 and 55 and accompanying text, schools often have greater capacity to control the location where a speaker is presenting, *see infra* notes 24 and 25.

12. *See, e.g.*, Alex Arriaga, *White Supremacists Target College Campuses With Unprecedented Effort*, CHRON. HIGHER EDUC. (Mar. 6, 2017), http://www.chronicle.com/blogs/ticker/white-supremacists-target-college-campuses-with-unprecedented-effort/117191 [https://perma.cc/AQ2E-KE8L]; Thomas Fuller & Christopher Mele, *Berkeley Cancels Milo Yiannopoulous Speech, and Donald Trump Tweets Outrage*, N.Y. TIMES (Feb. 1, 2017), https://www.nytimes.com/2017/02/01/us/uc-berkeley-milo-yiannopoulos-protest.html [https://perma.cc/V7FM-SUEG]; Katherine Mangan, *A White Supremacist Incites a Crowd at Texas A&M*, CHRON. HIGHER EDUC. (Dec. 7, 2016), http://www.chronicle.com/article/A-White-Supremacist-Incites-a/238589 [https://perma.cc/U5AL-GFP9].

13. *See* Thomas Healy, *Who's Afraid of Free Speech?*, ATLANTIC (June 18, 2017), https://www.theatlantic.com/politics/archive/2017/06/whos-afraid-of-free-speech/530094/ [https://perma.cc/2BY9-7PYM] ("[H]eckling that is so loud and continuous a speaker literally cannot be heard is little different from putting a hand over a speaker's mouth and should be viewed as antithetical to the values free speech.").

exercise from shouting or chanting with the intent to disrupt or end an event.[14] And in part, there are audience members seeking to hear the speakers' ideas, whether to learn, support or dispute. If protesters can shout over speakers without consequence, institutions find themselves in the awkward and infeasible position of having to determine which disruptions should be penalized and which not. (More on the challenges of this line-drawing in a moment.) Also, while protesting can be valuable training for post-graduation civic engagement, so too can posing hard questions to speakers who hold extreme views. If protest results in disruption, however, that opportunity may be foreclosed.

Along these lines and as a practical matter, a strict content-neutral rule also poses fewer risks of misuse than a rule that authorizes an individual or group to exclude or disinvite speakers because of those speakers' views. To be sure, for someone like me who is concerned about the negative impact certain speakers can have on students and other community members, it might be desirable in theory to exclude speakers whose views rest on disproven data or long-rejected ideological preferences. At the same time, the response to this position is powerful—that it is not workable (also in my view) to draw those lines in a setting that is committed to questioning and debating ideas. To do so, one would need to determine which data and ideas should never be questioned or debated—and also to determine that it is better for the campus community to be protected from hearing challenges to those inviolable data and ideas than to be pressed to defend them and to gain in understanding from that challenging encounter.[15]

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14. *Cf. Discord at Middlebury: Students on the Anti-Murray Protests*, N.Y. TIMES (Mar. 7, 2017), https://www.nytimes.com/2017/03/07/opinion/discord-at-middlebury-students-on-the-anti-murray-protests.html [https://perma.cc/6CB8-G8WN] (featuring diverse perspectives from students who attended the disrupted speaking engagement by Charles Murray at Middlebury College with the intent to listen, ask questions, or participate in protest).

15. There is also the perennially difficult question of sorting out which remarks are intended seriously and which might better be considered comedic or satirical and, perhaps, less troubling. *Cf.* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) (relying on the First Amendment to reject emotional distress claim for parody considered offensive and expressing skepticism about the possibility of identifying a principled standard to separate traditionally protected political cartoons from their "distant cousin[s]").

There is also the related practical point that excluding or disinviting speakers almost inevitably draws more attention to those speakers than allowing them to speak. Instead of the debate focusing on the value of the speaker's ideas, the exclusion from campus can have the unintended effect of reinforcing those ideas by suggesting that the campus community will be unduly influenced by their power.[16] The excluded speaker can then amplify this point via social media channels, leaving the school to appear to have engaged in this line-drawing out of fear rather than for whatever good reasons the school might have had in mind.[17]

II. INSTITUTIONAL CONSIDERATIONS AND RESPONSIBILITIES

Having a clear commitment to free expression and exchange of ideas, including ideas that have been widely rebuffed or have offended some community members, is not the end of the conversation, however. When speakers come to campus, they can have a significant impact on those who attend and sometimes on others in and outside of the community as well. Indeed, the impact on campus community members, especially students, through the addition of new perspectives and ideas to the community's cultural and intellectual life is among the chief rationales for inviting outside speakers into higher-education settings.

Consequently, a question arises as to what responsibilities colleges and universities have, if any, to address the costs to community members and others on and off campus that can arise from the presence and comments of outside speakers. I will explore these costs, along with potential responsive strate-

16. *See* Catherine Rampell, *What Milo Yiannopoulos and Elizabeth Warren have in common*, WASH. POST (Feb. 9, 2017), https://www.washingtonpost.com/opinions/what-milo-yiannopoulos-and-elizabeth-warran-have-in-common/2017/02/09/ee5da942-ef0e-11e6-9662-6eedf1627882_story.html [https://perma.cc/WAY9-5CRG] (noting that "suppression of speech," such as the cancellation of Milo Yiannopoulos' speech at the University of California at Berkeley, "not only generates more public interest, as bystanders scramble to learn what all the fuss is about; it can also win the speaker sympathy and the moral high ground").

17. *See* Jeremy W. Peters, *In Ann Coulter's Speech Battle, Signs That Conservatives Are Emboldened*, N.Y. TIMES (Apr. 26, 2017), https://www.nytimes.com/2017/04/26/us/politics/ann-coulter-university-of-california-berkeley.html [https://perma.cc/ZWM3-ARLD].

gies, in the next section. For now, I note simply that by costs, I do not mean to include the anxieties that can result from having one's ideas challenged but I do mean to take seriously the sense of intimidation or alienation that some experience when a speaker condemns or demeans aspects of their identity. I also want to take seriously concerns expressed about speakers who advance ideas that, in some observers' views, promote genocide, endanger the planet, or heighten the risk of other grave dangers to students, their families or the world.[18]

While it is beyond the scope here to explore the legal landscape in depth, this section will flag several sources of law and policy that may bear on schools' choices about responding to these costs.

First, to be clear, there is no law—at least none I am aware of—that would require a college or university to ban a speaker based on the potential costs associated with the person's ideas. To the contrary, for public institutions and for private institutions committed to First Amendment values, constitutional doctrine would be a steadfast barrier to doing so.[19]

A. Discretion in Fulfilling the Educational Mission

Still, colleges and universities are entitled to substantial discretion in determining how to fulfill their educational mission.[20] Against that backdrop, courts have occasionally held that schools can impose certain restrictions on outside speakers

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18. *See Free Speech, Not Hate Speech*, HARV. CRIMSON (Feb. 6, 2017), http://www.thecrimson.com/article/2017/2/6/berkeley-free-speech/ [https://perma.cc/7ABQ-KGTY] (arguing that speakers should not be invited to campus when doing so "only serves to further legitimize their untenable, hateful claims and poses a threat to fellow classmates").

19. *See, e.g.*, Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 134–35 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation . . . . Speech cannot be . . . punished or banned[] simply because it might offend a hostile mob." (footnote omitted)); *see also* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1265–67 (1995). For more on evaluating costs, see *infra* note 52 and accompanying text.

20. Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2214 (2016) ("Considerable deference is owed to a university in defining those intangible characteristics . . . that are central to its identity and educational mission."); *see also* Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978) (rejecting a medical student's procedural due process claim that she was entitled to a hearing for her dismissal on academic grounds).

based on the recognition that their focus and function is distinct from many other civic forums.[21] As the Eleventh Circuit observed, "the purpose of a university is strikingly different from that of a public park."[22] The court added: "Its essential function is not to provide a forum for general public expression and assembly; rather, the university campus is an enclave created for the pursuit of higher learning by its admitted and registered students and by its faculty."[23]

Courts have similarly recognized that some restrictions on speakers may be tolerated in the interest of "ensuring public safety, minimizing the disruption of the educational setting, and coordinating the use of limited space by multiple entities."[24] In addition, schools can reasonably justify limiting access to speakers "during discrete times of the academic year when an abundance of speakers would likely interfere with the educational mission."[25] And of course, schools can prohibit speech that is otherwise unprotected by the First Amendment, including speech that incites violence.[26]

Still, courts have not held that educators' discretion extends to excluding invited speakers based on the views those speakers might express, even when those views are experienced as

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21. By contrast, campus speech codes have, almost invariably, been invalidated. *See* Heidi Kitrosser, *Free Speech, Higher Education and the PC Narrative*, 101 MINN. L. REV. 1987, 1990 n.14 (2017) ("[V]irtually all codes challenged in courts have been struck down.").

22. Bloedorn v. Grube, 631 F.3d 1218, 1233–34 (11th Cir. 2011).

23. *Id.* at 1234.

24. Bowman v. White, 444 F.3d 967, 981 (8th Cir. 2006); *see also* Bloedorn, 631 F.3d at 1238 ("The University also has a significant interest in ensuring safety and order on campus, especially where the Free Speech Area is sited at a highly trafficked area of the campus, and the University employs a limited security force."); *cf.* McGlone v. Bell, 681 F.3d 718, 735 (6th Cir. 2012) (observing that the university had not explained how the policy at issue "maintain[ed] order or prevent[ed] interruption of its educational mission").

25. *Bowman*, 444 F.3d at 983.

26. *See supra* note 2; *see also* United States v. Stevens, 559 U.S. 460, 468 (noting that the First Amendment permits content-based limitations on certain speech, including obscenity, defamation, incitement, and speech integral to criminal conduct); Kathleen Ann Ruane, *Freedom of Speech and Press: Exceptions to the First Amendment*, CONG. RES. SERV. (Sept. 8, 2014), https://fas.org/sgp/crs/misc/95-815.pdf [https://perma.cc/M442-5CQ9].

harmful by some in the community.[27] While the Supreme Court has upheld measures that, in seeking to prevent crime and protect public safety, resulted in certain speech being restricted,[28] those restrictions were not prompted by "the direct impact of speech on its audience."[29] As Justice O'Connor observed, "[l]isteners' reactions to speech are not the type of 'secondary effects'" the Court has recognized as potentially permissible bases for regulation.[30]

B. The Influence of Antidiscrimination Law

At the same time, federal law provides that individuals may not be discriminated against or "denied the benefits of" educational programs or activities that receive federal financial assistance based on race, sex, color or national origin.[31] While individual actions against schools are limited to situations

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27. For cases rejecting other types of speech restrictions on high school and college campuses based on concerns about offense or disruption, see, for example, Healy v. James, 408 U.S. 169, 187–88 (1972) (rejecting university's refusal to recognize a student organization and observing that "disagreement . . . with the group's philosophy" or a view that a group's views are "repugnant" or "abhorrent," "the mere expression of them would not justify the denial of First Amendment rights"); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (rejecting a state law requiring university employees to disclose whether they had ever advocated, or been a member of a group that advocated, the overthrow of the U.S. government and observing "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die" (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)); Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1032 (9th Cir. 1998) (rejecting Title VI claim for injunctive relief that sought to remove *The Adventures of Huckleberry Finn* from high school syllabus because the author's use of a racist slur allegedly created hostile educational environment).

28. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 289–91 (2000) (plurality opinion) (upholding restrictions on nude dancing, notwithstanding the Court's recognition that such dancing is "expressive conduct," due to potential adverse effects on public health, safety and welfare).

29. Boos v. Barry, 485 U.S. 312, 321 (1988) (plurality opinion).

30. *Id.*; *see also id.* at 334 (Brennan, J., concurring) ("Whatever 'secondary effects' means, I agree that it cannot include listeners' reactions to speech.").

31. 42 U.S.C. § 2000d (2012); 20 U.S.C. § 1681 (2012). Because federal financial assistance includes financial aid to students, these laws apply to nearly all higher-education institutions in the United States. WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 22 (2014).

involving intentional discrimination,[32] the Office of Civil Rights within the federal Department of Education has authority to enforce Title VI and Title IX by terminating federal financial assistance to schools found in violation.[33] In addition to regulating a school's conduct, under both statutes a school can be held accountable for hostile environments created by others.[34]

To be clear, there is no case law suggesting that the presence or comments of an outside speaker would, without more, give rise to a cognizable claim under either Title VI or Title IX. Instead, as the Supreme Court has recognized in the context of peer harassment litigation, school administrators require flexibility in their work and will face liability only where their response to harassment "is clearly unreasonable in light of the known circumstances."[35] Even further, federal regulations and guidance limit harassment claims to those where the "conduct" is "sufficiently severe, pervasive or persistent."[36]

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32. *See* Alexander v. Sandoval, 532 U.S. 275, 293 (2001) ("Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce [disparate impact] regulations promulgated under § 602. We therefore hold that no such right of action exists.").

33. 42 U.S.C. § 2000d-1 (2012); 20 U.S.C. § 1682 (2012).

34. *See* Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999). Although *Davis* applied Title IX rather than Title VI, the Supreme Court has recognized repeatedly that interpretations of one should be applied to the other. *See, e.g.*, Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 258 (2009) ("Congress modeled Title IX after Title VI of the Civil Rights Act of 1964 and passed Title IX with the explicit understanding that it would be interpreted as Title VI was." (citations omitted)); *Sandoval*, 532 U.S. at 280 ("Title IX . . . was patterned after Title VI of the Civil Rights Act of 1964."); Cannon v. Univ. of Chi., 441 U.S. 677, 696 (1979) ("The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.").

35. *See Davis*, 526 U.S. at 648. The Court added that to be clearly unreasonable, funding recipients would have to respond (or fail to respond) in a manner that was "deliberately indifferent" to the harassment. *Id.*

36. *See* U.S. Dep't of Educ., Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11,448, 11,449 (Mar. 10, 1994); U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE, HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), https://www.ed.gov/about/offices/list/ocr/docs/shguide.html [https://perma.cc/NRL2-TVFT]. For a recent discussion of the relationship between Title VI and the First Amendment in relation to campus speech, see, for example, Yaman Salahi & Nasrina Bargzie, *Talking Israel and Palestine on Campus: How the U.S. Department of Education Can Uphold the Civil Rights Act and the First Amendment*, 12 HASTINGS RACE & POVERTY L.J. 155, 156 (2015) (arguing against the premise "that students suffer from a hostile educational environ-

C. Institutional Commitments to Teaching, Research, and Service

In addition to First Amendment and nondiscrimination law and values, the shared goals of most higher-education institutions also bear on how schools ought to engage with divisive or controversial outside speakers. Most basically, these include, in varying degrees depending on the school, commitments to teaching, research, and service to society.[37] While each is the subject of its own vast literature and debates,[38] I will flag a few of the most significant ways in which these goals are relevant to the discussion here.

Notably, while each can and should inform our thinking about these issues, none provides specific guidance. With respect to teaching, for example, it is axiomatic that there is value in students learning to engage with ideas different from their own. Indeed, the very point of education, both at the college and university level and elsewhere, is for students to engage with new ideas and information. We might conclude, then, that there is nothing but upside in having outside speakers bring their views onto campus. On the other hand, both common sense and empirical literature remind us that students are less

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ment in violation of their civil rights when a particular country or government with which they may identify is subjected to vigorous critique or academic scrutiny"). *See also* Shana v. Rutgers, No. A-5575-08T3, 2010 WL 4117268, at *15 (N.J. Super. Ct. App. Div. Oct. 12, 2010) (dismissing a student's claim that a faculty member's "blunt, insensitive or even rude" speech against him constituted unlawful discrimination, as "mere utterance of an . . . epithet which engenders offensive feelings" is insufficient to support a discrimination claim (quoting Taylor v. Metzger, 706 A.2d 685, 690 (N.J. 1998))).

37. *See, e.g.*, Jonathan R. Cole, The Great American University: Its Rise to Preeminence, Its Indispensable National Role, Why It Must Be Protected (2009); Colleges and Universities as Citizens (Robert G. Bringle, Richard Games & Edward A. Malloy eds., 1999).

38. *See generally* COLLEGES AND UNIVERSITIES AS CITIZENS, *supra* note 37. Although there is significant debate regarding the role of higher-education institutions in preparing students for the job market, *see, e.g.*, Jeffrey J. Selingo, *What's the purpose of college: A job or an education?*, WASH. POST (Feb. 2, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/02/02/whats-the-purpose-of-college-a-job-or-an-education [https://perma.cc/N6X5-YVCE]; Jessica Weinkle, *Universities Do More than Just Prepare Students for Jobs*, BOULDER DAILY CAMERA (Apr. 13, 2014), http://www.dailycamera.com/guest-opinions/ci_25547232/universities-do-more-than-just-prepare-students-jobs [https://perma.cc/4FGF-WSP5], that seems less relevant to how schools respond to contentious outside speakers than the other issues discussed above.

likely to take in information if they experience their surroundings as hostile to their presence.[39]

Likewise, with respect to research (as well as teaching), one might argue that institutional aims are enhanced by bringing in speakers who challenge conventional wisdom and accepted academic methodologies. At the same time, as debates about "alternative facts" suggest, there is a serious question whether the research mission may be harmed rather than strengthened by the unfettered presence of speakers relating demonstrably false information or flawed methodologies to the campus community.[40] Even further, outside speakers who tout their campus tours to enhance their legitimacy by association with higher education may gain further attention for their ideas and, in turn, diminish the public's acceptance of contrary knowledge that is produced in an academic setting.

And third, with respect to service to society, it might also follow that enabling free exchange with invited speakers will be citizenship-enhancing, in addition to educational, by strengthening students' ability to engage in civil discourse on contentious issues. The service mission might also be fulfilled by providing a forum in which demonstrably false or dangerous ideas can be contested, particularly where general public forums might not support or enable thoughtful challenges to the speakers' ideas. Yet, as just mentioned, speaking on a college or university campus can also lend a patina of legitimacy and

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39. *See, e.g.*, Richard Delgado & Jean Stefancic, *Four Ironies of Campus Climate*, 101 MINN. L. REV. 1919, 1922 (2017) ("[M]any campus administrators are committed to the goal of educating students for roles in a multicultural and multiracial world, and if the campus is cold or hostile, this goal will be difficult to achieve." (footnote omitted)); Lawrence, *supra* note 1, at 435–36, 458–61, 472–76 (describing the negative effects of hostile speech on students from marginalized social groups); Matsuda, *supra* note 1, at 2321–23, 2336–41, 2370–73, 2375–78 (same).

40. *See, e.g.*, Edward Glaeser & Cass R. Sunstein, *Does More Speech Correct Falsehoods?*, 43 J. LEGAL STUD. 65, 66 (2014) (discussing research showing that "balanced, objective information" does not necessarily result in "corrections of falsehoods"); S.I. Strong, *Alternative Facts and the Post-Truth Society: Meeting the Challenge*, 165 U. PA. L. REV. ONLINE 137, 138 (2017) (discussing empirical research showing that "'[e]xposure to accurate information may not be enough' to counteract individual or institutional adherence to alternative facts" (alteration in original) (quoting Brendan Nyhan & Jason Reifler, The Roles of Information Deficits and Identity Threat in the Prevalence of Misperceptions 3 (Nov. 11, 2016) (unpublished manuscript), http://www.dartmouth.edu/~nyhan/openingpolitical-mind.pdf [https://perma.cc/T36Q-HG59])).

amplify attention to individuals and ideas that are otherwise widely rejected as illegitimate. One might ask whether higher-education institutions would provide a greater service by making judgments that certain speakers, even if very few, are simply not engaged in reasoned discourse. To the extent that speakers use their platform to hurl gratuitous insults at students or others,[41] one might also argue that allowing these speakers models or reinforces a type of behavior that is desirable neither on campus nor in civil society.

Still, on the view that excluding speakers is infeasible for both normative and instrumental reasons,[42] the legal and policy landscape just discussed suggest that neutrality or invocation of a free-expression commitment when provocative speakers are on campus may also be an insufficient response.

III. A MENU OF INSTITUTIONAL RESPONSES

In this section, I take up the central question of how colleges and universities might respond to costs that can occur as a result of an invited speaker's presence or remarks on campus. Again, I recognize that there is consensus neither on whether it is possible for a speaker to cause all of the costs discussed here nor on the nature of any that might occur. Still, even a skeptic who rejects the possibility of harm might find it useful to take seriously the views of others who contend that harms do occur

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41. *See* Karen Herzog, *Breitbart writer targets transgender UWM student*, MILWAUKEE J. SENTINEL (Dec. 14, 2016), http://www.jsonline.com/story/news/education/2016/12/14/breitbart-writer-targets-transgender-uwm-student/95420206/ [https://perma.cc/B68V-DKS4] ("Yiannopoulos singled out a transgender student [in an on-campus speech] who had protested against a new [University of Wisconsin-Madison] policy created for its recreation center's locker rooms.").

42. *See supra* Part I. *See also* Kitrosser, *supra* note 21, at 2038 ("The very same societal failings reflected in the marketplace, after all, presumably will inhere in those persons and institutions empowered to restrict speech. This brings us back to the worry that those who create and enforce content-based speech restrictions will do so incompetently or abusively. Even putting aside such failings, the very nature of the social prejudices that critical theorists describe—specifically, their manifold and deeply ingrained ubiquity—makes the task of line-drawing between actionable and permissible speech content intrinsically precarious. Furthermore, fights over speech restrictions themselves are bound to become a part of the discourse consumed in the deeply imperfect speech marketplace. This returns us to the concern that restrictions will prove counterproductive.").

as well as the costs, financial and otherwise, that may arise when a contentious speaker comes to campus.

Drawing from the discussion above, I offer here a non-comprehensive catalogue of potential costs and institutional responses:

A. Diminished Student Learning or Well-Being

Individuals and groups may indicate that a speaker's comments target them for their identity or their beliefs and, consequently, they feel intimidated, afraid or alienated in ways that inhibit their participation in academic and other activities on campus, either around the time of the speech or in the longer-term because the speaker contributes to what they experience as an environment that is unwelcoming or even hostile to their presence.[43] This is especially likely to occur when a speaker comes to campus and singles out particular groups of people as less worthy or able.[44] This may also be more likely when a significant protest occurs and, while offering a counter-narrative, also amplifies the speaker's message. Although many well-

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43. *See* Snyder v. Phelps, 562 U.S. 443, 460–61 (2011) (recognizing that "[s]peech is powerful" and can "inflict great pain"); *cf.* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982) (acknowledging that protected speech "may embarrass others"); FCC v. Pacifica Found., 438 U.S. 726, 745 (1978) (similar acknowledgment that "society may find offensive" speech that is protected).

For discussion of the ways in which speech experienced as hostile may have negative consequences for individuals affected by the speech, see, for example, DONALD A. DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT (1985) (analyzing interviews of and data regarding Holocaust survivors in Skokie, Illinois about the harm they faced from the threat of Nazi-supporters' proposed march there and concluding that "[t]he major harmful consequence at Skokie was the infliction of mental trauma on the survivors" and that "their trauma appears to have involved both personal and communitarian dimensions"). *See also* Lisa Feldman Barrett, *When Is Speech Violence?*, N.Y. TIMES (July 14, 2017), https://www.nytimes.com/2017/07/14/opinion/sunday/when-is-speech-violence.html [https://perma.cc/LS3A-94RA] (citing studies showing negative physical effects of verbal abuse and other similar adversity). *But cf.* PHILIPPA STRUM, WHEN THE NAZIS CAME TO SKOKIE: FREEDOM FOR THE SPEECH WE HATE 147–48 (1999) (arguing that Skokie residents benefited from challenging the attempted march).

44. *Cf.* Andrew Altman, *Liberalism and Campus Hate Speech: A Philosophical Examination*, 103 ETHICS 302, 310 (1993) (arguing that "the language of racist, sexist, and homophobic slurs and epithets provides wholly conventional ways of treating people as moral subordinates" and that such terms "are used not only to express hatred or contempt for people but also to 'put them in their place,' that is, to treat them as having inferior moral standing").

publicized incidents involving recent speakers concern comments about gender, race or sexual orientation, in my experience students who are religiously observant or who hold conservative views also sometimes report feeling targeted in ways that negatively affect their sense of well-being on campus.

As a general matter, many schools make significant efforts to enable all students to thrive and engage fully in educational and other opportunities. With respect to negative consequences that may flow from invited speakers, schools might consider inviting, or supporting invitations to, other speakers who offer a different perspective.[45] Schools might also choose to have certain events introduced or moderated by a respected institutional leader or faculty member who is positioned to pose challenging questions and, if appropriate, to reiterate the institution's core values. Many schools can also make choices about where to locate the speaker so that, whatever the message, students can, if they choose, minimize their interaction with both the speaker and any related protests. And of course, institutional leaders can choose to express their own views on the issues being discussed, though at institutions with an active roster of invited speakers, this may prove to be as difficult as having campus leaders respond to the near-constant flow of world events that also impact their students.[46]

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45. For discussion of this and numerous additional ways schools might support students, see Office of the VP for Student Life, *Building Community in Challenging Times*, U. WASH., http://dsl.uw.edu/building-community-in-challenging-times/ [https://perma.cc/DQ96-7RC2].

46. For examples of schools' engagement with speakers in this way, see, for example, *Q&A for Richard Spencer 10/19 Event*, U. OF FLA., https://freespeech.ufl.edu/qa-for-1019-event/ [https://perma.cc/5ML7-DFRF] ("UF has been clear and consistent in its denunciation of all hate speech and racism and in particular of the racist speech and white nationalist values of Richard Spencer."); Office of University Life, *FAQ about CU College Republicans Event with Mike Cernovich on 10/30/17*, COLUM. U. (Oct. 30, 2017), https://universitylife.columbia.edu/faq-mike-cernovich [https://perma.cc/49H2-QBCF] ("Does the University agree with Mike Cernovich's messages? No, the University does not agree with Mike Cernovich's messages about male power over women, racial superiority, hostility toward religious minorities including Muslims, and other comments along these lines.").

In addressing conflicts between institutional values and invited speakers' messages, consideration must also be given to communicating in ways that do not foreclose discussion and debate on campus. *See generally* Steve Kolowich, *An Internet Troll is Invited to Speak: What's a College President to Do?*, CHRON. HIGHER

This is also an area where faculty can have a particular impact by hosting or participating on panels, by publishing their views in student newspapers or open statements[47] and, if relevant, by providing opportunities for nuanced class discussion of issues that, as a result of an invited speaker's presence, may be roiling the campus.[48] Faculty and student affairs staff might also educate on and work with interested students regarding protest strategies and options.[49]

B. Heightened Risk of Hostility and Harassment on Campus

Even without inciting violence, a speaker's expressed views might encourage or legitimate hostility toward a particular group on campus. To be sure, this concern is not limited to invited speakers. During the contentious presidential campaign season, for example, some students reported a heightened

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EDUC. (Feb. 10, 2017), http://www.chronicle.com/article/An-Internet-Troll-Is-Invited/239170 [https://perma.cc/FWY3-V9YR].

47. *See, e.g.*, Todd Gitlin et al., *An open letter about Charles Murray and his right to speak on campus*, COLUM. SPECTATOR (Mar. 20, 2017) http://columbiaspectator.com/opinion/2017/03/21/an-open-letter-about-charles-murray-and-his-right-to-speak-on-campus/ [https://perma.cc/JU5R-CFFA]; Katherine Franke et al., *Faculty Statement on Charles Murray Lecture*, COLUM. L. SCH. (Mar. 20, 2017), http://www.law.columbia.edu/open-university-project/academic-freedom/faculty-murray-statement [https://perma.cc/Q99B-MNPK].

48. Because this essay is focused on institutional responses to invited speakers, I do not address the many and significant ways in which students are often at the forefront of protesting viewpoints with which they disagree and providing counternarratives to the ideas being advanced by speakers. For more on student engagement with controversial speakers, see, for example, Ellis Arnold, *CU Boulder to Support Alternative Event to Milo Yiannopoulos Talk*, CU INDEP. (Dec. 15, 2016), https://cuindependent.com/2016/12/15/cu-alternative-event-milo-yiannopoulos [https://perma.cc/9JMY-WKFM] (discussing student petition for university to support alternative event to Yiannopoulos talk); Lisa Rathke, *College Students Protest Speaker Branded White Nationalist*, U.S. NEWS (Mar. 2, 2017) https://www.usnews.com/news/best-states/vermont/articles/2017-03-02/controversial-speaker-sparks-criticism-at-middlebury-college [https://perma.cc/9P4N-H3HN] (discussing student protest against white nationalist speaker); Claire Tully, *Auburn Unites Concert, march protest Richard Spencer appearance*, PLAINSMAN (Apr. 18, 2017), http://www.theplainsman.com/article/2017/04/auburn-unites-concert-march-protests-richard-spencer-appearance [https://perma.cc/F3U9-UECV] (discussing student-organized concert protesting Richard Spencer's appearance at Auburn University).

49. *See, e.g.*, Division of Student Affairs, *How to Protest Safely*, U.C. BERKELEY, http://sa.berkeley.edu/protest-safely [https://perma.cc/V7CU-3KE8] (last visited Nov. 13, 2017).

sense of vulnerability because of Donald Trump's comments about women, Muslims, undocumented immigrants, and others,[50] and others expressed vulnerability because they supported a candidate who was deeply unpopular among their peers.[51]

A school's response to this risk of increased hostility and possible harassment, whatever the source, is likely to be most effective with clear communication of institutional values, including through a well-known policy that prohibits harassment, vandalism and similar misconduct, and through meaningful enforcement of that policy. An effective policy will also be clear that speakers may not incite violence. At the same time, it is important for schools to be clear, consistent with free expression values discussed earlier, that being offended is not the same as being harassed.[52]

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50. *See, e.g.*, *The Trump Effect: The Impact of the Presidential Campaign on our Nation's Schools*, S. POVERTY L. CTR. (Apr. 13, 2016), https://www.splcenter.org/20160413/trump-effect-impact-presidential-campaign-our-nations-schools [https://perma.cc/WPG4-57WN].

51. *See, e.g.*, Clare Foran, *Trump-Supporting Republicans Face a Backlash on College Campuses*, ATLANTIC (Oct. 31, 2016) https://www.theatlantic.com/politics/archive/2016/10/republicans-trump-racism-sexism/505697/ [https://perma.cc/6Y6H-8C8L].

52. Columbia University's rules governing protests offers a useful model. *University Regulations (Including Rules of Conduct*), COLUM. U. (Oct. 2015), http://www.essential-policies.columbia.edu/university-regulations-including-rules-conduct#conduct [https://perma.cc/ZMV6-NSR3]. The Rules begin with an affirmative statement setting out the values of free expression and then makes clear that "the University cannot and will not rule any subject or form of expression out of order on the ground that it is objectionable, offensive, immoral, or untrue." *Id.* The Rules also recognize:

> Viewpoints will inevitably conflict, and members of the University community will disagree with and may even take offense at both the opinions expressed by others and the manner in which they are expressed. But the role of the University is not to shield individuals from positions that they find unwelcome.

Id. At the same time, the Rules expressly recognize that "the University may restrict expression that constitutes a genuine threat of harassment, that unjustifiably invades an individual's privacy, or that falsely defames a specific individual." *Id.* They explain:

> These forms of expression stand apart because they do little if anything to advance the University's truth-seeking function and they impair the ability of individuals at the University to participate in that function. The University has an obligation to assure members of its community that they can continue in their academic pursuits without fear for their personal security or other serious intrusions on their ability to teach and to study.

Id.

C. Amplification of Pseudoscience and Debunked Methodologies Within the Campus Community

A third potential cost is that speakers may be accorded greater legitimacy as a result of speaking at an academic institution, even when academics, including at the school the speaker is addressing, have disproved their contentions or demonstrated fundamental flaws in their analyses. Put another way, providing these speakers with a college or university platform can elevate pseudoscience, debunked methodologies, or falsified historical accounts to students who do not have the knowledge or training to doubt the views being advanced. This is not to say that schools should exclude speakers on the ground that their work would receive a failing grade in any class on campus; as discussed above, the overarching costs associated with excluding speakers almost invariably outweigh the potential benefits. But the question remains whether schools ought to do something to minimize the risk of appearing to endorse a speaker who addresses the campus community.

Here, communication about why schools allow speakers to come to campus may be the best strategy. Many students on campus, especially in their early years, may not know why, for example, a school whose faculty engage in research and teaching on climate change will permit an invited speaker to deny climate change or to advocate for energy policy that may pose direct environmental risks. And those speakers, in turn, may gain legitimacy off campus by highlighting their "campus tour."

By explaining simply and repeatedly that allowing someone to speak on campus does not mean that the school has endorsed the speaker's views, colleges and universities can push back against some of the legitimating effect that may be imput-

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For more general discussion of the relationship between speech and harassment, see generally Bridget Hart, *A Balancing Act for American Universities: Anti-harassment Policy v. Freedom of Speech*, 25 J.L. & POL'Y 399 (2016) (discussing whether university regulation of hate speech is constitutional); Thomas A. Schweitzer, *Hate Speech on Campus and the First Amendment: Can They be Reconciled?*, 27 CONN. L. REV. 493 (1995) (same); Alexander Tsesis, *Campus Speech and Harassment*, 101 MINN. L. REV. 1863 (2017) (same).

ed to a speaker by virtue of being on campus.[53] Likewise, schools might want to require that event hosts, including student organizations, permit some form of questions by audience members at all events to help ensure opportunities for contestation of speakers' ideas. And, in some instances, school leaders or faculty members might want to take additional initiative to educate the general public about the reasons for allowing speakers on campus to push back against the legitimation some speakers claim by their association with a campus-based event. While these points might seem obvious to many in the academy, they are not the norm in a world where employers, journalists, and even governments regularly screen and make choices among those who are invited to speak at their venues.

D. Institutional Resource Allocation

High-conflict speakers may also cause schools to allocate resources, both financial and attention, from other areas to handle the disruption on campus. Although these costs can be managed to a limited extent with clear and effective policies for permitting protests and protecting community safety, they are nonetheless substantial.[54] Indeed, mitigation of the resource reallocation needed to manage a campus event involving a highly contentious speaker presents a difficult challenge. Perhaps the best strategy for both institutional leaders and faculty members is to use the situation as an opportunity to educate students and others both about modes of disagreement in civil society and about the issues that have galvanized attention. If research or other efforts taking place at the school that address the speaker's topic, there may also be opportunities to high-

53. For illustrations of one possible approach, *see supra* note 46.

54. The University of Florida indicated, for example, that it, along with other agencies, would spend "[m]ore than $500,000 . . . to enhance security on our campus and in the city of Gainesville" for an event featuring a white nationalist speaker. *See Q&A for Richard Spencer 10/19 Event*, *supra* note 46.

For recent consideration of cost issues in the context of contentious speakers on campuses and in communities, see Frederick Schauer, *The Hostile Audience Revisited*, KNIGHT FIRST AMEND. INST. (Nov. 2017), https://knightcolumbia.org/content/hostile-audience-revisited [https://perma.cc/W4ZA-SQSR]. *See also* Suzanne B. Goldberg, *Costing Out Campus Speaker Restrictions*, KNIGHT FIRST AMEND. INST., https://knightcolumbia.org/content/costing-out-campus-speaker-restrictions [https://perma.cc/S44S-3LQ6] (last visited Nov. 13, 2017).

light those initiatives and, if relevant, promote ways that concerned students might get involved in addition to any protests they might choose to lead or join.

E. Increased Law-Enforcement Presence

Where there is concern about safety risks related to a speaker's presence, another potential cost may be the heightened presence of law enforcement on campus. Especially for students and others who may have concerns about interactions with law enforcement based on race, religion, or other aspects of identity, increased police or public safety presence can further escalate campus tensions. As with the resource-allocation point just discussed, clear and effective protocols governing the interactions of law enforcement with students and guests on campus can help mitigate these costs somewhat. It may also be helpful to have deliberate communication that police or public safety presence is intended not to endorse any given speaker but rather to enable events to take place safely for all and consistent with school policies that allow for speakers to present their views.

F. Physical Safety Concerns and Property-Damage Risks

In addition to the costs of law enforcement presence, there may be real risks to physical safety and property when a high-conflict speaker comes to campus. One need only read about the property damage and disruption at UC Berkeley in connection with one speaker[55] or the injuries to a faculty member at Middlebury at another outside speaker event[56] to recognize that these, too, may be associated with a policy that allows all speakers onto campus. These safety risks can, in turn, generate other costs including for students whose classes are moved or canceled, for community members who avoid parts of campus

55. Michael Bodley, *At Berkeley Yiannopoulos protest, $100,000 in damage, 1 arrest*, S.F. GATE (Feb. 2, 2017), http://www.sfgate.com/crime/article/At-Berkeley-Yiannopoulos-protest-100-000-in-10905217.php [https://perma.cc/98JJ-3BMU]; Gretchen Kell, *Campus investigates, assesses damage from Feb. 1 violence*, BERKELEY NEWS (Feb. 2, 2017), http://news.berkeley.edu/2017/02/02/campus-investigates-assesses-damage-from-feb-1-violence/ [https://perma.cc/E96Y-QK2M].

56. Conor Friedersdorf, *Middlebury Reckons with a Protest Gone Wrong*, ATLANTIC (Mar. 6, 2016), https://www.theatlantic.com/politics/archive/2017/03/middleburys-liberals-respond-to-an-protest-gone-wrong/518652/ [https://perma.cc/F6TH-669P].

out of concern for their safety, and for the school's reputation with prospective students, among others.

Mitigation can be achieved, to some extent, with great clarity around policy and careful planning including choices about where, when and how to hold events to minimize the risks of harm and allow for quick action if conflicts escalate in ways that threaten physical safety or property damage. Further, by taking clear action against those who destroy property or engage in physical conflict in connection with an event, the school can communicate a message that may reduce the risk of similar disruptions in the future.

G. Enhancing a Speaker's Legitimacy Off Campus

Finally, there may be a real-world cost from allowing speakers to convey ideas that promote grave harms outside of the campus environment, such as assault, hate crimes, environmental degradation, and genocide. Even for those who maintain, as I have here, that institutions should not bar invited speakers based on these or other risks, the question remains whether institutions can or should take steps to counter these risks. Here, again, there are a number of steps a school might take, depending on the circumstances, including nearly all that have been discussed above: communicating the reasons for allowing speakers on campus, supporting opportunities for other speakers to offer counternarratives, and, most fundamentally, teaching in ways that support critical analysis and conducting research that seeks to understand and perhaps to solve domestic and world problems rather than to exacerbate them.[57]

IV. CONCLUSION

One might respond to the challenges posed by contentious speakers on campus by concluding that the only obligation of colleges and universities is to ensure that the speaker is able to present remarks safely and without interruption, in keeping with First Amendment values and institutional commitments

57. The point here is not that there will or should be consensus about either dangers or solutions but rather that, on a wide range of issues, some will have concerns that a speaker's views may seek improperly to minimize, justify, or exacerbate harms in ways that will have a real-world impact.

to considering and contesting all ideas and viewpoints.[58] But if we take into account the foundational interests of higher-education institutions in teaching all students as well as producing research and serving the broader society, we can begin to recognize that the "no speakers barred" policy may negatively affect a school's ability to serve those interests, particularly when speakers demean certain groups on or off campus or advocate views that rest on falsified facts or debunked methodologies.

The answer, as I suggest above, is not to establish a process for excluding those speakers from campus. For a variety of normative and instrumental reasons, such a process would neither be feasible nor effective in eliminating those negative effects (nor permissible for schools bound by the First Amendment), at least not without great costs to the exchange of ideas.

Consequently, if we accept that all invited speakers must be permitted to speak and that their presence and remarks may give rise to a variety of costs for the campus community and beyond, the question then becomes how institutions might engage with speakers and otherwise respond to the potential costs to their educational, research, and service mission. The typology of potential costs and responses I offer in this essay is intended as a prompt for further questions and conversation. And while it is not the sort of destabilizing conversation that provocative speakers seek, it is precisely the sort of conversation that will be increasingly important to the extent that the polarization in much of American society also begins to pervade the institutions responsible for educating the next generation of our nation's thinkers and leaders.

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58. *Cf.* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (describing a school's role in "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes"); *id.* at 642 (stating that the purpose of education is not to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion").

REAWAKENING THE CONGRESSIONAL REVIEW ACT

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INTRODUCTION

A longstanding criticism of the administrative state has been that it imposes unduly burdensome costs on the American economy through the issuance of a blizzard of unnecessary rules that stifle investment and reduce employment.[1] That criti-

1. One estimate is that the rules generated by the Obama Administration in 2015 alone imposed more than $22 billion in annual costs. *See* Adam J. White, *Republican Remedies for the Administrative State*, *in* UNLEASHING OPPORTUNITY, PART II: POLICY REFORMS FOR AN ACCOUNTABLE ADMINISTRATIVE STATE 11 (Yuval Levin & Emily MacLean eds., 2017). That sum, however, is just part of the expense imposed by that administration's regulatory policies. *See, e.g.*, JAMES L. GATTUSO & DIANE KATZ, HERITAGE FOUND., RED TAPE RISING 2016: OBAMA REGS TOP $100 BILLION ANNUALLY, BACKGROUNDER, at 1 (2016), http://www.heritage.org/research/reports/2016/05/red-tape-rising-2016-obama-regs-top-100-billion-annually [https://perma.cc/CP5C-524H] ("The addition of 43 new major rules [in 2015] increased annual regulatory costs by more than $22 billion, bringing the total annual costs of Obama Administration rules to an astonishing $100 billion-plus in just seven years."); Binyamin Appelbaum & Michael D. Shear, *Once Skeptical of Executive Power, Obama Has Come to Embrace It*, N.Y. TIMES (Aug. 13, 2016), https://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html [https://nyti.ms/2jAytGL] ("The Obama administration in its first seven years finalized 560 major regulations—those classified by the Congressional Budget Office as having particularly significant economic or social impacts. That was nearly 50 percent more than the George W. Bush administration during the comparable period, according to data kept by the regulatory studies center at George Washington University . . . . And it has imposed billions of dollars in new costs on businesses and consumers."); James Gattuso & Diane Katz, *20,642 New Regulations Added in the Obama Presidency*, DAILY SIGNAL (May 23, 2016), http://dailysignal.com/2016/05/23/20642-new-regulations-added-in-the-obama-presidency/ [https://perma.cc/FJ5M-8WM8] ("More than $22 billion per year in new regulatory costs were imposed on Americans last year, pushing the total burden for the Obama years to exceed $100 billion annually. That's a dollar for every star in the galaxy, or one for every second in 32 years."); Kimberley A. Strassel, *Obama's Midnight Regulation Express*, WALL ST. J. (Dec. 22, 2016), http://www.wsj.com/articles/obamas-midnight-regulation-express-1482451192

cism has been advanced regardless of which political party occupies the White House.[2] During the presidential campaign and initial period of his administration, President Donald Trump made clear that he intends to address that problem. In fact, he and senior members of his administration have vowed to remake the administrative state as we currently know it.[3]

In a series of executive orders, the President directed senior agency officials to aggressively review the effects that excessive federal agency regulations have had on economic growth, to eliminate unnecessary rules, to ensure that agencies do not act in an *ultra vires* manner, to respect the values of federalism, and to always measure and be guided by the costs and benefits of

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[https://perma.cc/KW8Y-XEKN] ("According to a Politico story of nearly a year ago, the administration had some 4,000 regulations in the works for Mr. Obama's last year. They included smaller rules on workplace hazards, gun sellers, nutrition labels and energy efficiency, as well as giant regulations (costing billions) on retirement advice and overtime pay. Since the election Mr. Obama has broken with all precedent by issuing rules that would be astonishing at any moment and are downright obnoxious at this point."); Justin Sykes, *Nearly 4,000 EPA Regulations Issued Under President Obama*, AMS. FOR TAX REFORM (July 6, 2016, 2:25 PM), https://www.atr.org/nearly-4000-epa-regulations-issued-under-president-obama [https://perma.cc/275K-JJ5K] ("Since President Obama assumed office in 2009, the EPA has published over 3,900 rules, averaging almost 500 annually, and amounting to over 33,000 new pages in the Federal Register . . . . The compliance costs associated with EPA regulations under Obama number in the hundreds of billions and have grown by more than $50 billion in annual costs since Obama took office. Such high costs, especially those related to the energy sector, ripple throughout the economy, impacting GDP, killing thousands of jobs, and increasing the cost of consumer goods.").

2. The problem is bipartisan in nature. *See* Christopher DeMuth, *The Regulatory State*, NAT'L AFF., Summer 2012, at 70, 70 ("[T]he apparent partisan divide over regulations is illusory . . . . During the half-century before President Obama's election, the greatest growth in regulation came under Presidents Richard Nixon and George W. Bush."). In 2016, the George Mason University Mercatus Center found that regulations adopted since 1980 have cost the nation roughly $4 trillion in lost GDP. *See* Bentley Coffey et al., The Cumulative Cost of Regulations 8 (April 2016) (unpublished working paper) (on file with Mercatus Ctr.) ("Had regulations been held constant at levels observed in 1980, our model predicts that the economy would be nearly 25 percent larger. In other words, the growth of regulation since 1980 cost the United States roughly $4 trillion in GDP (nearly $13,000 per person) in 2012 alone.").

3. *See* Michael C. Bender & Rebecca Ballhaus, *Trump Strategist Steve Bannon: 'Every Day Is Going to Be a Fight*,' WALL ST. J. (Feb. 23, 2017), https://www.wsj.com/articles/trump-strategist-steve-bannon-every-day-is-going-to-be-a-fight-1487881616 [https://perma.cc/BLU4-6JAM] (stating that Steve Bannon, who was at that time the chief strategist to President Trump, said that the President will "push for deregulation, which Mr. Bannon referred to as 'deconstruction of the administrative state'").

any rules an agency considers.[4] As an additional step in his regulatory reform program, President Trump signed fifteen congressional joint resolutions designed to nullify agency rules promulgated during the last year of former President Barack Obama's administration.[5] Of particular concern were the so-called "midnight rules," ones that were issued in final form between the November 2016 election and the January 2017 inauguration.[6] Congress passed those joint resolutions under a lit-

4. Some of the President's executive orders address broad regulatory issues. *See* Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017) (directing agencies to establish Regulatory Reform Task Forces to determine what agency rules should be repealed, replaced, or modified); Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017) (limiting the costs of new regulations for the remainder of the fiscal year, creating a budget process for new regulations in the next fiscal year, and requiring agencies to eliminate two rules for every new one adopted); Exec. Order No. 13,766, 82 Fed. Reg. 8657 (Jan. 24, 2017) (developing a process for identifying high priority infrastructure projects and creating expedited environmental reviews and approvals for such projects). Other ones focus on particular regulatory problems. *See, e.g.*, Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017) ("Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule").

5. *See, e.g.*, Lisa Beilfuss, *Ruled Out: 13 Obama Regulations Rolled Back Under Congressional Review Act*, WALL ST. J.: WASH. WIRE (May 4, 2017, 10:46 AM), https://blogs.wsj.com/washwire/2017/05/04/ruled-out-13-obama-regulations-rolled-back-under-congressional-review-act [https://perma.cc/6E6C-94B6] (listing and summarizing the rules) (published before the signing of H.R.J. Res. 66, 115th Cong. (2017)); *Congressional Review Act Tracker 2017*, GEORGE WASH. UNIV. REGULATORY STUDIES CNTR. (Nov. 1, 2017), https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/CRA%20Tracker%2011-01-2017.pdf [https://perma.cc/NYY7-73XP].

6. First coined during the end of the Carter administration, the term "midnight rules" refers to the issuance of new rules in the waning period of an outgoing administration that will be followed by a change of political party. The phenomenon—also known as the "Cinderella Constraint," because government officials turn back into ordinary citizens at noon on January 20—has been a common occurrence for decades and is problematic for several reasons: the outgoing President cannot be held politically accountable, there is insufficient time for an agency to review comments, and it creates a burden for the incoming administration. *See, e.g.*, H.R. REP. NO. 114-782, pt. 1, at 2–4 (2016) (report on The Midnight Rules Relief Act, H.R. 5982, 114th Cong. (2016)); MAEVE P. CAREY, CONG. RES. SERV., R42612, MIDNIGHT RULEMAKING 2 (2012); Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947 (2003); Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of The "Midnight" Regulations Passed By The Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441 (2005); Patrick A. McLaughlin, *The Consequences of Midnight Regulations and Other Surges in Regulatory Activity*, 147 PUB. CHOICE 395 (2011); Susan E. Dudley, *Reversing Midnight Regulations*, REGULATION, Spring 2001, at 9, https://object.cato.org/sites/cato.org/files/serials/files/regulation/2001/4/dudley.pdf [https://perma.cc/7MF2-HFVC]; Jay Cochran, III, The Cinderella Constraint: Why Regulations Increase Significantly During Post-

tle-known and, until recently, even less often used statute known as the Congressional Review Act of 1996 (CRA).[7]

The CRA is Congress's most recent effort to trim the excesses of the modern administrative state. The Act does so by creating a fast-track procedure that enables Congress to set aside any new rule it finds unwise before the rule can go into effect. The Act directs federal agencies to submit to Congress and the Comptroller General a copy of every new rule so that the latter can examine it and the former can schedule a vote on a joint resolution to disapprove it without delay. The expedited process allows the Senate and House of Representatives to quickly pass a joint resolution of disapproval that is presented to the President for his signature or veto. If the President signs the resolution or Congress overrides his veto, the rule becomes null and void, thereby (hopefully) preventing whatever harm that Congress believed that the rule would inflict. Because the process created by the Act differs from the one that Congress ordinarily uses to consider legislation, the CRA raises a number of novel legal issues. This article will address the ones that are most important today.[8]

Election Quarters 1–6 (Mercatus Cntr. Working Paper, 2001), https://www.mercatus.org/system/files/The_Cinderella_Constraint%281%29.pdf [https://perma.cc/V93A-9CFZ].

7. The CRA was enacted as Title II, Subtitle E, of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 871 (1996) (codified at 5 U.S.C. §§ 801–08 (2012)).

8. For commentary on the CRA, see, for example, STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMM. ON COMMERCIAL & ADMIN. L., 109TH CONG., INTERIM REPORT ON THE ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY 87–96 (Comm. Print 2006) [hereinafter INTERIM REPORT]; CURTIS W. COPELAND & RICHARD S. BETH, CONG. RES. SERV., RL34633, CONGRESSIONAL REVIEW ACT: DISAPPROVAL OF RULES IN A SUBSEQUENT SESSION OF CONGRESS (2008); CURTIS W. COPELAND, CONG. RES. SERV., R40997, CONGRESSIONAL REVIEW ACT: RULES NOT SUBMITTED TO GAO AND CONGRESS, (2009); MORTON ROSENBERG, CONG. RES. SERV., RL30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE (2008) [hereinafter ROSENBERG, CONGRESSIONAL REVIEW UPDATE]; RYAN D. WALTERS, TEX. PUB. POL'Y FOUND., THE UNDERVALUATION OF THE CONGRESSIONAL REVIEW ACT (2017); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 83–84 (2006); Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 ADMIN. L. REV. 163, 189–90 (2009); Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677 (2004); Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95 (1997); Michael J. Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe "Substantially the Same," and Decline to Defer to Agencies Under* Chevron, 70 ADMIN. L.

Part I summarizes the background to the CRA and why Congress adopted that law. Part II then explains how the CRA works and what effect it has on agency rulemaking. Part III reviews the length and breadth of the CRA by discussing the meaning of the critical term "rule" and the retroactive reach of the Act. Part IV analyzes the Act's judicial review provision. That part maintains that Congress has precluded judicial review of any action taken by Congress or the President under the CRA, but not of an *agency's* compliance with that law. In fact, Part IV concludes that Congress could *not* preclude review of such a claim without violating the Fifth Amendment Due Process Clause.[9] Part V offers—and responds to—the argument that the CRA is unlikely to allow Congress to do much more than eliminate rules that agencies adopt in the twilight of an outgoing administration. The article concludes in Part VI by saying that the CRA should be helpful in corralling agency ex-

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REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009317 [https://perma.cc/ZY4D-4GL5]; Sean D. Croston, *Congress and the Courts Close Their Eyes: The Continuing Abdication of the Duty to Review Agencies' Noncompliance with the Congressional Review Act*, 62 ADMIN. L. REV. 907 (2010); Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the "Substantially Similar" Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707 (2011); Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051 (1999) [hereinafter Rosenberg, *Whatever Happened*]; Julie A. Parks, Comment, *Lessons in Politics: Initial Use of the Congressional Review Act*, 55 ADMIN. L. REV. 187 (2003); Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162 (2009); Daren Bakst & James L. Gattuso, *The Stars Align for the Congressional Review Act*, HERITAGE FOUND. (Dec. 16, 2016), http://thf-reports.s3.amazonaws.com/2016/IB4640.pdf [https://perma.cc/EG45-M79E]; Sam Batkins & Adam J. White, *Should We Fear 'Zombie' Regulations?*, REGULATION, Summer 2017, at 16; Alex Guillen, *GOP onslaught on Obama's 'midnight rules' comes to an end*, POLITICO (May 7, 2017, 7:10 AM), http://www.politico.com/story/2017/05/07/obama-regulations-gop-midnight-rules-238051 [https://perma.cc/PR2J-TTWN]; Brian Mannix, *Midnight Mulligan: The Congressional Review Act Rides Again!*, LAW & LIBERTY (Nov. 17, 2016), http://www.libertylawsite.org/2016/11/17/midnight-mulligan-the-congressional-review-act-rides-again/ [https://perma.cc/S6X4-4M6S]; Philip A. Wallach & Nicholas W. Zeppos, *How powerful is the Congressional Review Act?*, BROOKINGS INST. (Apr. 24, 2017); Sarah Westwood, *White House faces rough road to deregulation as its favorite tool, the Congressional Review Act, expires*, WASH. EXAMINER (May 8, 2015, 12:01 AM), http://www.washingtonexaminer.com/white-house-faces-rough-road-to-deregulation-as-its-favorite-tool-the-congressional-review-act-expires/article/2622125 [https://perma.cc/PP7J-JPLL].

9. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property without due process of law . . . .").

cesses, but new legislation could achieve that result more effectively and efficiently.

I. THE PROVENANCE OF THE CONGRESSIONAL REVIEW ACT: THE LIFE AND DEATH OF THE LEGISLATIVE VETO

Regulatory agencies are a necessity in contemporary America. For legal, structural, and political reasons, neither Congress nor the federal courts can decide which people should be charged with a crime, which compounds are hazardous waste, which pharmaceuticals are safe and effective, which weapons systems are most reliable, which grant applicants should be funded, or which individuals are disabled. Executive branch officials are necessary to make those calls. For many people, however, agencies are a necessary evil. There is the risk that they may make a hash out of a particular assignment or pursue their own form of "empire building" by expanding their jurisdiction beyond what Congress authorized. Further, the public has little to say about what agencies do, which people should fill those departments, and who should be dismissed.

Congress has that authority, along with a box of tools at its disposal to supervise an agency. Congress must establish agencies and approve their budgets.[10] Members therefore have the opportunity to set or revise an agency's priorities, secure promises from senior agency officials about its work during the upcoming fiscal year, and publicly embarrass at budget or oversight hearings agency officials whose organization has engendered public hostility.[11] Every member can also introduce legislation that would clip an agency's wings, and an important member's minatory presence can deter an agency from going on a frolic and detour. Also, members have almost unlimited access to various media outlets, which are more than happy to report how "troubled" a member is at the goings-on in a particular agency and how the agency has abused its authority in one fashion or another. The Senate also has a weapon

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10. *See* U.S. CONST. art. I, § 8, cl. 18 (the Necessary and Proper Clause); *id*. § 9, cl. 7 (the Appropriations Clause); *id*. art. II, § 2, cl. 1 (contemplating the creation of "executive Departments").

11. *See, e.g.*, CURTIS W. COPELAND, CONG. RES. SERV., RL34354, CONGRESSIONAL INFLUENCE ON RULEMAKING AND REGULATION THROUGH APPROPRIATIONS RESTRICTIONS (2008).

that the House of Representatives lacks: confirmation hearings.[12] Senators can obtain concessions from officials as a condition of receiving their votes for the position to which officials aspire. Every member and every committee also has staff that can negotiate with an agency's personnel over the direction it has taken or will take, and staff members who are dissatisfied with an agency's response are in a position to persuade their boss that an agency has "gone rogue." If the congressional staff are not familiar with a particular example of agency overreach, there are numerous private businesses, organizations, and individuals that are more than willing to let the staff know what is going on in the fourth branch.

Nonetheless, during the New Deal Congress came up with an additional means of restraining agencies: the legislative veto. Borrowing from the presidential veto, a legislative veto would allow both chambers—and, sometimes, just one—to nullify a specific agency action that a majority found unauthorized or unwise.[13] The rationale for the legislative veto was in part a version of "the greater includes the lesser" argument. The argument was that Congress should be free to reserve a legislative veto because Congress need not create a particular agency or empower one to adopt rules. Part of the justification was practical. Delegation is risky because of the difficulty of ensuring that agency officials adhere to Congress's mandates—what economists call a "principal-agent problem"—so Congress felt a need to nullify unwise agency actions before they became effective. The Supreme Court had also refused to limit the type or amount of authority that Congress could delegate

12. *See* U.S. CONST. art. II, § 2, cl. 1 (The Appointments Clause requires the "Advice and Consent" of the Senate for some "Officers of the United States.").

13. *See* Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1370 (1977); Note, *supra* note 8, at 2164 ("The problem of congressional control of the administrative state is not new. As early as the 1930s, members of Congress worried that wide delegations of administrative authority would leave the unelected bureaucracy politically unaccountable. Yet they also realized that Congress could not pass enough specific legislation to regulate the increasingly complex world. The legislative veto was seen as a partial solution to this dilemma. Congress would grant broad rulemaking authority to administrative agencies, but would reserve the ability to disapprove regulations that Congress disfavored. No single statute created an across-the-board legislative veto. Instead, over the course of sixty years, Congress enacted more than 200 federal statutes with individual legislative vetoes." (footnotes omitted)).

to agencies, so the legislative veto served as a means of compensating for the absence of any cap on what agencies could be allowed to do.[14] The legislative veto seemed perfect for the job.

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14. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1252–53 (1994). The Supreme Court has taken a hands-off approach to delegation issues. The Court has decided some degree of delegation is essential to manage today's society and that Congress is in a better position than the courts to decide what and how much authority that should be. *See, e.g.*, Opp Cotton Mills, Inc. v. Adm'r of the Wage & Hour Div. of the Dep't of Labor, 312 U.S. 126, 145 (1941) ("In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy in fixing, for example, a tariff rate, a railroad rate or the rate of wages to be applied in particular industries by a minimum wage law. The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable. The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective."). As long as Congress has identified some remotely usable "intelligible principle to which the person or body authorized to [act] is directed to conform," J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928), even one as vacuous as "excessive profits," *see* Lichter v. United States, 334 U.S. 742 (1948), the Court has upheld the delegation of even large-scale rulemaking authority. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) (upholding delegation to set ambient air quality standards "allowing an adequate margin of safety"); Mistretta v. United States, 488 U.S. 361 (1989) (upholding delegation of authority to promulgate sentencing guidelines); Am. Power & Light Co. v. SEC, 329 U.S. 90 (1946) (upholding delegation of authority to Securities and Exchange Commission to prevent unfair or inequitable distribution of voting power among security holders); Yakus v. United States, 321 U.S. 414 (1944) (upholding delegation to Price Administrator to fix "fair and equitable" commodity prices); Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591 (1944) (upholding delegation to Federal Power Commission to determine "just and reasonable" rates); Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943) (upholding delegation to Federal Communications Commission to regulate broadcast licensing "as public interest, convenience, or necessity" require). For opposing views on whether this state of affairs injures the public, benefits it, or is unavoidable regardless of its pluses and minuses, see, for example, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 133–34 (1980); THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 125–26 (2d ed. 2009); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1995); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399 (2000); Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969); David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 U. PITT. L. REV. 1 (2002); Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL'Y 87 (2010); Douglas H. Gins-

Congress certainly thought so. It took full advantage of that option, adding legislative veto provisions to hundreds of different statutes.[15]

The legislative veto, however, was controversial. Presidents saw it as an infringement on their executive authority.[16] When used to overturn an agency adjudication, the legislative veto could also be criticized as an effort by Congress to play the role of an Article III court.[17] The constitutionality of that practice finally reached the Supreme Court in 1983, and, unfortunately for Congress, the legislative veto did not survive. The Supreme Court ruled in *INS v. Chadha*[18] that Article I defines the process by which Congress may legislate, that Article I requires bicameral passage of legislation and presentment of that legislation to the President for his signature (or veto, followed by a possible congressional override), and that Congress cannot end-run the Article I procedure through a legislative veto, however practical that option might be.[19] The result was drastic: the numerous legislative veto provisions that Congress had added to legislation—whether the one- or two-chamber variety—were now unenforceable.[20]

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burg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251 (2010); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2005); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985); Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303 (1999); Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359 (2017).

15. *See* INS v. Chadha, 462 U.S. 919, 959–60 (1983) (Powell, J., concurring in the judgment); *id*. at 1003–13 (White, J., dissenting) (collecting statutes containing a legislative veto); Note, *supra* note 8, at 2164.

16. *See Chadha*, 462 U.S. at 976 & nn.12–14 (White, J., dissenting) (collecting authorities arguing pro and con on the constitutionality of the legislative veto).

17. *See id*. at 960–67 (Powell, J., concurring in the judgment).

18. 462 U.S. 919 (1983).

19. *See id*. at 944–59.

20. *See id*.; *see also* U. S. Senate v. FTC, 463 U.S. 1216 (1983) (relying on *Chadha* to affirm a lower court holding that a two-House veto is unconstitutional); Process Gas Grp. v. Consumer Energy Council, 463 U.S. 1216 (1983) (same, one-House veto).

II. CONGRESS'S RESPONSE TO THE DEMISE OF THE LEGISLATIVE VETO: THE CONGRESSIONAL REVIEW ACT OF 1996

The CRA was Congress's attempt to devise a lawmaking procedure that would approximate a legislative veto as closely as *Chadha* would allow.[21] The CRA falls between the quick-acting legislative veto and the deliberative process that Congress ordinarily uses to enact legislation. Like a legislative veto,

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21. The CRA was negotiated and added to a larger bill. *See supra* note 7. It was not the subject of pre-enactment congressional hearings, a Senate or House of Representative committee report, or extensive floor debate. Accordingly, the only CRA "legislative history" consists of a post-enactment joint statement by its sponsors. There are also a few allied documents created by the Congressional Research Service and congressional staff reflecting on the CRA and Congress's intent. *See* 142 CONG. REC. 8196 (1996) (Joint Statement of Senators Nickles, Reid, and Stevens); *id.* at 6922, 6929 (Joint Explanatory Statement of House and Senate Sponsors); *id.* at 6907 (Statement of Rep. David McIntosh); ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 37. Some commentators find worthwhile the statements of the CRA's sponsors. *See, e.g.*, Batkins & White, *supra* note 8, at 17. The difficulties in divining the intent of a collegial body are well known. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383–84 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter . . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it . . . ."). Decades ago, the Supreme Court went from pillar to post on the question whether legislative history is useful or even relevant to statutory interpretation. *Compare, e.g.*, Grove City Coll. v. Bell, 465 U.S. 555, 566-67 (1984) (relying on post-enactment remarks of a bill's sponsors), *with, e.g.*, Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) (finding post-enactment legislative history to be entitled to little weight). More recent decisions demonstrate that the Court believes it should have very little, if any, weight. *See* Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (affirming that statutory interpretation begins and ends with the text of a statute if the text is clear). If and to the extent that those materials are relevant to determine the intent of a collegial body, they would support the broad interpretation of the CRA offered in this article. *See* INTERIM REPORT, *supra* note 8, at 87–88 ("The framers of the Congressional review provision intentionally adopted the broadest possible definition of the term 'rule' when they incorporated section 551(4) of the APA. As indicated previously, the legislative history of section 551(4) and the case law interpreting it make it clear that it was meant to encompass all substantive rulemaking documents—such as policy statements, guidance, manuals, circulars, memoranda, bulletins and the like—which as a legal or practical matter an agency wishes to make binding on the affected public . . . . The committees are concerned that some agencies have attempted to circumvent notice-and-comment requirements by trying to give legal effect to general statements of policy, 'guidelines,' and agency policy and procedure manuals. 'The committees admonish the agencies that the APA's broad definition of 'rule' was adopted by the authors of this legislation to discourage circumvention of the requirements of chapter 8.'" (quoting 142 Cong. Rec. E571, at E578; 142 Cong. Rec. S3683, at S3687 (Joint Explanatory Statement of House and Senate Sponsors)).

the Act enables Congress to expeditiously nullify administrative rules that it finds unauthorized, unnecessary, or unwise before they can go into effect. Unlike a legislative veto, the CRA requires both houses of Congress to pass the identical joint resolution and the President to sign it (or Congress to override his veto) for a rule to be nullified. The CRA therefore satisfies the requirements of Article I described in *Chadha* while trying to preserve at least some of the expedition that the legislative veto afforded.[22]

The CRA has certain unique features that set it apart from the traditional Article I legislative process. Before a rule can take effect, the rule-issuing agency must submit to each house of Congress and the Comptroller General[23] a "report" containing the rule, a summary of its provisions, any cost-benefit analysis the agency conducted, and information regarding whether the agency complied with certain other federal laws.[24] Once the

22. One organization has challenged the constitutionality of the CRA on the ground that the act unconstitutionally permits Congress and the President to nullify a statutorily authorized agency rule without revising the underlying act of Congress. *See, e.g.*, Batkins & White, *supra* note 8, at 20–21 (discussing a lawsuit filed by the Center for Biological Diversity challenging CRA nullification of an Interior Department rule). That argument is fatally flawed in two respects. One is that, under *Chadha*, Article I requires only bicameral passage of a bill, presentment to the President, and his signature for the bill to become a law. 462 U.S. at 946–52. Congress and the President can collaborate to repeal a regulation without amending the underlying statute even if the CRA had never existed. The other flaw is that passage of a joint resolution of disapproval under the CRA *does* modify the underlying statute. *See infra* notes 191–94 and accompanying text.

23. The Comptroller General is the Director of the Government Accountability Office (GAO), previously known as the Government Accounting Office. Created by the Budget and Accounting Act of 1921, Ch. 18, § 312, 42 Stat. 20 (1921) (codified as amended in scattered sections of 31 U.S.C.), the GAO provides investigative, evaluative, and auditing services for Congress. *See* KAREN L. MANOS, GOVERNMENT CONTRACT COSTS & PRICING § 86:11 (2nd ed. 2017); *see also* GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, 118 Stat. 811 (2004).

24. 5 U.S.C. § 801(a)(1)(A) (2012) ("Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—(i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule."); *id*. § 801(a)(1)(B) ("On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—(i) a complete copy of the cost-benefit analysis of the rule, if any; (ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609; (iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and (iv) any other relevant information or requirements under any other Act and any relevant Executive orders."). The Secre-

report is filed, each chamber must forward it to the chairman and ranking member of the relevant committee with jurisdiction over the rule.[25]

Submission of the report starts three different clocks. One gives the Comptroller General fifteen days to comment on a "major rule,"[26] which the Act defines as a rule that will have a material effect on the economy.[27] The Comptroller General must include in his analysis whether the agency has performed a cost-benefit analysis and has complied with several other particular statutes.[28] The second, and more important, clock oper-

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tary of the Senate and the House Parliamentarian receive agency rules for Congress. COPELAND, *supra* note 8, at 10. The GAO places submitted rules into a database on its website. MAEVE P. CAREY ET AL., CONG. RES. SERV., F43992, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS 11, app. at 23–24 (2016), https://fas.org/sgp/crs/misc/R43992.pdf [https://perma.cc/NNW6-HK3Q] (listing opinions).

25. 5 U.S.C. § 801(a)(1)(C) ("Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.").

26. *Id.* § 801(a)(2)(A) ("The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B)."); *id*. § 801(a)(2)(B) ("Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).").

27. 5 U.S.C. § 804 ("For purposes of this chapter . . . (2) The term 'major rule' means any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.").

28. Among the laws that the Comptroller General considers when preparing his report are the following: the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified at 2 U.S.C. §§ 1501–07 (2012)); the Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (codified at 5 U.S.C. ch. 5 (2012)); the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (codified as amended at 5 U.S.C. ch. 6 (2012)); the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified at 44 U.S.C. §§ 3501–21 (2012)); and Executive Order No. 12,866, 58 Fed. Reg. 51,735 (1993) (requiring a cost-benefit analysis of every proposed rule). *See Congressional Review Act: Hearing Before the Subcomm. on Commer-*

ates for the sixty-day period that Congress may use to nullify the rule. The CRA lengthens the sixty-day period if it is interrupted by a congressional adjournment to prevent agencies from running out the clock by submitting rules at the tail end of a session.[29] The third clock concerns when a rule may go into effect. Ordinarily, a rule cannot take effect for at least thirty days after the *Federal Register* publishes it in final form.[30] The CRA increases that period to sixty days in the case of a "major" rule to afford Congress additional time to decide whether to nullify it.[31] The President can advance the effective date if he

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cial & Admin. Law of the H. Comm. on the Judiciary, 105th Cong. 37–38 (1997) (statement of Robert P. Murphy, General Counsel, GAO) (so noting). Given the brief period available for its analysis, the GAO uses a checklist to conduct "a paper review of the processes employed in the rulemaking under applicable statutory and regulatory mandates." *Id*. at 2; *see also* ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 3, 18. In response to requests from a member of Congress, the GAO has also issued opinions analyzing whether a particular agency memorandum or pronouncement is a "rule" for CRA purposes. *See 10th Anniversary of the Congressional Review Act: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 109th Cong. 12–13 (2006) (statement of J. Christopher Mihm, Managing Dir., Strategic Issues, GAO); Susan A. Poling, U.S. Gov't Accountability Office, Opinion Letter on GAO's Role and Responsibilities Under the Congressional Review Act, at 7 n.36 (May 29, 2014); CAREY, *supra* note 24, at 11–12, app. at 23–24 (listing opinions).

29. 5 U.S.C. § 801(d)(1) ("In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring—(A) in the case of the Senate, 60 session days, or (B) in the case of the House of Representatives, 60 legislative days, before the date the Congress adjourns a session of Congress through the date on which the same or succeeding Congress first convenes its next session, section 802 shall apply to such rule in the succeeding session of Congress."); *id*. § 801(d)(2)(A) ("In applying section 802 for purposes of such additional review, a rule described under paragraph (1) shall be treated as though—(i) such rule were published in the Federal Register (as a rule that shall take effect) on—(I) in the case of the Senate, the 15th session day, or (II) in the case of the House of Representatives, the 15th legislative day, after the succeeding session of Congress first convenes; and (ii) a report on such rule were submitted to Congress under subsection (a)(1) on such date."). The extension of the congressional review period does not excuse an agency from compliance with the submission requirement. *Id*. § 801(d)(2)(B) ("Nothing in this paragraph shall be construed to affect the requirement under subsection (a)(1) that a report shall be submitted to Congress before a rule can take effect.").

30. 5 U.S.C. § 553(d). A rule can postpone the effective date for a longer period, and an agency can accelerate that date for "good cause." *Id*. § 553(d)(1)–(3).

31. 5 U.S.C. § 802(b)(2) ("For purposes of this section, the term 'submission or publication date' means the later of the date on which—(A) the Congress receives the report submitted under section 801(a)(1); or (B) the rule is published in the Federal Register, if so published."). It could be argued that Congress should be free to bundle together and review multiple rules simultaneously and pass one

makes certain findings attesting to the need to avoid delay.[32] The President's acceleration of the effective date for a rule, however, does not prevent Congress from disapproving it.[33]

The filing of the rule with Congress is a critical event for CRA purposes.[34] To expedite Congress's action,[35] the CRA cre-

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joint resolution nullifying all of them. That approach makes sense as a matter of policy and efficiency, but the text of the CRA seems to contemplate that Congress must limit a joint resolution to one particular rule. *See id*. § 802(a) (defining "joint resolution"); *id*. § 802(b)(2)(B) (referring to "*the* rule" (emphasis added)); *see also* CAREY, *supra* note 24, at 4; ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 22–23. If an agency were to submit more than one rule in a single "report," however, the answer could be different. Plus, Article I does not regulate the number of joint resolutions that can be contained in any one bill. *See* INS v. Chadha, 462 U.S. 919, 946–52 (1983) (describing the Article I lawmaking process). Accordingly, if a joint resolution listed each rule in a separate paragraph, each such reference, for purposes of Section 802, would be to "the rule." That would enable Congress to include multiple rules within one joint resolution. Of course, packaging more than one agency rule in one joint resolution could materially change political support for the resolution.

32. 5 U.S.C. § 801(c)(1) ("Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress."); *id*. § 801(c)(2) ("Paragraph (1) applies to a determination made by the President by Executive order that the rule should take effect because such rule is—(A) necessary because of an imminent threat to health or safety or other emergency; (B) necessary for the enforcement of criminal laws; (C) necessary for national security; or (D) issued pursuant to any statute implementing an international trade agreement."); *id*. § 801(d)(3) ("A rule described under paragraph (1) shall take effect as otherwise provided by law (including other subsections of this section).").

33. 5 U.S.C. § 801(c)(3) ("An exercise by the President of the authority under this subsection shall have no effect on the procedures under section 802 or the effect of a joint resolution of disapproval under this section."); *id*. § 801(f) ("Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.").

34. The GAO General Counsel has concluded that the sixty-day period does not begin to run until both houses of Congress have received the agency's report. ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 3 n.5.

35. 5 U.S.C. § 802(a) ("For purposes of this section, the term 'joint resolution' means only a joint resolution introduced in the period beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress and ending 60 days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), the matter after the resolving clause of which is as follows: 'That Congress disapproves the rule submitted by the _____ relating to _____, and such rule shall have no force or effect.' (The blank spaces being appropriately filled in)."); *id*. § 802(b)(1) ("A joint resolution described in subsection (a) shall be referred to the committees in each House of Congress with jurisdiction."); *id*. § 802(c) ("In the Senate, if the committee to

ates a fast-track procedure that guarantees a vote before the sixty-day review period has expired.[36] The biggest concern was the Senate parliamentary practices, so the CRA directly addresses and eliminates them as a roadblock to a vote. If the relevant Senate committee does not vote on the rule within twenty legislative days, thirty Senators can bring a joint resolution of disapproval to the floor.[37] There, the resolution can be brought up for debate at any time. Debate is limited to a maximum of ten hours split evenly between supporters and opponents, stopping a filibuster; the resolution is not subject to amendment, a point of order, or a motion to postpone consideration; and there are no appeals to the full Senate from a ruling by the chair on points of procedure.[38] A House-passed joint

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which is referred a joint resolution described in subsection (a) has not reported such joint resolution (or an identical joint resolution) at the end of 20 calendar days after the submission or publication date defined under subsection (b)(2), such committee may be discharged from further consideration of such joint resolution upon a petition supported in writing by 30 Members of the Senate, and such joint resolution shall be placed on the calendar.").

36. *See* Note, *supra* note 8, at 2176–77 ("Though the executive may not be much more concerned about disapproval resolutions than about ordinary legislation, disapproval resolutions do benefit from a streamlined legislative process unavailable to ordinary legislation. Like all fast-track legislative procedures, the CRA is designed to ensure that political minorities are not able to use congressional procedure to hijack policy. That this feature of the CRA was seen as necessary provides useful evidence in contemporary debates about the legislative and regulatory processes." (footnote omitted)).

37. 5 U.S.C. § 802(d)(1) ("In the Senate, when the committee to which a joint resolution is referred has reported, or when a committee is discharged (under subsection (c)) from further consideration of a joint resolution described in subsection (a), it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for a motion to proceed to the consideration of the joint resolution, and all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the joint resolution is agreed to, the joint resolution shall remain the unfinished business of the Senate until disposed of.").

38. *Id.* § 802(d)(2) ("In the Senate, debate on the joint resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing the joint resolution. A motion further to limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the joint resolution is not in order."); *id*. § 802(d)(3) ("In the Senate, immediately following the conclusion of the debate on a joint resolution described in subsection (a), and a single quorum call at the conclusion of the debate if requested in accordance with the

resolution is immediately referred to the full Senate.[39] That process keeps the Senate from stalling.[40]

If both chambers have adopted the joint resolution, the CRA procedure reverts to the traditional Article I process. If either the Senate or the House of Representatives votes on and fails to pass a joint resolution of disapproval, the agency rule remains in place.[41] By contrast, if a joint resolution passes both chambers, it goes to the President for his signature or veto. If the President signs the joint resolution, or the Congress overrides

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rules of the Senate, the vote on final passage of the joint resolution shall occur."); *id*. § 802(d)(4) ("Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a joint resolution described in subsection (a) shall be decided without debate.").

39. 5 U.S.C. § 802(f) ("If, before the passage by one House of a joint resolution of that House described in subsection (a), that House receives from the other House a joint resolution described in subsection (a), then the following procedures shall apply: (1) The joint resolution of the other House shall not be referred to a committee. (2) With respect to a joint resolution described in subsection (a) of the House receiving the joint resolution—(A) the procedure in that House shall be the same as if no joint resolution had been received from the other House; but (B) the vote on final passage shall be on the joint resolution of the other House.").

40. The vote is on the rule in its entirety, not on a portion of it. *See* CAREY, *supra* note 24, at 4; ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 24 ("An up or down vote on the entire rule would appear to have been the intent of the framers of the review provision."); Rosenberg, *Whatever Happened*, *supra* note 8, at 1066 ("The language and structure of the provision, and the supporting explanation of the legislative history, contemplates a speedy, definitive and limited process. It is not unlike the legislative processes created for congressional actions dealing with military base closings, international trade agreements, and presidential reorganization plans, among others. Each deals with complex, politically-sensitive decisions that allowed only an up or down vote by Congress on the entire package presented. It was understood that piecemeal consideration would delay and perhaps obstruct legislative resolution of the issues before it. For similar reasons, the statutory structure and legislative history of the review provision strongly indicates that Congress intended the process to focus on submitted rules as a whole, and not to allow veto of individual parts." (footnotes omitted)).

41. Congress's failure to disapprove a rule does *not* constitute approval of it. The CRA has a provision to that effect. *See* 5 U.S.C. § 801(g) ("If the Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval."). Plus, as a constitutional matter, a unicameral or bicameral failure to pass a joint resolution of disapproval *cannot* be treated as approval. *Chadha* made clear that congressional approval of the rule would require bicameral passage of a joint resolution (or some other bill), presentment to the President, and his signature (or bicameral passage of a veto override resolution). *See* INS v. Chadha, 462 U.S. 919, 944–59 (1983).

his veto, the rule is invalidated.[42] To prevent the agency from engaging in shenanigans—by reissuing the same rule under a different name or with only trivial or cosmetic revisions—the CRA prohibits the agency from promulgating a new rule that is "substantially the same" as the one invalidated absent an intervening act of Congress.[43]

III. THE REACH OF THE CONGRESSIONAL REVIEW ACT

A. The Lateral Breadth of the CRA: What Is a "Rule"?

Oliver Wendell Holmes characterized a rule as "the skin of a living policy."[44] The meaning of that term is critical for the CRA because it is the base on which the entire statute rests. The CRA, however, did not invent that term. The Administrative Procedure Act (APA) first defined it fifty years earlier. The APA defines a rule (in part) as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."[45]

The APA divides rules into two categories.[46] *Legislative* or *substantive rules* create legally enforceable rights and duties.[47]

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42. 5 U.S.C. § 802(b)(1) ("A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.").

43. *Id*. § 802(b)(2) ("A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.").

44. CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 2–3 (4th ed. 2011). The reason is that, "[i]ncreasingly, rulemaking defines the substance of public programs. It determines, to a very large extent, the specific legal obligations we bear as a society. Rulemaking gives precise form to the benefits we enjoy under a wide range of statutes. In the process, it fixes the actual costs we incur in meeting the ambitious objectives of many public programs." *Id*. at 2.

45. The full definition of a "rule" in the APA is found at 5 U.S.C. § 551(4) (2012) ("'[R]ule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing . . . .").

46. 5 U.S.C. § 553(b), (d).

Interpretative rules come in various forms, such as guidance documents, manuals, opinions letters, so-called "Dear Colleague" letters, and the like.[48] In theory, interpretive rules merely construe statutes, legislative rules, agency practices, or other interpretative rules and do not have the same legal effect as legislative rules.[49] The Supreme Court, however, largely eliminated that distinction. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[50] the Court held that federal courts must accept an agency's reasonable interpretation of an ambiguous statute even if the court would have read the law differently.[51] As a practical matter, in many cases interpretive

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47. *See* Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977) (An authorized and properly issued rule has "the force and effect of law." (quoting TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947)); *see also, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 295 & n.18 (1979).

48. See, e.g., Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like— Should Federal Agencies Use Them To Bind the Public?, 41 DUKE L.J. 1311, 1320 (1992) ("[R]ules" include "legislative rules, interpretive rules, opinion letters, policy statements, policies, program policy letters, Dear Colleague letters, regulatory guidance letters, rule interpretations, guidances, guidelines, staff instructions, manuals, questions-and-answers, bulletins, advisory circulars, models, enforcement policies, action levels, press releases, testimony before Congress, and many others"); Rosenberg, Whatever Happened, supra note 8, at 1054. Distinguishing between legislative and interpretive rules can be difficult, and even the correct approach to that undertaking is a controversial issue. Compare John F. Manning, Nonlegislative Rules, 72 GEO. WASH. L. REV. 893 (2004) (arguing that the label "legislative rules" should only be applied to rules that underwent the APA notice-and-comment process, with all other agency pronouncements properly deemed interpretative), with Richard J. Pierce, Jr., Distinguishing Legislative Rules from Interpretive Rules, 52 ADMIN. L. REV. 547 (2000) (discussing the other tests used to make that distinction); see also Perez v. Mort. Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015) (noting but declining to decide the issue). The answer to that question, however, has no effect on the meaning of the underlying term "rule."

49. *See, e.g.*, RICHARD J. PIERCE, JR., ET AL., ADMINISTRATIVE LAW AND PROCESS § 6.4.7a, at 292 (6th ed. 2014); *id.* § 6.4.5, at 273.

50. 467 U.S. 837 (1984).

51. *Id.* at 865–66. A similar but even more deferential principle applies when an agency construes one of its rules. In that case, the administrative interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Bowles v. Seminole Rock Co., 325 U.S. 410, 414 (1945). The Court has applied that standard in diverse settings—for example, when the agency acted in a formal or informal proceeding, when it interpreted a rule in the context of litigation, when its later interpretation appeared to conflict with a different one, when the "agency" was a nontraditional regulatory agency, and even when the agency advanced its interpretation in a legal brief. *See, e.g.*, Talk America, Inc. v Michigan Bell Tel. Co., 564 U.S. 50, 59 (2011); Long Island Care at Home, Ltd. v.

rules can have the same effect as legislative ones because of their *in terrorem* effect on regulated parties.[52] The result is that "[a]lthough legislative and nonlegislative rules are conceptual-

Coke, 551 U.S. 158, 170–71 (2007); Stinson v. United States, 508 U.S. 36, 44–45 (1993) (U.S. Sentencing Commission); Udall v. Tallman, 380 U.S. 1, 16–17 (1965) (oil and gas leases). The Supreme Court reaffirmed *Seminole Rock* in *Auer v. Robbins*, 519 U.S. 452, 461 (1997), although some justices later expressed misgivings about that rule. *See Mort. Bankers Ass'n*, 135 S. Ct. at 1210 (Alito. J., concurring in part and concurring in the judgment); *id*. at 1212–13 (Scalia, J., concurring in the judgment); *id*. at 1213–25 (Thomas, J., concurring in the judgment). There is a strong case that the *Seminole Rock* rule is mistaken and should be overruled. *See id.* at 1211–13 (Scalia, J., concurring in the judgment); *id*. at 1213–25 (Thomas, J., concurring in the judgment); Decker v. Nw. Envtl. Cntr., 133 S. Ct. 1326, 1339–42 (2013) (Scalia, J., concurring in part and dissenting in part); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996). Justice Scalia expressed a willingness to reconsider *Seminole Rock* before his death. It is uncertain whether a majority of the Court is willing to do so. Interestingly though, the newest member of the Court, Justice Neil Gorsuch, wrote while a court of appeals judge that he would overrule *Chevron*. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring). As a matter of policy, the best defense of *Auer* deference is the same one offered to support *Chevron*. *See* Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297, 306, 308 (2017). Accordingly, if *Chevron* falls, *Auer* will follow.

52. *See Mort. Bankers Ass'n*, 135 S. Ct. at 1211–12 (Scalia, J., concurring in the judgment) ("By supplementing the APA with judge-made doctrines of deference, we have revolutionized the import of interpretive rules' exemption from notice-and-comment rulemaking. Agencies may now use these rules not just to advise the public, but also to bind them. After all, if an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law."); *see also* K.C. JOHNSON & STUART TAYLOR, JR., THE CAMPUS RAPE FRENZY: THE ATTACK ON DUE PROCESS AT AMERICA'S UNIVERSITIES (2017) (discussing the effect that a 2011 "Dear Colleague" letter published by the Department of Education Office of Civil Rights had on colleges); Anthony, *supra* note 48, at 1328–29; Randolph J. May, *Ruling Without Real Rules—Or How To Influence Private Conduct Without Really Binding*, 53 ADMIN. L. REV. 1303 (2001). Not every agency opinion receives *Chevron* deference. *See, e.g.*, Christian v. Harris Cnty., 529 U.S. 576, 587 (2000) (ruling that agency opinion letters are not entitled to receive *Chevron* deference); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1991) (same, EEOC opinions). Unless Congress expressly empowered an agency to fill a statutory gap, an agency's administration of a statutory scheme is entitled only to whatever persuasive value its opinion contains under the standard enunciated in *Seminole Rock* and *Auer*. *See* United States v. Mead Corp., 533 U.S. 218, 227–34 (2001); Pierce, *supra* note 48. In many instances, however, that may tip the scale in the government's favor, and in no instance does a private party receive any degree of deference for its reading of the law.

ly distinct and although their legal effect is profoundly different, the real-world consequences are usually identical."[53]

The Justice Department[54] and the federal courts have made clear that the term "rule" must be construed broadly.[55] As one lower federal court put it, "The APA defines the term 'rule'

53. Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 34 DUKE L.J. 381, 384 (1985). For that reason, Attorney General Jeff Sessions recently prohibited Justice Department lawyers from issuing "guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch (including state, local, and tribal governments)." Memorandum from Attorney General Jeff Sessions to All Components Regarding Prohibition on Improper Guidance Documents 1–2 (Nov. 16, 2017), https://www.justice.gov/opa/press-release/file/1012271/download [https://perma.cc/34J9-Y39P].

54. *See* TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 13 (1947) ("The definition of rule is not limited to substantive rules, but embraces interpretive, organizational and procedural rules as well.").

55. *See* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 892 (1990) ("[T]he individual actions of the BLM identified in the six affidavits can be regarded as rules of general applicability . . . announcing, with respect to vast expanses of territory that they cover, the agency's intent to grant requisite permission for certain activities, to decline to interfere with other activities, and to take other particular action if requested."); Chem. Serv., Inc. v. Envtl. Monitoring Sys. Lab., 12 F.3d 1256, 1267 (3d Cir. 1993) ("The MOU would appear to fit within the definition of a rule because EPA has entered into a statement of general applicability and future effect designed to implement the [Federal Technology Transfer Act of 1986, Pub. Law No. 99-502, 100 Stat. 1785]"); Caudill v. Blue Cross & Blue Shield of N.C., 999 F.2d 74, 76 (4th Cir. 1993) (agency medical benefit determinations); Poling, *supra* note 28, at 8 (noting that GAO had concluded that an HHS memorandum discussing the government's ability to waive work requirements under the Temporary Assistance for Needy Families Program was a CRA rule); COPELAND, *supra* note 8, at 11–14 (listing eleven different agency documents deemed rules, such as procurements requirements for the National School Lunch Program, a designation of critical habitat by the Fish & Wildlife Service, an EEOC document discussing health benefits for retirees, a document issued by the Office of Thrift Supervision addressing "Permissible Activities of Savings and Loan Holding Companies," and a document issued by the Bureau of Land Management regarding the issuance of oil and gas leases in Alaska); ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 2–3 (stating, based on a review of federal court decisions, that a "rule" includes "interpretive and substantive rules, guidelines, formal and informal statements, policy proclamations, employee manuals and memoranda of understanding, among other types of actions"); *id.* at 26–27 (noting that the GAO had deemed the following to be "rules under the CRA": a letter issued by the Centers for Medicare and Medicaid Services to state officials concerning the State Children's Health Insurance Program, a Department of Interior Trinity River "Record of Decision," the Farm Credit Administration's national charter initiative, the EPA's "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits," the Tongass National Forest Land and Resources Management Plan, and a Secretary of Agriculture memorandum concerning the Emergency Salvage Timber Sale Program).

broadly enough to include virtually every statement an agency may make . . . ."[56] The analysis of two commentators is quite instructive:

> [T]he APA definition, interestingly, does not refer to subject matter other than 'law' and 'policy.' In this respect, the definition could not be written more broadly. No area of public policy is excluded . . . . Rules covered a large range of topics in 1946; in the early twenty-first century the scope is virtually limitless . . . . The definition clearly established an expansive relationship between rules, law, and public policy. The terms *implement*, *interpret*, and *prescribe* describe the fullest range of influence that a rule could have.[57]

The CRA incorporates the APA's definition of a "rule" so that term should have the same meaning for both laws (with a few specified exceptions).[58] As the result, by using the "broadest possible definition of the term 'rule,'" Congress ensured that no agency action would escape its consideration.[59]

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56. Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 908 (5th Cir. 1983) (citation omitted).

57. KERWIN & FURLONG, *supra* note 44, at 4–5.

58. The exceptions are for the case-specific application of law or policy; personnel rules; rules of internal agency organization, practice, or procedure; and rules concerning monetary policy by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee. 5 U.S.C. § 804(3)(A)–(C) (2012); *id.* § 807. The CRA also exempts from a "major" rule—but not from a "rule"—"any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that act." *Id.* § 804(2).

59. *See* LUBBERS, *supra* note 8, at 164; Rosenberg, *Whatever Happened*, *supra* note 8, at 1066–67 ("The framers of the congressional review provision intentionally adopted the broadest possible definition of the term "rule" when it incorporated the APA's definition. As indicated previously, the legislative history of section 551(4) of the APA and the case law interpreting it clarifies it was meant to encompass all substantive rulemaking documents—such as policy statements, guidances, manuals, circulars, memoranda, bulletins and the like—which as a legal *or* practical matter an agency wishes to make binding on the affected public." (footnote omitted)); *see also* CAREY, *supra* note 24, at 6 ("Notably, the CRA adopts the broadest definition of 'rule' contained in the APA, which is broader than the category of rules subject to notice and comment rulemaking. Thus, some agency actions that are not subject to notice and comment rulemaking under the APA, and thus may not be published in the *Federal Register*, may still be considered a rule under the CRA." (footnote omitted)); Cohen & Strauss, *supra* note 8, at 102 ("Even though major rules are, in some respects, singled out for more intensive analytical requirements and have their effective date delayed for some period of time, even policy statements, interpretative rules, and technical manuals face congressional review.").

That conclusion makes eminent sense given the purpose of the CRA. Before *Chadha*, Congress could use a legislative veto to nullify rules before they went into effect, and it exercised that option liberally by including more than two hundred legislative veto provisions in regulatory schemes. Denied by *Chadha* of the ability to use that tool, Congress borrowed from the APA the broadly interpreted term "rule" to capture every possible agency document that could affect the public, the economy, or the nation. That term establishes the base for the entire CRA, so it must be read broadly to support the superstructure created by the rest of that law. In fact, only by construing the term "rule" in as broad a manner as the English language allows can that term play the role that Congress intended.

That conclusion also makes eminent sense as a matter of administrative law. Agencies often use interpretive rules to state a position on the meaning of governing statutes and regulations.[60] The practice can be helpful because it enables an agency to clear up an ambiguity in the governing law while avoiding the delay occasioned by the APA notice-and-comment process. But the practice is also a controversial one. Agencies need not submit interpretive rules through the notice-and-comment process,[61] so the first opportunity a private party has for judicial review can occur in an agency enforcement action. In that scenario, however, the controversy is biased in the agency's favor. *Chevron* and other Supreme Court decisions place a thumb on the government's side of the scale when it comes to the meaning of federal law, with the agency winning when it has the better of the argument *and* when courts find themselves in equipoise. That outcome is an oddity. Historically, courts have had the final say on the meaning of the law.[62] Now, administra-

60. Perhaps to avoid the rigors of formal or informal rulemaking, perhaps to avoid giving private parties an immediate opportunity for judicial review, which would be available were an agency to adopt a legislative rule. *See, e.g.*, Perez v. Mort. Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015); KERWIN & FURLONG, *supra* note 44, at 23; Anthony, *supra* note 48, at 1324.

61. *See, e.g.*, 5 U.S.C. § 553(b)(3)(A) (unless another statute directs otherwise, the APA notice-and-comment requirement "does not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."); *Mort. Bankers Ass'n*, 135 S. Ct. at 1204.

62. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

tive agencies sometimes have that power.[63] However large that category of cases may be, the government benefits from the Supreme Court's decision to give agencies decision-making power. In light of what Congress sought to achieve in the CRA, Congress would have wanted to be able to review any agency opinion of the law whose effect would be bolstered by *Chevron* or other case law before that opinion went into effect.

The views of the Government Accountability Office (GAO) as to the meaning of the CRA are also important in this regard. Congress gave the Comptroller General the responsibility to analyze every major rule to learn whether the agency has complied with a variety of laws other than the CRA.[64] That tasking has significance for purposes of the proper interpretation of the CRA. Perhaps the rationale that the Supreme Court used to justify the rule of administrative law adopted in *Chevron*—namely, courts must accept Congress's decision to delegate law-interpreting authority to an agency—does not apply to the CRA because Congress reserved for itself the authority to decide what is and is not a "rule." But *Chevron* is not the only relevant Supreme Court decision. In *Skidmore v. Swift & Co.*,[65] Justice Robert Jackson concluded that "the rulings, interpretations and opinions" of a statute offered by an agency entrusted with the responsibility for making it work are entitled to respect.[66]

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63. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.") (footnotes omitted).

64. *See* Poling, *supra* note 27, at 1, 3 (identifying laws that the Comptroller General considers when preparing his report).

65. 323 U.S. 134 (1944).

66. *Id.* at 139–40 ("There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. And, while we have given them notice, we have had no occasion to try to prescribe their influence. The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular

They "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,"[67] with the exact amount of guidance contingent on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking the power to control."[68] Just as a court would treat as scholarly guidance the opinion of John Henry Wigmore on a point of evidence or that of Arthur Corbin on an issue of contract law, so too should the courts accept a persuasive GAO opinion on the meaning of a CRA "rule."[69] As relevant here, the GAO's interpretation of the CRA can provide valuable guidance to its meaning.

The GAO has adopted a broad interpretation of a "rule" as encompassing any document in which an agency creates, modifies, or describes the law.[70] The GAO also reads the CRA broadly as applying to all new rules, whether or not they are "major" rules and regardless of whether they are legislative or interpretive rules.[71] It has further said that an unsubmitted rule

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case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.").

67. *Id.* at 140.

68. *Id.*

69. *See* Paul J. Larkin, Jr., *The World After* Chevron, HERITAGE FOUND. (Sept. 8, 2016), http://www.heritage.org/courts/report/the-world-after-chevron [https://perma.cc/33SU-RBML].

70. *Chevron* is relevant for another reason too. *Chevron* was decided in 1984, twelve years before the CRA became law, and it gives law-interpreting authority to agencies in a potentially large number of cases. *Chevron* directs courts to place a thumb (maybe the entire hand) on the government's side of the scale. A private party may find it quite difficult to persuade a court to adopt its interpretation of a statute. Under those circumstances, Congress may well have wanted to review an agency's rule, in whatever form it took, before anyone was at risk of facing a losing battle in court.

71. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-268T, CONGRESSIONAL REVIEW ACT 1–3 (2007) (Statement of Gary Kepplinger, General Counsel); *10th Anniversary of the Congressional Review Act*, *supra* note 28, at 9–10, 12; *Congressional Review Act*, *supra* note 28, at 37–38 (stating that agencies must submit all new rules to Congress, but the GAO is required to analyze only major rules); Poling, *supra*

has no legal effect.[72] Those conclusions are fully consistent with the CRA's text and purpose.

The GAO recently reiterated those conclusions in response to a congressional inquiry. Senator Pat Toomey asked the GAO for its opinion on whether a 2013 guidance document issued jointly by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation—a document known as the final Interagency Guidance on Leveraged Lending[73]—was a "rule" for purposes of the CRA and therefore should have been submitted to Congress as that Act requires. "Leveraged lending" generally refers to the extension of large loans to corporate borrowers for the purpose of engaging in mergers and acquisitions, recapitalization, buyouts, and expansion.[74] The Interagency Guidance document addressed a host of subjects, such as "underwriting standards, valuation standards, the risk rating of leveraged loans, and problem credit management."[75] The document also spoke to the types of actions and considerations that might prompt the three agencies to take an administrative action against a bank.[76] The agencies argued that the document was not a "rule" because it merely set forth general factors that they would consider when deciding, in the exercise of their discretion, whether to take an action against a bank. The GAO agreed with the agencies that the document was a policy statement, not a dictate affecting a bank's rights or obligations, but also concluded that a general statement of agency policy

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note 28, at 9 (concluding that the CRA requires GAO to analyze final rules, not proposed ones). The Congressional Research Service has reached the same conclusion. *See* RICHARD S. BETH, CONG. RES. SERV., DISAPPROVAL OF REGULATIONS BY CONGRESS: PROCEDURE UNDER THE CONGRESSIONAL REVIEW ACT (2001); ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 2–3.

72. *See* COPELAND, *supra* note 8, at 7 ("GAO has said on numerous occasions that covered final rules cannot take effect until the rules are submitted to it and to both Houses of Congress . . . .").

73. 78 Fed. Reg. 17,766, 17,770–76 (Mar. 22, 2013).

74. Letter from Susan A. Poling, GAO General Counsel, to Senator Pat Toomey, Pub. B-329272, Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation—Applicability of the Congressional Review Act to Interagency Guidance on Leveraged Lending 2 (Oct. 19, 2017), https://www.gao.gov/assets/690/687879.pdf [https://perma.cc/ZG86-4Q9U].

75. *Id*.

76. *Id*. at 3.

nonetheless is a rule for CRA purposes.[77] Relying on the text of the CRA, its legislative history, the GAO's prior decisions, and academic commentary, the GAO concluded that the Interagency Guidance was a rule because it "is a general statement of policy designed to assist financial institutions in providing leveraged lending to creditworthy borrowers in a sound manner."[78] The GAO also expressly rejected the agencies' argument that only a document establishing legally binding standards affecting the rights or obligations of third parties such as banks is a rule. Those factors are evidence that a document is a CRA rule, but they are not necessary for a document to meet the statutory definition.[79]

The GAO's decision in that matter is quite important.[80] It makes quite clear that the GAO believes that agency guidance documents are "rules" under the CRA even if they only describe the type of factors that an agency will take into account when deciding whether and how to exercise its enforcement discretion. The three banking agencies involved in that matter also are not the only ones that issue guidance documents. It is likely that most, if not all, agencies that can initiate some type of enforcement proceeding have their own version of the Interagency Guidance that the GAO decided should have been submitted to Congress. Given the GAO's conclusion in that matter, all of those numerous agency guidance documents would be subject to the CRA's submission requirement. The upshot is that there might be "hundreds or even thousands of sub-regulatory statements" that should have been submitted to Congress, but were not.[81] Moreover, because the CRA requires that a rule be submitted to Congress "before it can take ef-

77. *Id*. at 4–7.

78. *Id*. at 7.

79. *Id*.

80. *See* Editorial, *Toomey's 'Guidance' Repeal Guide*, WALL ST. J. (Oct. 29, 2017), https://www.wsj.com/articles/toomeys-guidance-repeal-guide-1509312087 [https://perma.cc/YBJ4-AJ8A]; Susan E. Dudley, *Don't Write Off the Congressional Review Act Yet*, Y. J. REG.: NOTICE & COMMENT (Nov. 6, 2017), http://yalejreg.com/nc/dont-write-off-the-congressional-review-act-yet-by-susan-e-dudley/ [https://perma.cc/P92B-XRRA].

81. Susan E. Dudley, *New Implications of the Congressional Review Act*, GEO. WASH. U. REGULATORY STUD. CNTR. (Nov. 8, 2017), https://regulatorystudies.columbian.gwu.edu/new-implications-congressional-review-act [https://perma.cc/LJR4-DMUR]; *see also* Dudley, *supra* note 80.

fect,"[82] the GAO also noted, unsubmitted agency guidance documents cannot serve as a legal basis for taking agency action.

Does the CRA apply to rules promulgated by so-called independent agencies?[83] The answer is yes. The text of the CRA does not distinguish between independent agencies and executive branch agencies, the ones traditionally under the direct and close supervision of the President. There is also no good reason to exempt independent agencies from congressional review. Congress's decision to create an independent agency shows only that Congress wanted to reduce *executive* control of the organization by restricting the President's authority to remove senior *officials*.[84] It does not mean that Congress exempted the agency from *Congress's* ability to use the CRA to oversee and nullify an agency's *rules*. Independent agencies can abuse their regulatory authority no less than executive branch agencies, so Congress would have wanted to review their rules too. Finally, Congress, President Trump, and the GAO have also concluded that the CRA applies to executive and independent agencies alike.[85]

B. The Vertical Reach of the CRA: When Does the Congressional Review Period Commence?

The CRA does not create a time for an agency to file a rule with Congress and the Comptroller General, but it does spur the agency to act quickly because it provides that a rule cannot

82. *Id*. at 1.

83. For a list of independent agencies, see 44 U.S.C. § 3502(5) (2012).

84. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 623–32 (1935).

85. The House and Senate both passed H.J. Res. 111, 115th Cong. (2017), which sought to invalidate a rule governing arbitration agreements promulgated by the Consumer Financial Protection Board, an independent agency, and President Trump signed the bill into law on November 1, 2017. *See* Yuka Hayashiu, *Trump Signs Bill Scrapping Rule That Made It Easier to Sue Banks*, WALL ST. J. (Nov. 1, 2017), https://www.wsj.com/articles/trump-signs-bill-scrapping-rule-that-made-it-easier-to-sue-banks-1509569795 [https://perma.cc/XR58-ULJ9]; *see also Congressional Review Act Tracker 2017*, *supra* note 5. The GAO had previously taken the position that the CRA applies to rules issued by independent agencies. *See 10th Anniversary of the Congressional Review Act*, *supra* note 28, at 10 ("With certain exceptions, CRA applies to most rules issued by federal agencies, including the independent regulatory agencies." (footnote omitted)); Poling, *supra* note 28, at 1 ("Congressional review is assisted by CRA's requirement that all federal agencies, including independent regulatory agencies, submit each rule to both Houses of Congress and to GAO before it can take effect.").

take effect until it has been submitted. By contrast, the CRA does define the time period available to Congress to review a rule.[86] According to the text of the Act, the clock does not commence until "the *later* of the date on which" the *Federal Register* publishes the rule or on which "Congress *receives the report*" required by the Act.[87] Accordingly, any and every regulation, policy statement, and the like that has not yet been properly submitted to Congress for its review remains open for invalidation even today[88]—even ones that were published in the Federal Register.

The text of the CRA makes that clear. The time to introduce a joint resolution of disapproval does not commence until the *later* of the date of *Federal Register* publication *or* the date that Congress receives the report. It would be silly to conclude that the legislative review period *precedes* the date that Congress can introduce a resolution of disapproval. Moreover, the period of expedited review in the Senate—a key feature of the CRA because it prevents a filibuster—is measured from the "submission or publication date," which "means the later of the date on which" Congress "receives the report" or it is "published." It would also be witless to conclude that the Senate's expedited procedure ends before Congress receives the rule. Accordingly, publication alone does not trigger the review period. To start the clock the rule must also be presented to Congress and the Comptroller General.[89]

Why is that critical? Why must an agency not only publish a rule in the *Federal Register* but also submit a published rule to Congress? There are several reasons. First, Congress wanted to put the burden of notification on the agency rather than on its members, their staff, or the GAO. Congress could have made publication in the *Federal Register* the triggering date and relied on one of those three groups to follow the *Federal Register* regularly to see when every new agency rule is published. But that would have placed an additional demand on parties Congress likely thought already carried a heavy burden.

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86. *See* 5 U.S.C. § 802(a) (2012).

87. 5 U.S.C. § 802(b)(2) (2012) (emphasis added).

88. As explained below, the question whether Congress or the courts have the final say on compliance with the CRA has a handful of sub-issues associated with it.

89. *See* ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 2 ("A covered rule cannot take effect if the report is not submitted.").

Second, Congress directed each agency to give the Comptroller General a copy of every rule so that the GAO could analyze "major" rules and report that analysis to each chamber. One element of that analysis is whether the agency had complied with several other federal laws and had performed a cost-benefit analysis. Congress considered the Comptroller General's analysis important and might have wanted to avoid the risk that it would not have that opinion if publication in the *Federal Register* alone triggered the review period. Atop that, the CRA directs agencies to "cooperate with the Comptroller General by providing information relevant to the Comptroller General's report" to Congress. The Comptroller General might find an agency report incomplete, which would hamper its ability to analyze the rule for Congress. Using the *Federal Register* publication date as the triggering event could hinder the Comptroller General's ability to complete its analysis within the fifteen-day period set by the CRA.

Third, reliance on *Federal Register* publication could create logistical difficulties at the end of a Congress, when members not re-elected to the next session (and their staff) would be leaving Capitol Hill for other pursuits. Given the prevalence of agencies' issuance of "midnight rules,"[90] Congress wanted to be able to restart the review clock in the new session without relying on departing members to act before leaving office.

Fourth, a final agency rule would burden or benefit different private parties, so Congress may have believed that the burden of notification should rest on the party responsible for changing the status quo. Accordingly, the CRA submission requirement is an eminently sensible one.[91]

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Where does that leave us? A broad construction of the term "rule" and a strict construction of the "submission" requirement are consistent with the text and purpose of the CRA. Congress decided that it needed another tool to review the

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90. *See supra* note 6.

91. The recent GAO decision noted above is important in this regard, too. *See supra* text accompanying notes 73–82. The GAO's October 19, 2017, decision discussed above involved a guidance document issued in 2013. The GAO's decision that the document should have been submitted to Congress under the CRA demonstrates that the agency believes that the Act reaches back well before the period during which "midnight regulations" are ordinarily promulgated.

work of agencies in addition to the budget process, oversight hearings, and nominations. Congress initially settled on the legislative veto as the tool it would use, but the Supreme Court scotched that notion in *Chadha*. Congress then turned to the CRA to reach the same goal that a legislative veto would have served, but in a way that avoided the roadblock imposed by the Supreme Court. Congress could not perform its oversight function if an agency could publish a rule and wait for the congressional review period to expire before submitting it to Congress. Only reading the CRA as discussed above prevents an agency from running out the clock on agency documents with an important effect.

IV. JUDICIAL REVIEW UNDER THE CRA

The APA supplies private parties with a cause of action to challenge an agency rule on the ground that it is arbitrary and capricious or exceeds the agency's statutory authority.[92] But Congress can preclude review under the APA through a different statute,[93] and sometimes Congress does that, either by creating a different review procedure or by simply foreclosing APA review.[94] A provision of the CRA appears to have just that effect. Section 805 of Title 5 provides as follows: "No determination, finding, action, or omission under this chapter shall be subject to judicial review."[95] On its face, Section 805 appears quite clearly to preclude all judicial review under the APA or

92. *See* 5 U.S.C. § 702 (2012).

93. *See id*. § 701(a) ("This chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.").

94. *See, e.g.*, Elgin v. Dep't of Treasury, 567 U.S. 1, 5 (2012) (ruling that the judicial review provisions of the Civil Service Reform Act of 1978, 5 U.S.C. §§ 1101–1105 (2012), are exclusive); Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 202 (1994) (ruling that the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. §§ 801–966 (2012), prevents a district court from exercising subject-matter jurisdiction over a pre-enforcement challenge to the act); Lincoln v. Vigil, 508 U.S. 182, 184 (1993) (ruling that the decision of the Indian Health Service to discontinue a particular program was "committed to agency discretion by law" and therefore not subject to judicial review under the APA, 5 U.S.C. § 701(a)(2)); Air Courier Conf. of Am. v. Am. Postal Workers Union, AFL-CIO, 498 U.S. 517, 531 (1991) (Stevens, J., concurring in the judgment) (concluding that the text of a section of the Postal Reorganization Act, 39 U.S.C. § 410(a) (2012), forecloses judicial review under the APA of certain actions taken by the U.S. Postal Service).

95. 5 U.S.C. § 805.

any other law. The question posed by that provision, therefore, is quite simple: what does that Section 805 mean? The answer, however, is more complicated.

The Supreme Court has never discussed Section 805, but a handful of lower federal courts have done so. There is no consensus over its proper interpretation. A majority of courts, including the D.C. and Tenth Circuit Courts of Appeals, have decided that the text of Section 805 is straightforward and bars them from reviewing the merits of a claim that an agency did not submit a rule to Congress.[96] Those courts, however, have not scrutinized Section 805 in any depth. They have essentially limited their analysis to a reading of Section 805's text in isolation from the other provisions and purpose of the CRA. By contrast, a few other lower courts, including the Second Circuit by implication,[97] have disagreed with the majority.[98] They have held that the text of Section 805 does not demand the odd, counterintuitive result that agencies may violate the CRA with

96. *See* Montanans for Multiple Use v. Barbouletos, 568 F.3d 225, 229 (D.C. Cir. 2009) ("That latter provision denies courts the power to void rules on the basis of agency noncompliance with the Act. The language of § 805 is unequivocal . . . ."); Via Christi Reg'l Med. Ctr., Inc. v. Leavitt, 509 F.3d 1259, 1271 n.11 (10th Cir. 2007) ("The Congressional Review Act specifically precludes judicial review of an agency's compliance with its terms."); United States v. Carlson, No. 12-305, 2013 WL 5125434, at *14–15 (D. Minn. Sept. 12, 2013), *aff'd* 810 F.3d 544 (8th Cir. 2016); New York v. Am. Elec. Power Serv. Corp., Nos. 2:04 CV 1098, 2:05 CV 360, 2006 WL 1331543, at *13–14 (S.D. Ohio Mar. 21, 2006); *In re* Operation of the Mo. River Sys. Litig., 363 F. Supp. 2d 1145, 1173 (D. Minn. 2004) (ruling that agency's determination under CRA that a rule is not a "major rule" is not subject to judicial review); Tex. Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Fin. Bd., No. A 97 CA 421 SS, 1998 WL 842181, at *7 & n.15 (W.D. Tex. June 25, 1998), *aff'd* 201 F.3d 551 (5th Cir. 2000); *cf.* United States v. Ameren Mo., No. 4:11 CV 77 RWS, 2012 WL 2821928, at *3–4 (E.D. Mo. July 10, 2012) (ruling that Section 805 bars judicial review of EPA's alleged noncompliance with the CRA but also ruling that it was unclear whether the CRA applied).

97. *See* Nat. Res. Def. Council v. Abraham, 355 F.3d 179, 201–02 (2d Cir. 2004) (considering CRA compliance claim without discussing Section 805).

98. *See* United States v. Reece, 956 F. Supp. 2d 736, 743–44 (W.D. La. 2013) (ruling that Section 805 does not bar review of a CRA noncompliance claim); Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv., 268 F. Supp. 2d 1197, 1234–35 (E.D. Cal. 2003) (rejecting a CRA noncompliance claim on the merits); United States v. S. Ind. Gas & Elec. Co., No. IP99-1692-C-M/S, 2002 WL 31427523, at *4–5 (S.D. Ind. Oct. 24, 2002); *cf.* United States v. Nasir, No. 5:12-CR-102-JMH, 2013 WL 5373691 (E.D. Ky. Sept. 25, 2013) (declining to decide whether Section 805 bars review of the claim that the DEA did not comply with the CRA when listing a controlled substance on the ground that the DEA complied with the CRA).

impunity, thereby completely frustrating the Act's purpose.[99] To them, Section 805 forecloses judicial review of *Congress's* actions once an agency has complied with the CRA without also precluding review of the question whether *the rule-issuing agency* has complied with the CRA by submitting a report containing the rule to Congress. Those courts have the better view of the statute.

Section 805 is quite clear in one respect. It states that no "determination, finding, action, or omission under this chapter" is subject to review by a court. The CRA does not define those terms,[100] so under the traditional rules of statutory interpretation, they should be given their ordinary dictionary meaning.[101] Given those terms, Section 805 is exceptionally broad, possibly as broad as the English language would allow. The text reaches every "action . . . or omission under this chapter"—which would appear to embrace anything that Congress could do or could fail to do—as well as every "determination" or "finding," apparently in an effort to reach whatever else Congress might do that was not an "action" or "omission." Accordingly, Section 805 would appear to reach every decision or step—

99. *See S. Ind. Gas & Elec.*, 2002 WL 31427523 at *5 (If Section 805 precludes judicial review of an agency's failure to comply with the CRA, "agencies could evade the strictures of the CRA by simply not reporting new rules, and courts would be barred from reviewing their lack of compliance. This result would be at odds with the purpose of the CRA, which was to provide a check on administrative agencies' power to set policies and essentially legislate without Congressional oversight. The CRA has no enforcement mechanism, and to read it to preclude a court from reviewing whether an agency rule is in effect that should have been reported would render the statute ineffectual. Moreover, the language of the statute precludes judicial review of a 'determination, finding, action, or omission under this chapter . . . .' Agencies do not make findings and determinations under this chapter. Congress, on the other hand, is required to make a number of findings and determinations under the CRA. Therefore, it is logical to interpret the judicial preclusion language as barring review of the determinations, findings, actions, or omissions made by Congress after a rule is submitted by an agency, but not extending the bar of judicial scrutiny to questions of whether or not an agency rule is in effect that should have been reported to Congress in the first place.").

100. The CRA defines only three terms: "Federal agency," "major rule," and "rule." 5 U.S.C. § 804.

101. *See* Green v. Brennan, 136 S. Ct. 1769, 1791 (2016) ("When a word or phrase is left undefined . . . we consider its 'ordinary meaning.'" (quoting Asgrow Seed Co. v. Winterboer, 513 U.S. 179 (1995))); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 69 (1st ed. 2012) ("The ordinary-meaning rule is the most fundamental semantic rule of interpretation. It governs constitutions, statutes, rules, and private instruments." (footnote omitted)).

including deciding or doing nothing at all—that could be associated with the CRA. No decision or judgment, no action of any kind, no failure to act, no omission—nothing that could be done under the CRA would be eligible for judicial review. Accordingly, Section 805 seems quite straightforward regarding *what* is not subject to judicial review.

Where the Act is unclear, however, is *whose* "determination, finding, action, or omission under this chapter" is not subject to judicial review? There are a limited number of possibilities because there are only a few parties who could take (or fail to take) a relevant action "under this chapter."

The CRA refers to a few entities with tertiary roles in this process: the chairman and ranking member of the congressional committee with jurisdiction over the rule's subject matter, each chamber of Congress, the Comptroller General, and the Administrator of the Office of Regulatory Affairs at the Office of Management and Budget. None of them, however, plays a major role in the operation of the CRA. The chairman and ranking member of the relevant committees serve only as recipients and conduits of the reports submitted by the rule-issuing agency.[102] Neither chamber of Congress acting alone can pass legislation.[103] The Comptroller General must provide Congress with a report analyzing the one submitted by the agency,[104] but he cannot take any action to advance or delay Congress's review, and he cannot vote on the passage of a disapproval resolution.[105] Accordingly, for purposes of the CRA only the rule-issuing agency, Congress, and the President play an important role, which means that only one or more of those parties is the likely focus of the judicial-review preclusion, CRA Section 805. Whom would Congress have wanted to immunize from judicial review?

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102. 5 U.S.C. § 801(a)(1)(C).

103. U.S. CONST. art. I, § 7, cl. 2; *see also* INS v. Chadha, 462 U.S. 919, 948–51 (1983).

104. 5 U.S.C. § 801(2)(A).

105. Only senators and representatives may vote on a bill, U.S. CONST. art. I, § 7, cl. 2, and the people of their states or districts choose them, *id.* § 2, cl. 1; *id*. amend. XVII. By contrast, the President appoints the Comptroller General, 31 U.S.C. § 703(a)(1) (2012), and no sitting member of the Senate or House of Representatives can simultaneously serve as the Comptroller General, U.S. CONST. art. I, § 6, cl. 2 (the Disqualification Clause).

Start with Congress. It is eminently clear that Congress did not want any of its actions to be subject to judicial review. Congress expressly exempted itself from judicial review when it adopted the APA in 1946,[106] and the CRA carried forward the same exemption.[107] Another way to put it is that Congress expressly exempted itself from review when it passed the APA, and Congress did not add itself back into the APA judicial review process when it adopted the CRA. Of course, Congress's work product—"Law[s]"[108]—are subject to judicial review,[109] but not a "determination, finding, action, or omission under this chapter" or anything else that Congress (or any of its members) may do.[110]

Now move to the President. Congress did not expressly exempt the President from review under the APA by excepting him from the definition of an "agency," but the Supreme Court has made up the difference. The Court held in *Franklin v. Massachusetts*,[111] four years before the CRA became law, that the term "agency" does not include the President.[112] What is true

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106. *See* 5 U.S.C. § 804 ("For purposes of this chapter—(1) The term 'Federal agency' means any agency as that term is defined in section 551(1)."); *id*. § 551 ("For the purpose of this subchapter—(1) 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress . . . .").

107. 5 U.S.C. § 804(1) (providing that the term "Federal agency" under the CRA has the same meaning that that APA uses for "any agency").

108. U.S. CONST. art. I, § 7, cl. 2.

109. And have been ever since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803).

110. 5 U.S.C. § 805.

111. 505 U.S. 788 (1992).

112. *Id.* at 800–01 ("The APA defines 'agency' as 'each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia.' 5 U.S.C. §§ 701(b)(1), 551(1). The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion. As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements. Although the President's actions may still be reviewed for constitutionality, we hold that they are not reviewable for abuse of discretion under the APA." (citations omitted)); *cf*. Mississippi v.

about Congress is also true about the President: the APA does not subject the President's actions to judicial review, and the CRA does not add him back in.

Who is left? Only the rule-issuing agency. Did Congress intend the CRA to immunize the agency's action from judicial review? No. Congress sought to *curb* agency action through the CRA, not immunize it. Remember, before *Chadha*, Congress and the President were not subject to review under the APA. By contrast, an agency *was* subject to review under the APA for its unlawful actions before *Chadha*.[113] The CRA also did not seek to change that arrangement; its goal was to *increase Congress's* oversight power, not *weaken* the judicial review power of *the courts*. Why would Congress have wanted to eliminate the historic role that courts have played in halting illegal agency actions? There is no persuasive reason for believing that Congress did. The CRA gave Congress fast-track authority so it could review an agency rule before it went into effect. Immunizing agencies from judicial review is unnecessary to make the CRA work or to achieve the CRA's purpose and would have been an irrational response to Congress's concern with agency overreaching. The bottom line is this: the best reading of Section 805 is that it precludes judicial review of any decisions or actions taken *by Congress (including the Comptroller General, who works for Congress) or the President* but does *not* foreclose judicial review of an agency's compliance with the Act.[114]

Johnson, 71 U.S. (4 Wall.) 475 (1866) (denying leave to file a bill seeking to enjoin the President from implementing an act of Congress).

113. An injured party can seek relief (other than money damages) if the agency has exceeded its statutory authority or acted in an arbitrary and capricious or unconstitutional manner. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party."); *id.* § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."); *id.* § 706(1)–(2).

114. ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 6 ("The legislative history of this provision [5 U.S.C. § 805] indicates that this preclusion of judicial review would not apply to a court challenge to a failure of an agency to report a rule."); Rosenberg, *Whatever Happened*, *supra* note 8, at 1057. As one Congressional Research Service scholar has concluded:

Atop that is another consideration. The Supreme Court has made it clear that it will not construe an act of Congress as foreclosing all judicial review of a constitutional claim unless the text of the relevant statute is pellucid in that regard.[115] That is critical here. Unlike the President, a federal agency has no inherent authority; it possesses only whatever power Congress has granted it.[116] Accordingly, as explained in detail below, an agency cannot infringe on someone's "life, liberty, or property" unless it can identify some statutory "law" that justifies its action.[117] The Due Process Clause is relevant here because it prevents an agency from acting in an *ultra vires* manner.[118]

> [T]he statutory scheme appears geared toward congressional review of all covered rules at some time; and a reading of the statute that allows for easy avoidance would seem to defeat that purpose. Interpreting the judicial review preclusion provision to prevent court scrutiny of the validity of administrative enforcement of covered but non-submitted rules appears to be neither a natural nor warranted reading of the provision. Section 805 speaks to "determination[s], finding[s], actions[s], or omission[s] *under this chapter*," a plain reference to the range of actions authorized or required as part of the review process. Thus Congress arguably did not intend . . . to subject to judicial scrutiny, its own internal procedures, the validity of Presidential determinations that rules should become effective immediately for specified reasons, the propriety of OIRA determinations whether rules are major or not, or whether the Comptroller General properly performed his reporting function. These are matters that Congress can remedy by itself.

ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 31.

115. *See* Webster v. Doe, 486 U.S. 592, 603 (1988); Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986); Weinberger v. Salfi, 422 U.S. 749, 762 (1975); Johnson v. Robison, 415 U.S. 361, 373–74 (1974).

116. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

117. U.S. CONST. amend. V.

118. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) ("The third clause in which the Solicitor General finds seizure powers is that 'he shall take Care that the Laws be faithfully executed . . . .' That authority must be matched against words of the Fifth Amendment that 'No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .' One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules." (footnote omitted)). Of course, not every claim that an executive official acted beyond his statutory authority raises a due process claim. *See* Dalton v. Specter, 511 U.S. 462, 476 (1994) (noting the "well established" distinction between "claims that an official exceed-

The Due Process Clause is a lineal descendant of Magna Carta, and its best-known feature is Article 39.[119] Article 39 provided that "[n]o free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land."[120] Article 39 "was a plain, popular statement of the most elementary rights."[121] It sought to restore the customary rights of Englishmen and prevent the Crown from arbitrarily detaining and punishing someone not first adjudged guilty of a crime—a common occurrence under King John.[122] As one scholar

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ed his statutory authority" and "claims that he acted in violation of the Constitution"). What makes the CRA different is that it deprives an unsubmitted rule of *any* legal force and effect. 5 U.S.C. § 801(a)(1)(A) (2012) ("Before a rule can take effect . . . ."); *id.* § 801(b)(1) ("A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule."); *id*. § 801(f) ("Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect."); *infra* Part V.B. That feature of the CRA makes the issue more like the one in *Youngstown*, which involved *the lack of any statutory authority*, *Youngstown*, 343 U.S. at 585 ("[W]e do not understand the Government to rely on statutory authorization for this seizure.") than like the one in *Dalton*, which involved the claim that the President acted *in excess of his statutory authority*, *Dalton*, 511 U.S. at 476.

119. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855) ("The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*. Lord Coke, in his commentary on those words, (2 Inst. 50,) says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, 'but by the judgment of his peers, or the law of the land.' The ordinance of congress of July 13, 1787, for the government of the territory of the United States northwest of the River Ohio, used the same words."). For a discussion of the history and purposes of Magna Carta, see, for example, DAVID CARPENTER, MAGNA CARTA (2015); ARTHUR L. GOODHART, "LAW OF THE LAND" (1966); J.C. HOLT, MAGNA CARTA (2d ed. 1992); A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA (1968); THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 22–26 (5th ed. 1956); MAGNA CARTA COMMEMORATION ESSAYS (Henry Elliott Malden ed., 1917); WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN WITH AN HISTORICAL INTRODUCTION (2d ed. 1914); R.H. Helmholz, *Magna Carta and the ius commune*, 66 U. CHI. L. REV. 297 (1999); Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 327–50 (2016); C.H. McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV 27 (1914).

120. HOLT, *supra* note 119, at 461.

121. Charles E. Shattuck, The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property," 4 HARV. L. REV. 365, 373 (1891).

122. MCKECHNIE, *supra* note 119, at 377 & n.1.

noted a century ago, "The main point in this [provision], the chief grievance to be redressed, was the King's practice of attacking his barons with forces of mercenaries, seizing their persons, their families and property, and otherwise ill-treating them, without first convicting them of some offence in his *curia*."[123] The guarantee that the Crown could administer punishment only in accordance with "the law of the land" meant, as Coke put it, that "no man [could] be taken or imprisoned, but *per legem terrae*, that is, by the common law, statute law, or custome of England."[124] Expressed in today's language, Article 39 protected "life (including limb and health), personal liberty (using the phrase in its more literal and limited sense to signify freedom of the person or body, *not* all individual rights), and property."[125]

Article 39 of Magna Carta became a foundational part of American constitutional law in the eighteenth century.[126] Familiar with the legal theories of Sir Edward Coke,[127] the Found-

123. McIlwain, *supra* note 119, at 41.

124. 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 45 (William S. Hein & Co. 1986) (1642).

125. Shattuck, *supra* note 121, at 373 (footnote omitted). In the fourteenth century, Parliament revised Magna Carta by changing the phrase "*per legem terrae*" or "the law of the land" to "due Process of the Law." 28 Edw. 3, c. 3, *reprinted in* 1 STATUTES OF THE REALM 345 (William S. Hein & Co. 1993) (1810); *see also* McIlwain, *supra* note 119, at 49. That revision, however, did not alter its meaning, effect, or significance. *See* Davidson v. New Orleans, 96 U.S. 97, 101 (1878) ("The equivalent of the phrase 'due process of law,' according to Lord Coke, is found in the words 'law of the land,' in the Great Charter, in connection with the writ of *habeas corpus*, the trial by jury, and other guarantees of the rights of the subject against the oppression of the crown."); Walker v. Sauvinet, 92 U.S. 90, 93 (1875) ("Due process of law is process due according to the law of the land."); *see also* Daniels v. Williams, 474 U.S. 327, 331 (1986); Hovey v. Elliott, 167 U.S. 409, 415–17 (1897); RALPH V. TURNER, MAGNA CARTA 3 (2003); Max Radin, *The Myth of Magna Carta*, 60 HARV. L. REV. 1060, 1063–68, 1075, 1090–91 (1947).

126. *See* Horne v. Dep't of Agric., 135 S. Ct. 2419, 2426 (2015) ("The colonists brought the principles of Magna Carta with them to the New World . . . ."); Larkin, *supra* note 119, at 340–42.

127. *See, e.g.*, Kerry v. Din, 135 S. Ct. 2128, 2133 (2015) (plurality opinion) ("Edward Coke['s] . . . Institutes 'were read in the American Colonies by virtually every student of law . . . .'") (quoting Klopfer v. North Carolina, 386 U.S. 213, 225 (1967)); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 614 (2009) ("Because most of the American colonies were initially chartered and settled during the early seventeenth century, when Coke's career as a judge and member of Parliament was at its height, Coke exerted a strong influence on colonial law. A large number of seventeenth-century American lawyers studied law in England, where Coke's *Reports* and *Institutes* were a staple of legal educa-

ers saw Article 39 as exemplifying the tenet of English constitutionalism that the Crown and Parliament were obligated to respect the "natural and customary rights recognized at common law."[128] The Framers' generation used the phrase "the law of the land" or "due process of law" in numerous important political documents, such as the Virginia Resolutions of 1769, the Declaration and Resolves of the First Continental Congress of 1774, the Declaration of Independence, later-enacted state constitutions, and ultimately the Fifth Amendment.[129] They did not see any material difference in meaning between the two phrases.[130]

Like its ancestor term in Magna Carta "the law of the land," the concept of "due process of law" binds the government to act according to law.[131] Most contemporary discussion of the Due Process Clause focuses on the debate over the issue of whether the clause should be limited to a procedural guarantee of fundamentally fair proceedings or should also embrace a substantive component, one that forbids arbitrary legislation.[132] What tends to be overlooked in that debate, however, is that the clause guarantees "due process of *law*." That last word is an important one. The ancestor of the clause, Article 39 of Magna Carta, obligated the government to act pursuant to "the law of the land," rather than the whims of the Crown. The barons had suffered under the latter for too long and rebelled precisely to force King John to comply with the common law before he

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tion, just as they were in the American colonies until the publication of Blackstone's *Commentaries* in 1765." (footnote omitted)).

128. Gedicks, *supra* note 127, at 619.

129. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2633 & n.3 (2015) (Thomas, J., dissenting); Kerry v. Din, 135 S. Ct. 2128, 2132 (2015) (plurality opinion); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855); HOWARD, *supra* note 108, at xi, 15–16, 19, 211–15 (listing colonial charters); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1789, at 547 (4th ed. 1873); Gedicks, *supra* note 127, at 622–23; H.D. Hazeltine, *The Influence of Magna Carta on American Constitutional Development*, 17 COLUM. L. REV. 1, 22 (1917).

130. *See* Daniels v. Williams, 474 U.S. 327, 331 (1986); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1911); Larkin, *supra* note 119, at 342.

131. *See* JOHN PHILLIP REID, THE RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 93 (2004) ("Rule-of-law belonged to the seventeenth and eighteenth centuries. It was . . . the cornerstone of the jurisprudence of liberty in the years when liberty was struggling to survive.").

132. *See* Larkin, *supra* note 119, at 294–303.

could deprive anyone of his life, liberty, or property. The Founding Generation carried that principle forward into the Due Process Clause of the Fifth Amendment.

The upshot of that history is this: an agency has no authority to act except what it receives from Congress; the government must be authorized by law to infringe on someone's life, liberty, or property; and a statute that has the intent and effect of permitting an agency to evade those limitations—that is, a law that exempts the government from complying with the rule of law—is not a law but a license to act lawlessly. Due process demands that there be some already-existing law for the government to infringe on someone's life, liberty, or property; the government cannot make it up as it goes along. Otherwise, the government's actions would not be authorized by, and would be at odds with, the "due process of law" (or, as it would have been said in 1215, "the law of the land").[133]

That conclusion considerably raises the stakes as far as the preclusion of judicial review is concerned. Since 1953, when Harvard Law School Professor Henry Hart first discussed in depth Congress's power over the jurisdiction of the federal courts,[134] constitutional law scholars have vigorously debated whether Congress can preclude judicial review of a private party's claim that a government official has violated the Constitution.[135] Congress can channel the resolution of all legal claims

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133. *See* John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 497 (1997) ("In their procedural aspect, the Due Process Clauses are understood first of all to require that when the courts or the executive act to deprive anyone of life, liberty, or property, they do so in accordance with established law. Judges and executive officers may not simply make up some method of proceeding and sentence someone to prison on that basis. This requirement that deprivation follow the rule of law is so fundamental that it is often forgotten, but there is good reason to believe that some version of it is the historical root meaning of due process." (footnote omitted)); McIlwain, *supra* note 119, at 30.

134. See Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362, 1402 (1953).

135. *See, e.g.*, Paul M. Bator et al., Hart and Wechsler's The Federal Courts and the Federal System 366–428 (3d ed. 1988) (discussing issue and collecting authorities); 1 Julius Goebel, Jr., History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 204–50 (P. Freund gen. ed. 1971); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895 (1984); Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157 (1960); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. Pa.

into a particular scheme when it offers an opportunity for review by an Article III court at the end of the process.[136] It is an entirely different matter, however, to interpret a statute as foreclosing *any* judicial review of a constitutional claim, particularly when the defendant has had no prior opportunity to raise that claim in an Article III court and it is offered as a defense in a government enforcement action. The Supreme Court has been exceedingly reluctant to construe an act of Congress to deny a party any opportunity to assert a constitutional claim. Reading a law in that manner would pose extraordinarily difficult constitutional issues because it would amount to an attempt by Congress to legislate around the nation's fundamental law by zoning out federal constitutional claims.[137]

The CRA does not require an answer to the question that Professor Hart broached more than 60 years ago. There is a presumption that the APA affords a private party the right to obtain judicial review of a claim that an agency has not complied with another law.[138] To be sure, the CRA modifies that presumption with respect to any "determination, finding, action, or omission." But Section 805 has that effect only insofar as one or more of those actions are done "under this chapter." An agency does not promulgate any rules "under" the CRA; rather it promulgates rules by relying on the substantive law-

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L. Rev. 45 (1975); Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 Nw. U.L. Rev. 143 (1982); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts,* 95 Harv. L. Rev. 17 (1981); Symposium, *Congressional Limits on Federal Court Jurisdiction,* 27 Vill. L. Rev. 893 (1982) (contributions by Martin Redish, Leonard Ratner, Charles Rice, Max Baucus & Kenneth Kay, James McClellan, and Paul Bator); Albert Van Alstyne, *A Critical Guide to* Ex Parte McCardle, 15 Ariz. L. Rev. 229 (1973); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923).

136. *See, e.g.*, Elgin v. Dep't of Treasury, 567 U.S. 1 (2012); Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) (both discussed *supra* at note 94); *cf.* Younger v. Harris, 401 U.S. 37, 53 (1971) (ruling that federal courts cannot generally interfere with an ongoing state criminal prosecution even when a defendant raises a constitutional claim).

137. *See* Webster v. Doe, 486 U.S. 592, 603 (1988); Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986); Weinberger v. Salfi, 422 U.S. 749 (1975); Johnson v. Robison, 415 U.S. 361, 373–74 (1974).

138. *See, e.g.*, Sackett v. EPA, 566 U.S. 120, 130 (2012).

making authority that Congress granted the agency elsewhere in an implementing statute.[139]

It is one thing to read a statute as precluding judicial review under the APA of an agency's decision to deny government benefits when there is an alternative scheme available to challenge the agency's action. There would be no reason to address those issues in the case of the CRA because it is implausible that, in a statute designed to rein in administrative agencies, Congress sought to bar the federal courts from serving their historic function as neutral and impartial arbiters of federal constitutional challenges to agency actions. Proof of that conclusion can be seen in the severability components of Section 806(b). It provides that "[i]f any provision of this chapter or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this chapter, shall not be affected thereby."[140] That subsection reveals that Congress contemplated that there would be *some* judicial review of *some* issue involving the CRA. Otherwise, it would make little sense to include a provision addressing the situation in which a court decided that the text or application of the Act is "invalid." Section 806(b) shows that Congress did not intend to foreclose the federal courts from adjudicating constitutional claims that could arise in connection with the CRA.

There are two arguments to the contrary. The first one is that, as numerous lower federal courts have concluded, the text of the CRA is straightforward and forecloses judicial review of any claim involving the CRA. As explained above, however, the text of the CRA forecloses only judicial review of actions by Congress and the President, not the agency whose rule is at issue. The second argument is that the Act was designed to be a

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139. *See* United States v. S. Ind. Gas & Elec. Co., No. IP99-1692-C-M/S., 2002 WL 31427523, at *5 (S. D. Ind. Oct. 24, 2002) ("Agencies do not make findings and determinations under this chapter; Congress, on the other hand, is required to make a number of findings and determinations under the CRA. Therefore, it is logical to interpret the judicial preclusion language as barring review of the determinations, findings, actions, or omissions made by Congress after a rule is submitted by an agency, but not extending the bar of judicial scrutiny to questions of whether or not an agency rule is in effect that should have been reported to Congress in the first place.").

140. 5 U.S.C. § 806(b) (2012).

political tool for Congress and the President to use to eliminate rules that they find unwise, not a vehicle for litigation over the political choice they make. But the CRA was (and is) unnecessary to empower the political branches to engage in political wheeling and dealing. Private parties do not sit at the table in that game. They need the courts to protect them against what Congress and the President have dealt them.

Can a party decide not to wait to be sued or criminally charged before raising the claim that an agency has not complied with the CRA? The answer to that question is yes, but the analysis is a little trickier. The APA provides an injured party with a cause of action to sue an agency if it has acted in an unlawful, *ultra vires*, or arbitrary and capricious manner. Judicial review is available under the APA to an injured party, only for "final agency action for which there is no other adequate remedy in a court."[141] Is the ability to raise an agency's CRA noncompliance as a defense in a government enforcement action an "adequate" substitute for APA review? At first blush the answer might appear to be yes because a defendant has another remedy: a defense in an enforcement proceeding. In fact, the *Younger v. Harris*[142] doctrine requires the federal courts to abstain from deciding a constitutional issue that could be presented in an ongoing criminal or civil proceeding.[143] Moreover, it could be argued that the government's action is not "final" until it files a criminal or civil charge against someone because only then has the government's position crystallized. Nonetheless, a person should be able to bring a pre-enforcement action under the APA to challenge an agency's noncompliance with the CRA. Both the finality and inadequacy elements are readily satisfied in that setting.

As far as finality goes, the Supreme Court has taken what it calls a "pragmatic" approach[144] and has concluded that an agency action is "final" if two conditions are true: (1) the action represented the consummation of the agency's decisionmaking process and (2) it determines a party's rights or obligations, or

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141. *Id.* § 704.

142. 401 U.S. 37 (1971).

143. *See id.* at 37, 56 (criminal prosecution); *see also* Huffman v. Pursue, Ltd., 420 U.S. 592, 592–94, 604, 607 (1975) (applying *Younger* to a state-initiated civil action).

144. Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967).

identifies important legal consequences for a violation.[145] Those conditions clearly obtain in the case of the CRA. An agency must submit a new rule to Congress for review for it to take effect, and the agency's failure to do so gives a private party the right to raise the agency's noncompliance as a defense. As for the "adequacy" of an alternative legal remedy, that term does not foreclose pre-enforcement review as a matter of law. The Supreme Court has not read the term "adequate remedy in a court" to deny a party the opportunity to bring a pre-enforcement legal challenge when that party faces serious legal consequences from a potentially unlawful rule. The reason is that private parties cannot file an enforcement action, yet they stand at risk of accumulating penalties for allegedly ongoing violations of a disputed governmental action.

The Supreme Court's recent decisions in *Sackett v. EPA*[146] and *U.S. Army Corps of Engineers v. Hawkes*[147] are illuminating in this regard. *Sackett* involved the issue of whether a private party could seek judicial review of an EPA compliance order finding that their property was a "wetland" and was therefore subject to the permitting requirements of the Clean Water Act.[148] The Court noted that the Sacketts could defend against an enforcement action on the ground that their property was not a wetland, but held nonetheless that the opportunity to present that claim as a defense did not afford them with an "adequate remedy in a court," for APA purposes.[149] The reason was that "the Sacketts cannot initiate that process, and each day they wait for the agency to drop the hammer, they accrue, by the Government's telling, an additional $75,000 in potential liability."[150] The Court recognized that there was another "possible route to judicial review—applying to the Corps of Engineers for a permit and then filing suit under the APA if a permit is denied," but found that option inadequate because "[t]he remedy for denial of action that might be sought from one agency does not

145. *See* Bennett v. Spear, 520 U.S. 154, 177–78 (1997).

146. 566 U.S. 120 (2012).

147. 136 S. Ct. 1807 (2016).

148. The Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. § 1251–1387 (2012)).

149. *Sackett*, 566 U.S. at 127–28.

150. *Id.* at 127.

ordinarily provide an 'adequate remedy' for action already taken by another agency."[151] *Hawkes* involved an effort by a peat mining company and its owners to challenge a determination by the U.S. Army Corps of Engineers that the land they sought to use for mining was a wetland subject to the Clean Water Act permitting requirements.[152] The Court held that the Corps' actions were final because a determination that the mining area was not a wetland would have created a "safe harbor" for the mining company, which would have bound the government in any enforcement action.[153] The Court also squarely rejected the government's argument that the ability to raise a claim as a defense in an enforcement action is an adequate alternative remedy. "As we have long held, parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of 'serious criminal and civil penalties.'"[154] *Sackett* and *Hawkes* both involved the Clean Water Act, but each decision rested on the APA, not the Clean Water Act. Accordingly, depending on the consequences for violating an agency rule, a party may be able to seek relief under the APA for a claim that an agency has violated the CRA without waiting to be administratively cited, civilly sued, or criminally charged.

V. OPPOSING VIEWS OF THE SCOPE OF THE CONGRESSIONAL REVIEW ACT

There are several responses to the interpretation set forth above. While reasonable, they are unpersuasive. The next subsections will summarize those arguments and then identify the flaws in them.

A. A Broad Reading of the CRA Is Unreasonable

The threshold argument is that the above interpretation is unreasonable.[155] Indeed, the above argument has no limiting

151. *Id*.

152. *Hawkes*, 136 S. Ct. at 1812–13.

153. *Id*. at 1814.

154. *Id*. at 1815 (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 153(1967)).

155. *See* Prof. Lisa Heinzerling, Address at the Federalist Society Fifth Annual Executive Branch Review Conference (May 17, 2017), http://www.fedsoc.org/multimedia/detail/is-the-modern-congress-doing-more-harm-than-good-event-audiovideo [https://perma.cc/WT6W-QLHD]; Prof. David C. Vladeck, Ad-

principle. The logical conclusion of the interpretation offered above is that Congress could invalidate today any rule adopted since the CRA went into effect in 1996, or perhaps even since the APA became law fifty years earlier. That interpretation, so the argument would go, is not what Congress had in mind. It would permit Congress to reach back *twenty-one years* to nullify rules that have become part of the framework of our law. That result would create chaos in administrative law, because no one would know which rules are and are not in effect today, and impair every agency's ability to carry out its mandates, because its rules could always be nullified at some future point. It would also eviscerate society's legitimate, settled expectations, because every change in administration could erase all that came before.

Atop those considerations is another one, a variant of the "Be careful what you ask for" admonition. Reading the term "rule" as broadly as its text allows would sweep in a mountain of documents that Congress never intended to be subject to the CRA.[156] As one scholar has noted, agency documents come in "a myriad of formats" with "a myriad of labels," such as "legislative rules, interpretive rules, opinion letters, policy statements, policies, program policy letters, Dear Colleague letters, regulatory guidance letters, rule interpretations, guidances, guidelines, staff instructions, manuals, questions-and-answers, bulletins, advisory circulars, models, enforcement policies, action levels, press releases, testimony before Congress, and many others."[157] Congress wanted to be able to review agency rules, but it did not want to rent warehouses to store them until the sixty-day CRA review period has passed. Congress never

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dress at the Federalist Society Fifth Annual Executive Branch Review Conference (May 17, 2017), http://www.fed-soc.org/multimedia/detail/what-is-congress-doing-to-reassert-its-power-over-agencies-event-audiovideo [https://perma.cc/WT6W-QLHD]. Some would say that "unreasonable" is a bit too mild a criticism. *See* Jonathan Miller, *The New War on Old Rules: A Strategy for Gutting 20 Years of Regulations*, CONG. QUARTERLY, May 19, 2017, at 19 ("[Professor Richard J.] Pierce thinks the result will be predictable: 'I think the courts are going to string them up by their balls,' he says. 'I don't think that's going to work.'").

156. Between April 1996 and July 2012, agencies submitted more than 60,000 final rules to Congress. Morton Rosenberg, Report Prepared for the Administrative Conference of the United States: The Critical Need for Effective Congressional Review of Agency Rules: Background and Considerations for Incremental Reform 3 (2012).

157. Anthony, *supra* note 48, at 1320.

intended that an agency submit every document it generates for its review; it wanted agencies to submit only those documents that could bind the public by creating positive law. To-do manuals and the like do not perform that function. Forcing agencies to send them to Congress on pain of later nullification would force agencies to spend inordinate amounts of time inundating Congress with tons of needless paper that no staffer, to say nothing of a member, will want to review, read, or care about one whit. No rule of statutory interpretation values busywork above common sense, and the broad reading of the CRA discussed above does just that.

Proof that the above interpretation of the CRA is unreasonable, the argument goes, lies in two facts. One is that Congress has rarely invoked the CRA in the two decades since its enactment, and on the occasions that it has, Congress has never once sought to nullify a rule issued years ago. Between 1996 and 2011, agencies submitted more than 57,000 rules to Congress. Yet, until this year Congress passed only seventy-two joint resolutions of disapproval, only one became a law, and it involved a then-recently promulgated rule.[158] That happened early in 2001. A majority-Republican Congress passed a joint resolution of disapproval to invalidate an ergonomics regulation promulgated during the waning days of President Bill Clinton's Administration,[159] and President George W. Bush signed that joint resolution into law.[160] The rarity with which Congress has taken up the CRA to nullify a rule is powerful evidence that neither the Congress that adopted that law nor any of the Congresses since then thought that the CRA could be applied in a broad manner.

The other fact is that, over the last two decades, Congress has likely funded agency programs and activities created or implemented under rules issued long ago but never sent to Congress for CRA review. That action is important, the argument

158. *See* CAREY, *supra* note 24, at 5; Christopher M. Davis & Richard S. Beth, *Agency Final Rules Submitted on or After June 13, 2016, May Be Subject to Disapproval by the 115th Congress*, CONG. RES. SERV. INSIGHT (Dec. 15, 2016), https://fas.org/sgp/crs/misc/IN10437.pdf [https://perma.cc/6NAQ-HDCD].

159. *See* Ergonomics Program, 65 Fed. Reg. 68,261 (proposed Nov. 14, 2000) (to be codified at 29 C.F.R. pt. 1910).

160. *See* Ergonomics Rule Disapproval, Pub. L. No. 107-5, 115 Stat. 7 (2001); BAKST & GATTUSO, *supra* note 8, at 2–3; Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2318 n.287 (2001).

goes, because federal agencies may spend only funds that Congress has appropriated for an authorized purpose.[161] By appropriating funds for an agency to enforce an unsubmitted rule, Congress has implicitly made the decision to exempt the rule from the CRA or to overlook the agency's noncompliance. In either case, the passage of time since the rule was adopted signals Congress's acceptance, however reluctant, of the rule's legitimacy, and that resignation is tantamount as a practical matter to Congress's refusal to undo the rule under the CRA.

A broad interpretation of the CRA would reward members of Congress for political gamesmanship. The public is generally unfamiliar with the operation of the CRA and likely would believe that Congress has amended the underlying statute rather than simply disapprove one particular rule. A broad reading of the Act would permit Congress to take advantage of the public's unfamiliarity with the ordinary legislative process, the one established by the CRA, and the limited effect of a joint resolution of disapproval to disguise its action. It would be ironic and unreasonable, the argument goes, to read the CRA—a statute designed to hold government agencies accountable for their rules—in a manner that permits Congress to avoid accountability itself by obscuring the effect of a joint resolution of disapproval.

Finally, it is unnecessary to give the CRA a broad interpretation to ensure that Congress can nullify an agency rule it finds unwise. Congress can always pass a law erasing a rule simply by following the same procedures that predated the CRA. *Chadha* did not restrict how Congress can pass legislation. It only required Congress to go through the constitutionally mandated process for doing so.

B. A Broad Reading of the CRA Is Reasonable

This section offers ten counter-arguments to the view that a broad reading of the statute is unreasonable. These arguments

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161. The Appropriations Clause of Article I and the Antideficiency Act prohibit any federal official from spending funds except as provided by an act of Congress. *See* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Accounts of the Receipts and Expenditures of all public Money shall be published from time to time."); Antideficiency Act (Act of Mar. 3, 1905), ch. 1484, § 4, 33 Stat. 1214, 1257 (codified as amended at 31 U.S.C. §§ 1341–51 (2012)).

in favor of a broad reading are drawn from, among other things, the CRA's text, purpose, and practical use.

1. The Text of the CRA

The argument that a broad reading is unreasonable is not faithful to the text of the statute. Look to the opening words of the CRA. It provides that a rule must be submitted to Congress "[b]efore the rule can take effect." It is impossible to read that provision as allowing a rule to become effective before it has been submitted to Congress.[162] The verb "can" is also noteworthy in this regard. The Oxford English Dictionary defines the primary meaning of "can" as "be able to."[163] In the context of a law, to "be able to" refers to authority, not timing. To "be able to" do *X* means one has the power to do *X*, not that one will do it before anything else. If the opening line of the CRA were concerned only with timing, Congress would have used the phrase "takes effect" or "will go into effect." Those terms would better indicate that Congress merely wanted to receive a copy of the rule before the APA's thirty-day period or the CRA's sixty-day period expired. Finally, the GAO and OMB have concluded that a rule must be submitted to go into effect.[164] As one scholar has noted:

> The very first sentence of the Congressional Review Act . . . states that, "Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General" several items. These items include a copy of the rule, a concise statement explaining whether it is a "major" rule under the CRA, the proposed effective date of the rule, and any regula-

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162. Representative Dave McIntosh, the House sponsor of the CRA, certainly read the law that way. *See* 142 CONG. REC. 6907 (1996) ("Under Section 801(a), covered rules, with very few exceptions, may not go into effect until the relevant agency submits a copy of the rule and an accompanying report to both Houses of Congress.").

163. 2 THE OXFORD ENGLISH DICTIONARY 817 (2d ed. 1989).

164. *See Federal Rulemaking and the Regulatory Process: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 92 (2010) (statement of Curtis W. Copeland, Cong. Res. Serv.) (quoting OMB Memorandum M-99-13, Mar. 30, 1999, to agencies: "In order for a rule to take effect, you must submit a report to each House of Congress and GAO . . . ."); CAREY, supra note 24, at 11 ("The CRA does not specify when an agency must submit a rule. However, a rule cannot become effective until after it is submitted." (footnote omitted)); COPELAND, supra note 8, at 7 (quoted *supra* note 72).

> tory analyses required by law. There is nothing particularly mysterious or complicated about this mandate.[165]

2. The Effective Date of the CRA

The CRA does not apply to agency rules issued before the Act became law in 1996. The Supreme Court has made it clear that an act of Congress does not apply retroactively unless its text so dictates,[166] and the text of the CRA does not state that it applies retroactively. There is also no reason to construe the Act in that manner to avoid rendering the law a nullity. The CRA functions perfectly well with only a prospective effect. Accordingly, any argument that Congress can nullify rules issued between 1946 and 1996 is very wide of the mark. Only the latter date matters.

There is nothing irrational about construing the CRA to reach back to 1996. The CRA imposed a new duty on agencies that became effective when the Act became law. If the agencies did not comply with that new requirement, they have acted unlawfully. Nullifying a rule that the agency did not submit to Congress serves the public by eliminating a rule that is not law and should not have been applied against the public, while also serving the didactic function of making clear to agencies that compliance is necessary because the Act has teeth. Congress intended that agencies comply with the CRA, and only by reading it to enable Congress, even as late as today, to nullify an unsubmitted rule can Congress ensure that the agencies know that it meant business when it passed that statute.

3. The Number of Rules Subject to CRA Review

It is difficult to know the exact number of post-1996 rules still subject to review by Congress. Private parties have offered different opinions on the subject,[167] and the government (unsur-

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165. Croston, *supra* note 8, at 908 (footnotes omitted).

166. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 265–80 (1994); Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 842–44 (1990) (Scalia, J., concurring); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.").

167. *See, e.g.*, CURTIS COPELAND, CONGRESSIONAL REVIEW ACT: MANY RECENT FINAL RULES WERE NOT SUBMITTED TO GAO AND CONGRESS 2 (2014) (estimating that twelve percent of agency rules published in the *Federal Register* from 1997

prisingly) has not made public the number of instances in which it failed to comply with the CRA (although it is possible that such an inquiry is underway). Nonetheless, it is doubtful that every post-1996 rule is subject to CRA review today. The CRA directs agencies to submit any new rule to Congress as part of a report that the Comptroller General is to review for the Senate and House of Representatives. Agencies are likely to comply when issuing a new legislative rule, because it would create new rights and duties. It is in the case of interpretative rules that agencies may have fallen short. Nonetheless, in any case where the agency has submitted a report in a timely manner, the CRA review period has already expired (or, in the case of a recently issued rule, is still open but only for sixty legislative days). If the agency did not comply with the CRA in a particular case, the congressional review period remains open for that rule.

That result should hardly be deemed troublesome even if there are a large number of rules that were not submitted. The GAO reported that between 1999 and 2009, agencies had failed to submit more than 1,000 rules to Congress.[168] Congress has also directed OMB to provide Congress with guidance on how it construes the CRA, and has issued compliance directives to the agencies.[169] Agencies cannot say that they were not warned. Moreover, only if an agency acted unlawfully by failing to give Congress the opportunity to nullify a rule can Congress review that rule today. Far from being problematic, that outcome is desirable. Any problem created by the size of the corpus of still-reviewable rules would arise only if there is a large number of instances in which agencies did not follow the law. Yet, exempting from CRA review rules that should have been, but were not, submitted would reward agencies for recalcitrance or disobedience on a large scale. It makes little sense to decide

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through 2011 were not submitted to Congress); Wallach & Zeppos, *supra* note 8, at 3 (finding a ceiling of "348 significant rules with apparent reporting deficiencies"); *id*. app. 3 (listing rules); James Valvo, *Hundreds of Important Rules Vulnerable To Repeal Under the Congressional Review Act*, CAUSE ACTION INST. (Mar. 29, 2017), http://causeofaction.org/economically-significant-rules-vulnerable-to-repeal-under-congressional-review-act/ [https://perma.cc/3NLJ-5S7H].

168. *See* COPELAND, *supra* note 167, at 15; ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 26.

169. *See* COPELAND, *supra* note 167, at 6; ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 28 (citing a provision in the FY1999 OMB appropriation).

that an agency should be forgiven, not for one minor slip-up, but for being a career offender.

4. The Burden on Agencies

There is no merit to the argument that a broad reading of the CRA imposes a needless burden on agencies of preparing and submitting written reports that no one will read. Agencies submit their rules (and the reports containing them) electronically to the GAO, and by hard copy to Congress.[170] Sending electronic copies of rules to Congress when they are sent to the Government Printing Office for publication in the *Federal Register* scarcely burdens anyone. If Congress wants hard copies, that is Congress's choice.

5. The Relevance of Appropriations Bills

While it is true that Congress can alter or repeal a substantive law through an appropriations bill,[171] there is a strong presumption against construing an appropriations bill in that manner, and both chambers have rules to keep appropriations bills separate from substantive legislation.[172] That separate treatment implements the principle that "the process through which the activities of government are chosen should be distinct from the process through which those activities are funded."[173] That is why a substantive law remains valid until it is repealed (or held unconstitutional), while an appropriations law lasts only for whatever portion of a fiscal year the bill covers.[174]

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170. *See* COPELAND, *supra* note 167, at 56 n.130; E-mail from Susan E. Dudley, Dir., George Wash. Univ. Regulatory Studies Ctr., to author (June 1, 2017) (on file with author). GAO lists received rules on its website. *See Congressional Review Act*, U.S. GOV'T ACCOUNTABILITY OFFICE, https://www.gao.gov/legal/congressional-review-act/overview [https://perma.cc/UQ7M-23XS] (last visited Oct. 18, 2017).

171. *See* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 440 (1992) ("Congress . . . may amend substantive law in an appropriations statute, as long as it does so clearly."); United States v. Will, 449 U.S. 200, 222 (1980) (citing United States v. Dickerson, 310 U.S. 554, 555 (1940)).

172. *See* H.R. Res. 5, 115th Cong. Rules XXI(2)(b)–(c), XXII(5)(b)(2) (2017); S. Res. 285, 113th Cong. Rule XVI.2 (2013).

173. James V. Saturno, Cong. Res. Serv., R41634, Limitations in Appropriations Measures: An Overview of Procedural Issues 1 (2016).

174. *See id*.; *see also* 31 U.S.C. § 1301(c) (2012); 1 U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF APPROPRIATIONS LAW 2–34 (3d ed. Jan. 2004) ("Since an appropriation act is made for a particular fiscal year, the starting presumption is

Congress votes on appropriations bills under the assumption that the money to be disbursed will be spent only for authorized purposes. As the Supreme Court explained in *Tennessee Valley Authority v. Hill*,[175] Congress does not examine the status of agency rules when it grants an agency funds to implement them. Congress assumes that those rules were promulgated in accordance with the governing law, which includes the relevant authorizing statute, the APA, the CRA, and any other applicable law.[176] Indeed, given the vast number of rules that agencies adopt annually, it would be unreasonable for Congress to operate under any other presumption. That presumption is important in this context because an agency rule that is yet to be submitted to Congress has not gone into effect even if the agency published the rule in the *Federal Register*. As explained below, the CRA does not start the congressional review period until the date that the rule is published in the *Federal Register* or the date that a report containing the rule is submitted to Congress, whichever is later.[177] Accordingly, an unsubmitted rule is not "in effect" yet. The proper course is for the agency to refrain from spending any funds devoted to its implementation until the agency satisfies the requirements under the CRA. Only then would the appropriations be authorized for use or disbursement.

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that everything contained in the act is effective only for the fiscal year covered."); *see also id*. at 1–31, 2–13.

175. 437 U.S. 153 (1978).

176. *Id.* at 190–91 ("The doctrine disfavoring repeals by implication 'applies with full vigor when . . . the subsequent legislation is an *appropriations* measure.' This is perhaps an understatement since it would be more accurate to say that the policy applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act. We recognize that both substantive enactments and appropriations measures are "Acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need." (alteration in original) (citations omitted) (quoting Comm. for Nuclear Responsibility v. Seaborg, 463 F.2d 783, 785 (1971)).

177. 5 U.S.C. § 801(a)(3)(A) (2012).

6. The Absence of a "Statute of Limitations" on Congress's Review

It must be noted that what the CRA does *not* say is also significant. It pointedly does *not* adopt a statute of limitations that would deny Congress the opportunity to review a rule that was published in the *Federal Register* but has not yet been submitted. Statutes of limitations did not exist under common law,[178] but they do exist today. Congress uses them to limit the ability of either the government or a private party to bring a case before a court in order to decide whether the defendant committed a civil wrong or a crime.[179] Congress does not always include a statute of limitations in a law creating a private right, and when that occurs, the federal courts will often look into the relevant state law.[180] But that approach is not a sensible one in this context.

The CRA does not create private rights that can be enforced in federal court. It grants *Congress* an *institutional* right that, as explained above, is *not* subject to judicial review. Congress also specified *when* it may exercise that oversight opportunity—sixty legislative days *after* a rule is submitted to Congress—as well as precisely when that period begins to run—*when* the rule is so submitted. Looking elsewhere to find a limit on Congress's review authority would frustrate the all-inclusive purpose of the CRA. Finally, because no private party has the authority that Article I of the Constitution guarantees to

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178. CHARLES DOYLE, CONG. RES. SERV., STATUTES OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW, CRS 7-5700, at 1 (Oct. 1, 2012), https://fas.org/sgp/crs/misc/RL31253.pdf [https://perma.cc/59RV-P4V6].

179. *See* 18 U.S.C. § 3282 (2012) ("Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or information is instituted within five years next after such offense shall have been committed."); 28 U.S.C. § 2462 (2012) (requiring that "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise" be brought within 5 years from the date when the claim first accrued).

180. *See* Wilson v. Garcia, 471 U.S. 261, 266–67 (1985) ("The Reconstruction Civil Rights Acts do not contain a specific statute of limitations governing [42 U.S.C.] § 1983 actions—'a void which is commonplace in federal statutory law.' . . . When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." (quoting Bd. of Regents v. Tomanio, 446 U.S. 478, 483 (1980)).

Congress—"All legislative Powers"[181]—trying to identify a limitations period by resorting to private law would involve an entirely unguided reach into a grab-bag of possibilities wholly unrelated to the problem Congress addressed in the CRA. Indeed, the CRA expressly states that the President's decision to advance the effect date of a rule does not affect Congress's ability to review and nullify it.[182]

Further, the CRA does not leave open any room for application of the equitable doctrine of laches to bar Congress's review today of an unsubmitted rule. Laches is a defense developed by the English equity courts to bar a claim for non-damages relief sought by someone who had, as the saying goes, "sat on his rights." The doctrine is principally applicable to "claims of an equitable cast" for which Congress has defined no statute of limitations.[183] In the case of the CRA, to be sure, there is no statute of limitations to exclude late-filed claims, so it could be argued that the doctrine of laches should be applied to Congress's inaction on unsubmitted post-1996 rules. That argument, however, is mistaken. Put aside the fact that laches is applied by courts, not legislatures. The CRA *has* a statute of limitations of sorts—the sixty-day period Congress has to review a submitted rule. But, as explained below, that period does *not* commence until the *later* of two dates: the date when the *Federal Register* publishes the rule *or* the date that the rule-issuing agency submits it to Congress. In the case of the latter, it is important to note that only submission of the rule triggers the review period clock, not publication or even Congress's knowledge of the rule's existence. For that reason, it makes no sense to say that the review period can expire for a never-submitted rule. If that were true, no agency would ever bother to submit its rules to Congress since doing so could only lead to an adverse result. It must be remembered that the CRA review period comes into play for old rules only if it is the *agency—not* Congress—that sat on its *obligations*—not *rights*. Accordingly, the doctrine cannot bar Congress from now

181. U.S. Const. art. I, § 1.

182. *See* 5 U.S.C. § 801(c) (quoted *supra* note 32).

183. *See* Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962, 1973 (2014).

considering a rule never previously submitted in compliance with the CRA, however long that period might be.[184]

7. Prior Infrequent Use of the CRA

The past, infrequent use of the CRA is hardly surprising, and certainly does not suggest that the Act must be read narrowly. This is true for several reasons. Every executive agency must submit proposed rules to the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) for review.[185] If the agency and OMB disagree on the merits of a particular rule that is proposed, the President or his designee can referee the dispute.[186] Under the CRA, the President can veto a joint resolution of disapproval, and he is not likely to scuttle a rule that he or OMB has already approved. Accordingly, the optimal time for Congress to invoke the Act is during the early days of a new administration headed by a President who replaces one from the opposing party and who belongs to the same party as the majority of the incoming members of both houses of Congress.[187] That unique confluence of factors has happened at most only three times since the CRA became law: when George W. Bush became President in 2001, when Barack Obama became President in 2009, and when Donald Trump became President in 2017. Yet neither of those

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184. *Cf. id.* at 1974 ("[W]e adhere to the position that, in face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief.").

185. *See* Exec. Order No. 12,291, 3 C.F.R. 127, 128 (1982); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011); DeMuth, *supra* note 2, at 73–74.

186. *See* Christopher DeMuth, *OIRA at Thirty*, 63 ADMIN. L. REV. 101, 102 (2011); DeMuth, *supra* note 2, at 73–74.

187. *See* CAREY, *supra* note 24, at 5; Brito & Rugy, *supra* note 8, at 190; Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 1002 (2001); *see also* Croston, *supra* note 8, at 910 ("[T]here are structural problems inherent in any model of congressional enforcement. First, because the agencies are in the Executive Branch and at least nominally under the President's control, 'Congress rarely is held accountable for agency decisions.' If regulated entities are upset because agencies are passing secretive, burdensome rules without complying with the CRA, they will probably not take out their anger on Congress. They will blame the agencies, which are naturally at fault, and perhaps complain to the Office of Information and Regulatory Affairs (OIRA) or other executive actors. The general result is a congressional 'lack of interest' in CRA enforcement. In addition, . . . the 'partisan and constituency interests of individual members of Congress usually prevent them from acting collectively to preserve congressional power—or, what is almost the same thing, to deny authority to the other branches of government.'" (footnotes omitted)).

first two Presidents was leery of using the administrative state to advance his policy goals. President Bush did sign one joint resolution of disapproval early in his administration, but that pertained to an ergonomics rule issued by the Occupational Safety and Health Administration under unique circumstances.[188] President Bush used the regulatory process to advance his interests in homeland security.[189] As for President Obama, he aggressively used the rulemaking process to advance his policies, particularly during his last six years in office, when he no longer had a Democratic majority in Congress.[190] Only now, with the election of President Trump, is there a President who seems committed to reducing the size and power of the administrative state. The past infrequent use of the CRA is therefore irrelevant.

8. Gamesmanship

The argument about gamesmanship is mistaken for two reasons. The first one is that a joint resolution of disapproval *does* amend the underlying statute or regulation. *Chevron* held that courts must accept an agency's interpretation of an ambiguous statute. By nullifying a rule under the CRA, Congress's joint resolution nullifies not only the *outcome* that the rule directs, but also whatever *construction* the agency gave to the relevant statute. It must be remembered that Section 802 requires a joint resolution to identify the specific rule to be nullified.[191] In so doing, Section 802 effectively incorporates that rule into the

188. *See* ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 15 ("In sum, the veto of the ergonomics standards could be seen as the product of an unusual, confluence of factors and events: control of both Houses of Congress and the presidency by the same party, the longstanding opposition by these political actors, as well as by broad components of the industry to be regulated, to the ergonomics standards, and the willingness and encouragement of a President seeking to undo a contentious, end-of-term rule from a previous Administration.").

189. *See* KERWIN & FURLONG, *supra* note 44, at 43.

190. *See* David E. Bernstein, Lawless: The Obama Administration's Unprecedented Assault on the Constitution and the Rule of Law (2015); Kerwin & Furlong, *supra* note 44, at xii (writing in 2010 that "[i]f there is any consensus on anything, it is that regulation will be a centerpiece of the Obama program.").

191. 5 U.S.C. § 802(a) (2012) (providing that the "joint resolution" includes the following: "the matter after the resolving clause of which is as follows: 'That Congress disapproves the rule submitted by the _____ relating to _____, and such rule shall have no force or effect.' (The blank spaces being appropriately filled in).").

resolution. Congress's decision to nullify the rule therefore also nullifies whatever statutory interpretation the agency adopted under *Chevron*. As two scholars have noted:

> [T]he enactment of a resolution of disapproval alters the agency's statutory mandate in an unusual way. The congressional review statute is explicit that if any rule is disapproved, the agency may not re-issue the same or a substantially similar rule unless the agency has been provided specific statutory authority enacted after the date of the joint resolution disapproving the original rule. Of course Congress may amend statutes. Under this procedure, however, a simple and unelaborated "No!" withdraws from agencies a range of substantive authority that cannot be determined without subsequent litigation.[192]

The other important effect stems from the CRA's express anti-circumvention provision. The Act provides that, in the absence of an intervening federal legislation, the agency cannot readopt a nullified rule and cannot issue a new one that is "substantially the same" as the one Congress eliminated. The effect is to create a "buffer zone" around the now-erased rule to disable an agency from engaging in mischief by reissuing a new rule with a different title, a different effective date or penalty, a slightly different substance or tone, or some other cosmetic change in a thinly disguised effort to escape nullification. To create that buffer zone, a joint resolution must necessarily amend the underlying statute. In fact, given *Chadha*, new legislation with that effect is the only way that Congress could amend the original law. Accordingly, a joint resolution does have the effect of amending the underlying statute and so does not mislead the public.[193]

Consider this hypothetical. Congress passes legislation providing that "*X* is mandatory"; the relevant agency issues a

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192. Cohen & Strauss, *supra* note 8, at 104.

193. As a matter of politics, trying to force members of Congress to be held accountable for their legislative acts is like trying to grab quicksilver. Congress is the major leagues of politics. People do not get elected to the Senate or House of Representatives without having the ability to avoid or shed accountability when necessary. Reading the CRA or any other statute to keep members from disguising their rationales for legislative behavior is a fool's endeavor. That is why the courts avoid inquiries into a legislator's motives. *See* United States v. O'Brien, 391 U.S. 367, 383 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter.").

rule (whether legislative or interpretive—the difference does not matter) saying that "X means X_1, X_2, and X_3"; Congress passes a joint resolution disapproving that rule; and the President signs the resolution into law. The resolution has the effect of deeming X_1, X_2, and X_3 to be erroneous interpretations of X. That is, Congress by law has now revised the meaning of X to exclude X_1, X_2, and X_3 as possible interpretations. Put another way, the effect of disapproval is the same as if Congress had passed a statute providing that "X is mandatory, but X_1, X_2, and X_3 are not X." In fact, the resolution has an even broader effect. Because the agency cannot issue a new rule that is "substantially the same" as the one Congress eliminated, X_4 and (perhaps) X_5 have also been deemed null and void to create a buffer zone around X_1, X_2, and X_3 for substantially similar rules.[194]

9. Agency Nullification

The alternative, narrow view of the CRA noted above enables an agency to stiff arm Congress by refusing to submit a rule for Congress's review and waiting for the sixty-day review period to expire. That result would render the CRA a nullity, which is obviously not the role that Congress intended for the CRA. That result is also at odds with the text of the statute for the reasons given above. Congress has furthermore gone out of its way to address a scenario that might occur at the end of a

194. Commentators have offered their views on the meaning of the CRA term "substantially similar." Fleshing out the meaning of "substantially similar" is beyond the scope of this article, but a few points in response to their theories are in order. There is no merit to several possible interpretations of "substantially" similar, such as the following: (1) an agency can reissue the identical rule if the "external conditions" have changed, or if it just believes that to be true; (2) an agency can issue a new rule if the original cost-benefit analysis for the disapproved rule has materially changed; and (3) an agency can issue a new rule if the original cost-benefit analysis has materially changed and the agency has fixed the specific problems that Congress identified when it disapproved the rule. *See* Finkel & Sullivan, *supra* note 8, at 734–37. Options 1 and 2 would permit the agency to re-promulgate the identical rule and so ignores the CRA's prohibition on reissuance of a rule that is "substantially similar." A new rule that is identical to the one that Congress and the President disapproved is "substantially similar" to the original rule under any rational interpretation of that term regardless of any change in its effect. Option 3 adds the requirement that the agency "fix" the "problems" mentioned by members of Congress during debate over a CRA joint resolution and so is subject to all of the same criticisms that can be made against relying on the isolated remarks of legislators to determine a statute's intent.

term of Congress by providing a detailed mechanism for calculating the number of days that the new Congress would have to review a rule submitted with fewer than sixty legislative days remaining in the prior Congress. These provisions demonstrate that Congress did not want to lose the opportunity to review a rule simply because the agency submitted it late in a particular Congress. It therefore makes no sense to read the CRA as allowing the rule-issuing agency to ignore the Act by not submitting a rule at all.

10. Remedial Legislation

The argument that the CRA is not remedial is either irrelevant or wrong, depending on one's view of the value of the Senate filibuster. Yes, Congress did not need the CRA to enact legislation; Article I empowered Congress to do just that. But the Senate rules allow any Senator to prevent a bill from coming to a vote by filibustering, which means that, in a polarized political climate, a supermajority is generally necessary for the Senate to pass, or even debate, any bill. The CRA, however, ensures that the Senate can vote on a joint resolution by eliminating the filibuster and ruling out of bounds any other procedural mechanism with the same effect. Some parties would dislike that result because it would enhance Congress's ability to overturn agency rules; they see the CRA as anything but remedial. Other parties would prefer to see the Senate vote on a joint resolution; they see the elimination of the filibuster as worthwhile. Neither opinion matters. To ease the process and increase the speed at which a legislation is passed, Congress decided to eliminate a practice that is not required by Article I or *Chadha*. That is Congress's prerogative, and its decision controls regardless of what others might think.[195]

195. *See* U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the rules of its Proceedings . . . ."); Nixon v. United States, 506 U.S. 224, 250 (1993) (White, J., concurring in the judgment) (concluding that each chamber's authority to establish its procedures authorizes the Senate to use a committee to hear evidence and report to the full Senate in impeachment cases).

VI. THE LONG-TERM USEFULNESS OF THE CONGRESSIONAL REVIEW ACT

The CRA is a workable substitute for a legislative veto. It satisfies the Bicameralism and Presentment requirements that the Supreme Court found critical in *Chadha* while still giving Congress an opportunity to eliminate rules before they can inflict damage on the economy, a business, or an individual. The Act achieves these goals by staying the effectiveness of a rule until Congress has had an opportunity to consider it, by establishing a fast-track review process so that Congress can act quickly, and by presenting a joint resolution of disapproval to the President for his signature or veto. Of course, the CRA process does not offer Congress the same authority and convenience that it enjoyed with a legislative veto. But no statute could do so as long as *Chadha* remains good law. Congress cannot return to the days when one house could invalidate an agency rule without the concurrence of the other house and the President, and thus the CRA is a reasonable alternative.

Congress and President Trump have used the CRA to nullify rules submitted to Congress on or after June 13, 2016. The above theory would enable them to reach back even further and undo any rule promulgated after the CRA was signed into law that was never submitted to Congress. Whether the Trump Administration exercises that authority is a matter of politics and will, not law. The administration might decide that it does not have a majority in each house of Congress to reach back and eliminate unsubmitted rules. Or the administration might decide to negotiate away that authority with Congress in exchange for particular legislation or, in the case of the Senate, more intense effort to expedite the process of confirming the President's nominees for positions in his administration or on the bench. Or the administration might not have the political courage to withstand the criticism that will follow upon its decision to invalidate unsubmitted rules in areas, such as the environment or land use, where the administration's opponents will fight tooth and nail to sustain rules that they persuaded agencies to adopt under President Trump's predecessors. Only time will tell.

But there is an additional issue to consider: Does the CRA matter *prospectively*? After all, Congress can follow the same

Article I process used to pass every other type of legislation. The President can also repeal existing legislative rules by going through the same APA notice-and-comment process that an agency used to promulgate them. As far as interpretative rules go, the President does not even need to do that much. Agency interpretative rules are exempt from the notice-and-comment process, so he or the chief agency officer can simply revise or repeal whatever guidance manual, opinion letter, or equivalent document the agency issued previously. So, if Congress and the President can repeal any existing legislative or interpretative rule without regard to the CRA, what difference does that statute make going forward? Why is it important?

President Trump could use executive orders to rescind or modify rules or policies adopted during the Obama Administration, but the repeal or revision of a regulation that has gone into effect must undergo the same APA notice-and-comment period that an agency must follow when initially adopting a rule.[196] The notice-and-comment process and the ensuing litigation, which will inevitably follow as the night follows the day, could put off for years the final resolution of the validity of a rule that neither Congress nor the President believes improves life for the American public. Moreover, if Congress were to pass and President Trump were to sign into law a joint disapproval resolution, the agency would be barred from readopting the rule absent an intervening change in federal statutory law. Atop that, the Trump Administration might conclude that aggressive use of the CRA establishes a precedent that future administrations, not committed to regulatory reform, would find difficult to distinguish or evade, thereby al-

196. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) ("The [APA] makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action."); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983) (ruling that an agency must comply with the APA when rescinding a rule). The APA established a multi-step procedure for "notice-and-comment rulemaking." To start, the agency must issue a "[g]eneral notice" of proposed rulemaking, which is ordinarily done by publication in the Federal Register. Next, the agency must give interested parties the opportunity to offer written submissions regarding the proposed rule, with the agency obliged to consider and respond to significant comments. When promulgating its final rule, the agency must include "a concise general statement" of the rule's basis and purpose. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015); *see also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

lowing the administration to make its mark on administrative law. President Trump and Congress therefore might find that the CRA provides the best vehicle by which to eliminate what they see as unjustified economic burdens, partly because, in addition to eliminating the regulation, it would keep a regulatory agency from going astray from whatever statute Congress enacted.[197]

Nullification of a rule under the CRA has a more significant effect than would be the case if the President or agency simply withdrew it. Once a rule is nullified, the agency cannot promulgate a rule that is "substantially the same" unless the agency can point to an intervening federal law as authority for the rule.[198] An obvious purpose of that provision is to prevent an agency from issuing a new rule with merely a different caption, justification, need, or explanation, or one that makes only cosmetic or substantively trivial revisions to the original one. How different a rule must be to satisfy that requirement is uncertain. Congress did not explain what that difference must be or even how to go about answering that question. Some new rules—for example, one that encourages a party to act in a certain way rather than legally directing or effectively coercing him to do so—should satisfy the substantial difference requirement. Rules like those use a very different mechanism to achieve a result—moral suasion instead of coercion. On the other hand, rules that merely minimize the effect of the original rule—for example, one that reduces the penalty for noncompliance—likely would be found "substantially the same." Those rules carry forward the command-and-control approach to regulation that agencies are fond of using while simply making noncompliance less painful (perhaps only slightly).

But the question remains whether the CRA is a useful and important tool for correcting an errant agency. Some commentators believe that the CRA has failed to check administrative

197. *See* Kimberly Strassel, *A GOP Regulatory Game Changer*, WALL ST. J. (Jan. 27, 2017), http://www.wsj.com/articles/a-gop-regulatory-game-changer-1485478085 [https://perma.cc/P9WY-QC9H]; *see also* Michael Barone, *Two really audacious proposals for Trump and the Republicans*, WASH. EXAMINER (Jan. 30, 2017, 9:37 AM), http://www.washingtonexaminer.com/two-really-audacious-proposals-for-trump-and-the-republicans/article/2613333 [https://perma.cc/W8DT-NSJ9].

198. 5 U.S.C. § 802(b)(2) (2012) (quoted *supra* note 31).

excess.[199] Certain members of Congress have introduced bills to make the CRA more useful. For example, allowing Congress to bundle more than one rule into a joint resolution of disapproval rather than consider them one at a time or establishing a fast-track procedure for the House of Representatives.[200] These revisions would certainly make the CRA review process more efficient, but they would not answer the question whether the CRA, however revised, can function in nearly as effective a manner as a legislative veto.

Ultimately, the answer is no. The CRA cannot work as effectively as a legislative veto in restraining the regulatory state. The reason is a simple one: the politics of the CRA process work in the President's favor. The President appoints the OIRA Administrator, and the latter is responsible for reviewing proposed agency rules. Absent some extraordinary, intervening political occurrence the President is not likely to sign any joint resolution of approval that would scuttle a rule his administration has adopted. Once the initial break-in period of his administration has become history and his own appointees are up and running, the President will largely be able to keep Congress from interfering in his regulatory policy. At that point, unless there is a supermajority in Congress to overturn a presidential veto, Congress will return to the regulatory sidelines. Only new legislation would get Congress back into the game.

That would happen, for example, if Congress were to enact a bill known as the Regulations from the Executive in Need of Scrutiny Act, or the REINS Act for short.[201] The REINS Act

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199. *See* Rosenberg, *Whatever Happened*, *supra* note 8, at 1083 ("The CRA is not working. Part of the problem may be traced to identifiable structural and interpretive flaws. Part may also be attributable to a lack of political will to confront and deal with complex and sensitive policy issues that major rulemakings often present. Avoidance is the easier path when a court is available to bail you out or an agency is handy to blame. But a good part of the problem appears to lie in the failure of the Congress to understand and appreciate the nature of the stakes involved and the dangers inherent in failing to act decisively to resolve them.").

200. *See* The Midnight Rules Relief Act, S. 34, 115th Cong. (2017); The Midnight Rules Relief Act, H.R. 31, 115th Cong. (2017); H.R. REP. NO. 114-782, pt. 1 (2016) (report on a predecessor bill, The Midnight Rules Relief Act, H.R. 5982, 114th Cong. (2016)); ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 18, 21.

201. S. 21, 115th Cong. (2017); Regulations from the Executive in Need of Scrutiny Act of 2017, H.R. 26, 115th Cong. (2017); *see also* Jonathan Adler, *Placing "REINS" on Regulation: Assessing the Proposed REINS Act*, 16 N.Y.U. J. LEGIS. & PUB.

would flip the CRA (and the legislative veto) on its head. It would require an agency to submit to Congress any rule that would have an effect on the economy greater than $100 million. At that point, the legislative process would treat the rule like any other bill. The rule would not become law unless and until both chambers approved a joint resolution of approval and the President signed it into law. The difference between the proposed REINS Act and the CRA works entirely to Congress's advantage. Inaction now would defeat the rule. Accordingly, the REINS Act would put Congress in an even better position than the one it occupied before *Chadha* struck down the legislative veto.

VII. CONCLUSION

Congress adopted the CRA to have the opportunity to quickly review agency rules before they could go into effect. Congress intended that the term "rule" include every type of document that an agency could prepare that could have an adverse effect on the economy or the public. Congress intended that the CRA would apply to every rule promulgated after President Bill Clinton signed the act into law, and it also intended to limit judicial review to only those actions or inactions attributable to the rule-issuing agency. An agency that has submitted to Congress whatever rules it has adopted since 1996 may continue to rely on them in whatever enforcement action the agency may threaten or bring. Only rules that have not been submitted to Congress are now subject to CRA review and repeal. But that was the dual purpose of the act: to review rules before their troublesome effects could be felt and to ensure that agencies would comply with the act's requirements by preventing unsubmitted rules from becoming law unless and until they passed Congress's review. Whether that interpretation of the CRA is deemed to be broad, narrow, or just right is of no importance. The text and purposes of the statute demand that rules never submitted to Congress be deemed not yet in effect, whatever form they have taken and whenever they were issued. Agencies cannot, by acting unlawfully, run out a clock that never started.

POL'Y 1 (2013). The House passed its bill in January 2017. The Senate is yet to act on Senate Bill 21.

OF BRUTAL MURDER AND TRANSCENDENTAL SOVEREIGNTY: THE MEANING OF VESTED PRIVATE RIGHTS

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INTRODUCTION

The idea of vested private rights is divisive; it divides those who practice law from those who teach and think about law. On one side of the divide, practicing lawyers act as though (at least some) rights exist and exert binding obligations upon private persons and government officials, such that once vested the rights cannot be taken away or retrospectively altered.[1] Lawyers convey estates in property, negotiate contracts, and write and send demand letters on the supposition that they are specifying and vindicating rights, which are rights not as a *result* of a judgment by a court in a subsequent dispute but rather because they *direct* judicial deliberations and *determine* judgments. Lawyers also negotiate compensation from local governments for expropriations and regulatory takings, demand due process protections for their clients, apply to courts for injunctive relief, and seek enforcement of laws and judgments across state lines. They do this on the presumption that officials are obligated to act or refrain from acting in certain ways because of the existence of rights enjoyed by persons in their unofficial capacities.

On the other side of the divide, scholars of law and jurisprudence generally proceed as if the concepts of vested right and nonretrospectivity have little real meaning.[2] The English positivist and American legal realist movements are thought to have discredited the doctrine of vested private rights. On the currently prevailing account, lawyers who practice private law are generating expectations, which might or might not be realized depending upon how courts interpret or construct the law and whether the legislative sovereign acts to change the law.

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1. *See, e.g.*, J. Spencer Hall, *State Vested Rights Statutes: Developing Certainty and Equity and Protecting the Public Interest*, 40 URB. LAW. 451 (2008); Gregory Overstreet & Diana M. Kirchheim, *The Quest for the Best Test to Vest: Washington's Vested Rights Doctrine Beats the Rest*, 23 SEATTLE U. L. REV. 1043, 1044 (2000) (calling vested rights "absolutely critical" to real property practice); E.A. Prichard & Gregory A. Riegle, *Searching for Certainty: Virginia's Evolutionary Approach to Vested Rights*, 7 GEO. MASON L. REV. 983 (1999).

2. *See, e.g.*, Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1071 (1997); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 517 (1986); Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657, 1658–59 (1999).

The sustained skepticism of the concept of vested private rights in the theoretical inquiries of scholars, coupled with sustained interest in the reality of vested private rights in the practical deliberations of lawyers, has left the doctrine in a state of limbo—neither fully discredited nor fully coherent. Neil Duxbury, a noted theorist, has observed that the concept of vested rights "is not easily shaken off."[3] Yet Charles Siemon, an accomplished practitioner, has found it difficult to find order amidst the "confusion in the law."[4]

This Article attempts to explain the continuing appeal of the vested private rights doctrine and to discern some coherence in it while also accounting for the causes of skepticism. The Article proceeds by way of comparing theoretical accounts of the doctrine in English positivist and American legal realist scholarship with instances of the doctrine in legal practice. Disagreement between theory and practice can be narrowed by critical engagement with both. In fact, a surprising area of agreement emerges when one distinguishes what the positivist and realist theorists claimed and *did not claim*, and what the doctrine does and *does not* (always) *do*. English positivists did not argue that vested rights doctrine is impossible or unlawful in principle, only that it is inconsistent with the legal systems they described, in which legislative sovereignty is a foundational constitutional commitment. And realists did not claim that law-abiding citizens, legislators, executive officials, and judges cannot or do not understand themselves to be bound to respect vested private rights, only that many citizens, officials, and judges are motivated by other concerns.

On the practice side, the doctrine of vested rights does not necessarily entail judicial review or judicial supremacy. It does not always prohibit legislators from changing laws retroactively or retrospectively. And vested rights do not always impose an absolute duty upon duty-bearers. Vested private rights often perform less ambitious tasks.

The theorists and practitioners disagree about the existence or efficacy of vested rights in the strongest possible sense, as

3. Neil Duxbury, *Ex Post Facto Law*, 58 AM. J. JURIS. 135, 142 (2013).

4. CHARLES L. SIEMON & WENDY U. LARSEN WITH DOUGLAS R. PORTER, VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS iii (1982).

rights that bind persons conclusively and that cannot be altered by subsequent legislation. Yet even this disagreement reveals an implicit *agreement* about what the strongest—most central or focal—sense of vested private right *is*. Theorists and practitioners seem to agree that any vested private right worthy of the name must possess two essential characteristics. For reasons explained below, I call these essential features "*personal directiveness*" and "*public indefeasibility*." A legal right that possesses both of these features in the fullest measure is a vested private right in the most complete or meaningful sense. Following jurisprudential thinkers from Aristotle to H.L.A. Hart to John Finnis, I call these rights *central instances* of the reality of vested private rights, and I call the concept that corresponds to a central instance the *focal meaning* of the idea of vested private rights.[5] A central instance of a vested private right found in legal practice most closely resembles the focal meaning of the concept of vested private right; the focal meaning of vested private right is the form or ideal type of the strongest and most effective vested private rights that are found in practice.[6]

Just as there are central instances, there are penumbral (not in the center but close to it), peripheral (more distant from the center, at the edge of the penumbra), and even defective (outside the penumbra) instances. And just as there is a focal meaning, there are less-focal, muddled, and even mistaken or wrong meanings. Between the center and the periphery lie various radiating spectra. Thus, if one has an adequate focal meaning of vested private right then one need not think of the existence of vested private rights in a binary, either-or fashion. Some rights might be more or less personally directive, and thus more or less like private rights. Others might be less or more defeasible, and thus more or less vested.

This study reveals coherence in the idea of the vested private right as a norm that imposes a conclusive duty upon a duty-

5. See Aristotle's mechanism for distinguishing between central friendships and friendships of utility in ARISTOTLE, NICOMACHEAN ETHICS bk. VIII.4 (c. 384 B.C.E.), and John Finnis's translation of Aristotle's terminology and interpretation of his method in JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 9–11 (2d. ed. 2011). *See also* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607–15 (1958).

6. On the importance and efficacy of central case and focal meaning in the study of law, see generally FINNIS, *supra* note 5, at 3–22.

bearer or class of duty-bearers[7] and which constrains powers to recognize, change, or adjudicate private rights and duties.[8] Central instances of this norm are rare. This accounts for theoretical skepticism of the concept. Yet less-central instances of vested rights are rather common. This accounts for the practical appeal of the doctrine itself. One can thus distinguish weak senses and peripheral instances of vested private rights, which are not as conceptually interesting but are nevertheless significant for the practice of law, from strong senses and central instances, which are rare in practice but theoretically interesting and important. This framework preserves the valuable insights of theory and the valuable utility of vested rights in practice, while not claiming too much for either. This way of understanding the doctrine might also open new lines of inquiry about the senses in which different private rights are and are not rights, and the senses in which they are and are not vested.

After this Introduction, this article proceeds in three additional parts. Part II briefly traces the history and development of the doctrine of vested private rights for the purpose of clarifying its contours. Part III examines and critiques theoretical challenges to the doctrine with particular emphasis on the early English positivism of Jeremy Bentham and John Austin and the American legal realist movement. Part IV draws lessons from Parts II and III to propose a focal meaning of the concept of vested private rights and illustrates each of its two essential features.

A note about terminology: I follow here what has become conventional terminology in jurisprudence scholarship,[9] but not uniformly in law or legal scholarship,[10] terming as "retro-

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7. In Hart's influential theory of law, these duties arise out of what Hart called primary rules, which concern the obligations of law. *See* H.L.A. HART, THE CONCEPT OF LAW 91 (3d ed. 2012).

8. In Hart's account, these powers arise out of what Hart called secondary rules, which concern the powers to recognize as valid, change, or adjudicate the primary rules, those rules that create obligations. *See id.* at 94. Though the discussion here concerns rights and duties, rather than rules, I follow Hart's taxonomy of powers.

9. *See* Duxbury, *supra* note 3, at 136–37.

10. Among law professors, it is "standard practice" to use the terms "retrospective" and "retroactive" interchangeably. James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 102 n.51 (1993).

spective" those laws which alter a right or duty after it is settled and specified, and as "retroactive" those laws that impose or increase criminal sanction for an action after the action has been committed. This Article concerns retrospective laws, though derivatively, insofar as the maxim opposing retrospectivity rests upon, and applies only to, private rights that are vested.

I. EVOLUTION OF THE BASIC CONSTITUTIONAL DOCTRINE

A. A (Short) History of What It Is

The doctrine of vested private rights is generally viewed as an American phenomenon of largely historical interest. The concept of vested private rights as a check on legislative sovereignty came into full flower on American soil at the time of the Revolution.[11] It is difficult to understand the complaints against Parliament enumerated in the Declaration of Independence unless one conceives of constitutional limitations on Parliamentary supremacy. And the notion of limits on legislative power extended to the framing of American constitutions, including, according to some, the United States Constitution of 1787–89.[12] For example, James Madison characterized the Ex Post Facto Clauses of Article I as constitutional bulwarks against encroachment upon both personal security and "private rights."[13]

For a century after the Founding, American scholars and jurists identified vested rights doctrine as basal to American law

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11. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1699–703 (2012); Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 780–82 (1936); Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1441–42 (1999). The revolutionary debates were framed in part by Parliament's then-recent divestment of the rights of John Wilkes and the East India Company without due process of law. *See* Chapman & McConnell, *supra*, at 1694–99.

12. THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 357–413 (1868) (arguing at length that due process and law of the land clauses were framed to prohibit the disturbance of vested rights).

13. THE FEDERALIST NO. 44, at 277–79 (James Madison) (Henry Cabot Lodge ed., 1888). Cooley also suggested that the "natural and obvious meaning of the term *ex post facto*" includes not only criminalization of an act after its commission but also retrospective legislation. COOLEY, *supra* note 12, at 264.

and made categorical statements about the limits that it placed upon legislative power to enact retrospective statutes.[14] Joseph Story stated the view, "Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact."[15] And so, in Story's interpretation of American constitutionalism, "no State government can be presumed to possess the transcendental sovereignty to take away vested rights of property."[16]

Although the doctrine of vested private rights specifically is distinctly American, the idea of rights as constraints upon government power is not. The notion of law as an antecedent source of obligations upon officials, which legislators and judges declare and do not generate, has deep roots in the common law.[17] The origins of rights against the sovereign can be traced back to both English common law and the unwritten constitution of British North America.[18] And the sources of those rights are distinctively English: "custom, ownership, inheritance, contract, and reason."[19] The existence of such rights does not depend upon the written charters and judicial opinions in which they are declared; they are part of the unwritten law, discovered and not commanded by judicial and political officials.[20] As Gordon Wood explains, American colonists inherited the English idea of democratic self-government as a means to secure rights and privileges.[21] They also shared the English eagerness to obtain from their rulers written recognition of their rights

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14. *See* Kainen, *supra* note 10, at 103; *see also* COOLEY, *supra* note 12, at 357–59; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 319 (2d ed., Halsted 1832); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1398–99, at 272–74 (5th ed. 1891).

15. 2 STORY, *supra* note 14, § 1398, at 272.

16. *Id.* § 1399, at 273.

17. *See* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY xiii–xiv (2008); ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 175–202 (1966).

18. *See* 1 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 9–11 (1986); JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 4 (2003); Smead, *supra* note 11, at 780.

19. 4 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF LAW 114 (1993).

20. Wood, *supra* note 11, at 1423–24.

21. *Id.* at 1426–27.

and privileges, which of course was grounded in the historical experiences of Magna Carta and the English Bill of Rights.[22] Yet written charters were not understood to create the rights, but rather to settle and specify them—"to reduce to a certainty the rights and privileges we were entitled to," as one colonist expressed it.[23]

In English history, of course, the threats to liberty have primarily come from the crown. And thus at least since the Cromwellian and Glorious Revolutions, Parliament has been viewed as the guardian of, not a threat to, rights and liberties.[24] As the Declaration of Independence illustrates, Americans at the time of the Founding had a very different experience of Parliament's powers than their English counterparts.[25] American lawyers adopted the common law canon of charitable construction that a statute should not be read to divest vested rights unless the plain language of the statute made the divesting interpretation unavoidable.[26] Yet, following Coke's suggestion that the maxim reflected something inherent in the nature of law itself—a requirement of justice—American lawyers held retroactive and retrospective laws "to be oppressive and unjust, and it was maintained that the essence of a law was that it be a rule for the future."[27]

The doctrine of vested private rights continued to occupy a prominent place in the foundation of American law long after the Founding. As late as 1914, Edward Corwin described the "Doctrine of Vested Rights" as "*the* underlying doctrine of American Constitutional Law."[28] Indeed, as between vested rights and the police powers, Corwin argued that vested rights was the more basic doctrine.[29] And in 1936, Dartmouth Professor Elmer Smead referred to the more general maxim against

22. *Id.* at 1427.

23. *Id.*

24. *Id.* at 1425–26.

25. And the philosophical and political assumptions shared by lawyers in colonial America and the early Republic were more amenable to thinking of rights as limitations on legislative power. *See id.* at 1427–35.

26. *See* Smead, *supra* note 11, at 780–81.

27. *Id.* at 780.

28. Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 255 (1914) (emphasis added).

29. *See id.*

retroactive and retrospective legislation as a "basic principle of jurisprudence."[30]

Of course, *Calder v. Bull*[31] looms large over the subject. Yet while the *Calder* Court interpreted the Ex Post Facto Clause of Article I, Section 10 of the United States Constitution to apply only to retroactive criminal laws, the ruling did not endorse state legislative supremacy.[32] Assuming that *Calder* was rightly decided (a question of persistent controversy),[33] it is not obviously read for the proposition that private rights may be abrogated in the exercise of legislative sovereignty.[34] It was enough for the *Calder* Court to hold that the Ex Post Facto Clauses of the Constitution of the United States do not reach the matter because the states did not delegate to the federal government powers to secure private rights.[35] Except for the impairment of contracts, the power to discern the boundaries between vested rights and lawful retrospective laws was reserved to the states.[36]

That interpretation of *Calder*, later maintained by Thomas M. Cooley[37] and Corwin,[38] was put to the test in 1814. Sitting as a

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30. Smead, *supra* note 11.

31. 3 U.S. (3 Dall.) 386 (1798).

32. *See* Smead, *supra* note 11, at 791.

33. *See, e.g.*, E. Enters. v. Apfel 524 U.S. 498, 538–39 (1998) (Thomas, J., concurring); Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 416 (1829) (Johnson, J., concurring); Corwin, *supra* note 28, at 249; Smead, *supra* note 11, at 791.

34. Writing for the Court, Justice Chase would not "subscribe to the omnipotence of a state legislature" over private law. *Calder*, 3 U.S. (3 Dall.) at 387–88. Indeed, to maintain that a state legislature may "violate the right of an antecedent lawful private contract; or the right of private property" would be a "political heresy." *Id.* at 388–89.

35. *See id.* at 386–87; Kainen, *supra* note 10, at 106–07. Alternatively, the holding might rest upon the premise that the act of the Connecticut legislature ordering the probate court to grant Bull a new hearing did divest Calder and his wife of a vested private right. Justice Chase observed that the legislation did not "revise and correct" the original judgment. *Calder*, 3 U.S. (3 Dall.) at 387. Nor did the disallowance of Morrison's will necessarily entail that Calder and his wife were the sole and rightful heirs. Justice Chase explained that "a right . . . only to recover property cannot be called a perfect and exclusive right. I cannot agree, that a right to property vested in Calder and wife, in consequence of the decree (of the 21st. of March 1783) disapproving of the will of Morrison, the Grandson." *Id.* at 394. For, he explains, "the decree against the will (21st. March 1783) did not vest in or transfer any property to" Calder and his wife. *Id.*

36. *See* 2 STORY, *supra* note 14, § 1398, at 272.

37. *See* COOLEY, *supra* note 12, at 169–73.

Circuit Justice, Joseph Story affirmed and adhered to the doctrine of vested private right as a matter of state constitutional law in a case that presented a question of "delicacy and embarrassment."[39] Justice Story regarded it as an "unwelcome task" to "call in question the constitutionality of" a New Hampshire statute that awarded a tenant who was wrongfully in possession the value of improvements he made during his possession.[40] Justice Story noted that, according to the *Calder* ruling, the Ex Post Facto Clauses of the United States Constitution apply "only to laws, which render an act punishable in a manner, in which it was not punishable, when it was committed."[41] Nevertheless, the New Hampshire Constitution prohibited the making of "retrospective laws . . . either for the decision of civil causes or the punishment of offences."[42]

In interpreting the term "retrospective," Justice Story concluded that it must include not only laws that take effect prior to passage, but also "all statutes, which, though operating only from their passage, affect vested rights and past transactions."[43] He reasoned, "Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective; and this doctrine seems fully supported by authorities."[44] For this principle he cited *Calder v. Bull*.[45] Writing for the court, Justice Story held that the New Hampshire statute was unconstitutional because it "confers an absolute right to compensation on one side, and a corresponding liability on the other, if the party would enforce his previously vested title to the land."[46] The statute thus effected "a direct extinguishment of a vested right in all the improve-

38. For a discussion of Cooley's interpretation, see Corwin, *supra* note 28, at 250–52.

39. Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 766 (C.C.D.N.H. 1814) (No. 13,156).

40. *Id.*

41. *Id.* at 767.

42. *Id.* (quoting N.H. CONST. of 1784, pt. I, art. XXIII).

43. *Id.*

44. *Id.*

45. *See id.*

46. *Id.* at 768.

ments and erections on the land, which were annexed to the freehold."[47]

Other state constitutions were held to protect vested rights against subsequent alteration and abrogation.[48] A state legislature could not retrospectively expand an adverse possessor's claim against the original owner to include a portion of a tract that he did not physically possess or improve where the adverse possessor did not act under color of title.[49] The common law recognized only actual adverse possession, rather than constructive possession of the whole tract, without color of title.[50] The retrospective reach of the statute infringed a state constitutional provision declaring the right of "acquiring, possessing, and protecting property," and a state constitutional takings clause.[51]

By the same logic, constitutional protections for vested rights did not always protect unvested expectations, statutory privileges and other beneficial results of state action, or posited privileges that were contrary to natural law, such as the privilege to own a slave.[52] For example, where a claimant had been conveyed title by a special statute, repeal of the statute did not divest the claimant of a vested private right.[53] The court reasoned that the statute was "repealed by the same authority which enacted it, and therefore the plaintiff's title cannot be assisted thereby."[54] These cases, and others like them,[55] illustrate that vested rights and duties were often understood to be settled and specified by some pre-political source of authori-

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47. *Id.*

48. *See, e.g.*, Spachius v. Spachius, 16 N.J.L. 172 (1837).

49. *See* Proprietors of Kennebec Purchase v. Laboree, 2 Me. 275, 278 (1823).

50. *See id.* at 287–88.

51. *Id.* at 290–91.

52. *See, e.g.*, Griffin v. Potter, 14 Wend. 209 (N.Y. Sup. Ct. 1835). *But compare* Buckner v. Street, 4 F. Cas. 578 (E.D. Ark. 1871) (No. 2,098) (decided under the Thirteenth Amendment), *with* Fisher's Negroes v. Dabbs, 14 Tenn. 119 (1834) (decided under the Tennessee Constitution).

53. *See* Austin v. Trs. of Univ. of Pa., 1 Yeates 260 (Pa. 1793).

54. *Id.* at 261.

55. *Compare* Berdan v. Van Riper, 16 N.J.L. 7, 10–11 (1837) (vested right in joint tenancy created by grant before statute enacted altering rule for creation of a joint tenancy) *with In re* Anthony Street, 20 Wend. 618 (N.Y. Sup. Ct. 1839) (no vested right in damages for expectation that land would be taken for laying out of public street).

ty—customary law, private ordering, natural law, natural rights, and equity—or by the political commonwealth exercising dominion as landowner over its own lands.[56]

For more than a century after *Calder*, the Supreme Court of the United States perceived constitutional protections for vested rights in clauses of the United States Constitution other than the Ex Post Facto Clauses.[57] Legislative limitations on private rights were construed so as not to abrogate them.[58] And natural property rights notions provided coherent, if not thoroughly originalist, bases for a workable regulatory takings doctrine.[59] The maxim against retrospectivity, resting upon the doctrine of vested private rights, was "the primary organizing idea"[60] in constitutional rights protection before the substantive due process era that commenced with *Lochner v. New York*.[61]

Lochner initiated a much more sweeping limitation upon democratic self-governance than the earlier vested rights doctrine.[62] And as *Lochner* was left behind in the march of the Court's twentieth-century rights jurisprudence, economic rights were as well. Since the legal realist revolution (about which more is said below) and the New Deal, impairments of vested rights have been allowed on varying standards of reasonableness.[63] This more recent jurisprudence overturned not just the judicial activism and libertarianism of *Lochner* but also much common law and fundamental constitutional doctrine with it.[64]

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56. *See, e.g.*, Union Canal Co. v. Landis, 9 Watts 228 (Pa. 1840).

57. *See* Smead, *supra* note 11, at 792–97; Kainen, *supra* note 10, at 102–08; *see also* Coombes v. Getz, 285 U.S. 434, 441–45 (1932); Tr. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 640–44 (1819); Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 49–51 (1815).

58. *See* Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 36 U.S. (11 Pet.) 420, 547–50 (1837).

59. *See* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1566–73 (2003).

60. Kainen, *supra* note 10, at 88–89.

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

62. *See* Kainen, *supra* note 10.

63. *See, e.g.*, Energy Reserves Grp. v. Kan. Power & Light, 459 U.S. 400, 413–17 (1983); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 445–48 (1934).

64. Though vested private rights are often mistakenly associated with *Lochner*, *see, e.g.*, Honeywell Inc. v. Minn. Life and Health Ins. Guar. Ass'n, 110 F.3d 547, 554–55 (8th Cir. 1997), the concept of vested private rights was not invented by

Yet, as demonstrated below, the idea did not go away that some rights are beyond the competency of legislative powers to alter or abrogate. The idea remains in law, though not in a comprehensive or even doctrinally coherent way. The Supreme Court of the United States has in recent decades employed realist language in its retrospectivity jurisprudence, leaving to the "sound instincts" of judges the question whether any particular right claim is sufficiently grounded in "settled expectations" to qualify as vested,[65] but it treats certain rights as vested for other purposes, such as establishing expropriation liability under the Takings Clause of the Fifth Amendment.[66] The doctrine continues to bear weight in private law and in state constitutional law. Meanwhile, many new rights have been announced by courts of last resort, which perform the same work that vested rights were understood to do in early decades. These generally arise out of the doctrine of substantive due process, which is grounded in radically different principles than the maxim against retroactivity and retrospectivity.[67]

B. What It Is Not

That short history of the doctrine must be sufficient for present purposes. Some words are now in order about what the doctrine of vested private rights does *not* necessarily mean. Of course the doctrine carries with it certain historical, political, and linguistic baggage, which cannot be avoided altogether. But I hope to set aside at least some of that baggage to better reveal the doctrine itself. I leave to the reader to determine how much of it must be picked up again at the end of the Article.

First, and it might seem most obviously, the doctrine of vested private rights concerns only *private* rights. In an informative study, Ann Woolhandler has shown the importance of the distinction between private rights and public rights during the

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activists during the *Lochner* era and does not depend upon a classical liberal theory of economics or constitutionalism. *See* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993); Kainen, *supra* note 10, at 132–33.

65. Landgraf v. USI Film Prods., 511 U.S. 244, 269–70 (1994).

66. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019–20 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434–35, 438, 441 (1982).

67. *See* Kainen, *supra* note 10, at 111–12.

pre-New Deal era when the doctrine of vested private rights enjoyed its greatest prestige.[68] In that period, the doctrine reached only private rights. Woolhandler associates those with what the jurists called the absolute rights of individuals—life, liberty of movement, and property—which persons would enjoy in a state of nature, plus rights to the enforcement of contracts.[69] The doctrine did not secure against retrospective alteration of public rights, which included the government's own proprietary rights, delegated government power, and statutorily-created privileges.[70]

One might draw the line between public and private rights in a slightly different place,[71] but the basic distinction itself seems to explain quite a lot about how the doctrine worked in practice before the *Lochner* era and the New Deal.[72] And the distinction is firmly grounded in common law jurisprudence. Though the doctrine of vested private rights imbued it with novel significance,[73] the public-private distinction was not an American innovation. Blackstone divided the third and fourth volumes of his *Commentaries* into discussions "Of Private Wrongs" and "Of Public Wrongs."[74] He took pains to communicate that common law rights and duties could be classified along that cleavage, for each wrong corresponds to and contrasts with the right it abridges, and consists in a violation of a duty not to commit the wrong.[75] Thus:

> Wrongs are divisible into two sorts or species; *private wrongs*, and *public wrongs*. The former are an infringement or priva-

68. *See* Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1023–29 (2006).

69. *See id.* at 1020–22, 1020 nn. 18–21.

70. *See id.* at 1027–36.

71. For common law jurists, the pre-political sources of rights and obligations included not just hypothetical states of nature but also custom, divine law, and natural law, which they viewed as real and meaningful foundations of law. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *38–92; JOSEPH STORY, A DISCOURSE PRONOUNCED UPON THE INAUGURATION OF THE AUTHOR AS DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY 6–21 (Boston, Hilliard 1829).

72. *See* Woolhandler, *supra* note 68, at 1027–36.

73. *See* Wood, *supra* note 11, at 1426–33.

74. See John Finnis's helpful explanation of Blackstone's jurisprudence in 4 JOHN FINNIS, PHILOSOPHY OF LAW: COLLECTED ESSAYS, 189–210 (2011).

75. Blackstone defined a wrong as "being nothing else but a privation of right." 3 BLACKSTONE, *supra* note 71, at *2.

> tion of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries*: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors*.[76]

Next, it is prudent to disavow any intention of taking sides on the debate between judicial sovereignty and legislative sovereignty. The nonretroactivity and nonretrospectivity principles are often treated as aspects or incidents of the separation between legislative and judicial powers.[77] Constraints on a legislature's competence are expressed as gains for the judiciary, and it is commonplace to assign vested rights doctrine to the judiciary's side of the ledger.[78] The doctrine of vested rights is thus perceived as antithetical to constitutional orders, such as England's, that have legislative sovereigns. Coke's maxim that right reason controls contrary acts of Parliament[79] has long been read through Blackstone's interpretation of Coke's decision as one of statutory interpretation to avoid a consequence not intended by Parliament[80] and his insistence that Parliament can abrogate even fundamental and absolute rights by stating its intention to do so expressly.[81] Yet this dichotomy is not strictly entailed in Parliamentary supremacy vis-à-vis the judiciary. The constitutional supremacy of reason, custom, and the

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76. *Id.*

77. *See, e.g.*, Woolhandler, *supra* note 68, at 1019.

78. *See, e.g.*, Corwin, *supra* note 28; Woolhandler, *supra* note 68.

79. "[W]hen an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void." SIR EDWARD COKE, *Dr. Bonham's Case*, *in* 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE, 275 (Steve Sheppard ed., 2003).

80. *See* 1 BLACKSTONE, *supra* note 71, at *91.

81. *See id.* This framing as a Coke vs. Blackstone debate is typical:

> The principle [prohibiting retroactive and retrospective legislation] in England took the form of a rule of construction. Believing that retroactive laws which affected past acts disadvantageously were unjust the common law courts declared that they would not give such a statute in general words a retrospective operation. Parliament, however, could make a statute specifically retroactive. Thus, the principle illustrates the well-known conflict between the Cokian doctrine of natural law and the Blackstonian doctrine of legislative sovereignty.

Smead, *supra* note 11, at 797.

duty of judges to maintain fidelity to superior law is more firmly grounded and deeply rooted than either Parliamentary sovereignty[82] or judicial review.[83] As Arthur Hogue reminded us, "[l]egislative sovereignty is a modern invention; the legal historian must set aside many modern ideas while working back to the foundation years of the common law."[84]

In the American context, the notion of vested rights is often expressly coupled with judicial review. Edward Corwin made this connection.[85] Another scholar argued that "the absence of the rule of legislative sovereignty and the presence of the institution of judicial review . . . were essential to the development" of vested rights doctrine.[86] Yet the doctrine does not necessarily entail the power of judicial review that Corwin asserted, much less judicial supremacy. Professor Philip Hamburger has found evidence "not of a power of judicial review, but of a duty of judges to decide in accord with the law of the land."[87] Indeed, vested rights were part of American jurisprudence long before the concept of judicial review.[88] Cases articulating the modern

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82. *Compare* T.R.S. ALLAN, CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW (2001) (arguing that, because ordinary common law binds both private citizens and public officials, Parliamentary sovereignty is qualified), *and* J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY (1987) (showing that seventeenth-century common law jurists viewed common law as permanent, reaching back to time immemorial), *with* JEFFREY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES (2010) (arguing that Parliament has unlimited legislative authority), *and* JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY (1999) (denying that Parliamentary sovereignty is created by and subordinated to common law), *and* Richard Ekins, *Judicial Supremacy and the Rule of Law*, 119 Law Q. Rev. 127 (2003). For a position that might be described as intermediate between the two, see R.H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 94–126 (2015) (explaining that common law jurists viewed natural law as partly indeterminate, requiring legislative specification, but that judges also had a duty not to discern a legislative intent contrary to reason).

83. *See* HAMBURGER, *supra* note 17.

84. HOGUE, *supra* note 17, at 193.

85. Corwin, *supra* note 28, at 275; *see also* EDWARD S. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW: ITS LEGAL AND HISTORICAL BASIS AND OTHER ESSAYS, 10–18 (1914).

86. Smead, *supra* note 11, at 781.

87. HAMBURGER, *supra* note 17, at 2.

88. As Matthew Franck has shown, it was Corwin who first gave "judicial review" its name and doctrinal justification. *See* Matthew J. Franck, *Edward S. Cor-*

view of judicial *supremacy* came later still.[89] Corwin's own scholarship on vested rights did not entail judicial supremacy. To the extent that protection of vested rights against legislative encroachment involved adjudication, he maintained, judges did not become moral philosophers. Instead, natural and other vested private rights were understood to be defined according to their common law contours.[90]

One can perceive (and jurists have perceived) the existence of vested rights without affirming the power of judicial review,[91] and one might not perceive them without being a legislative supremacist.[92] Coke did not invoke what we would today recognize as a concept of vested private rights, even as he struck down an act of Parliament as contrary to reason.[93] On the other hand, Blackstone expressed the view that at least some rights and duties are beyond the competence of human lawmakers to alter,[94] even as he argued that "what the parliament doth, no authority upon earth can undo."[95] The point is

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win and the Emergence of "Judicial Review," in THE DOCTRINE OF JUDICIAL REVIEW: ITS LEGAL AND HISTORICAL BASIS AND OTHER ESSAYS (Transaction Press ed., 2014).

89. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (noting that "courts retain the power . . . to determine if Congress has exceeded its authority under the Constitution"); Cooper v. Aaron, 358 U.S. 1, 18 (1958) (stating that "the federal judiciary is supreme in the exposition of the law of the Constitution").

90. Corwin, *supra* note 28, at 254.

91. *See, e.g.*, Williams v. Register of W. Tenn., 3 Tenn. 214, 217–18 (1812) (holding that claimant had been deprived of vested property right in violation of state constitution but that legislature had not given judiciary power to remedy the deprivation).

92. *See* the discussion of legal realism in Part III.C, *infra*.

93. 1 COKE, *supra* note 79, at 275.

94. 1 BLACKSTONE, *supra* note 71, at *41–44.

95. *Id.* at *161. Blackstone also argued that the unwritten, customary law is entitled to deference and that legislation is prone to mischief:

> The mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question; and how far they have been owing to the defective education of our senators, is a point well worthy the public attention. The common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently its symmetry has been destroyed, its proportions distorted, and its majestic simplicity exchanged, for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays, (which have sometimes disgraced the English, as well as other courts of justice,) owe their original not to the common law

that vested rights can operate as binding norms upon the deliberations of both legislators and judges. Vested rights doctrine gives rise to a conflict between rights and retrospective laws, not between legislative powers and judicial powers.[96] At least where there exists a written constitution, the dichotomy between legislative and judicial supremacy is more problematic; written constitutions can be amended to overrule both legislation and judicial decisions.

That vested rights can alone influence and even direct legislative deliberation and decision-making, without any consideration of judicial review, is illustrated by the fact that legislatures treat some rights as vested regardless of how those rights have been characterized in adjudication. A striking example is found in Congressional deliberations concerning private patent-term restoration statutes for veterans who served overseas during their patent terms and were thus deprived of opportunity to benefit financially from their inventions. Proponents of term extension argued that extending the patent term was really a restoration of patent rights promised to the patent owners that they did not receive.[97] Though the term "vested right" was not used, this argument appealed to the public obligation to secure to veterans the rights that they were promised when issued their patents.[98]

For an American audience, one must bracket debates about the meaning of the Due Process Clauses, and particularly the merits of substantive due process doctrine. Different accounts

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> itself, but to innovations that have been made in it by acts of parliament, "overladen (as Sir Edward Coke expresses it) with provisoes and additions, and many times on a sudden penned or corrected by men of none or very little judgment in law."

Id. at *10.

96. Richard Helmholz observed that, for common lawyers, the apparent inconsistency between Parliamentary supremacy and natural law would not have been viewed as a source of conflict between courts and legislature but rather as a clash "between the law of nature and the powers of both Parliament and the royal courts. . . . Both were bound by the laws of nature." HELMHOLZ, *supra* note 82, at 120.

97. *See* Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. COPYRIGHT SOC'Y U.S.A. 19, 54–55 (2001).

98. *See* Erika Lietzan, *An Invitation to Further Patent Reform: The Case for Reconsidering Section 156 of the Patent Act*, 25 GEO. MASON L. REV. (forthcoming 2018) (on file with author).

of due process might be more[99] or less[100] compatible with a vested-rights reading of the Due Process Clauses. The doctrine of vested rights itself, however, does not depend upon any particular conception of due process, or even a Due Process Clause at all.[101] Before the invention of substantive due process, vested rights doctrine was the constitutional basis for distinguishing valid from invalid retrospective legislation.[102] Legislation could validly abrogate expectancies and unvested interests, and could alter or supply remedies, but could not alter vested rights.[103]

If some rights are vested, then they are reasons for action from the internal point of view of legislators, just as they are for judges and citizens.[104] As James Ely has observed, Blackstone's "analysis of the fundamental rights secured by the 'law of the land' only makes sense if binding on Parliament."[105] Legislators can understand themselves to have strong reasons for fidelity to laws that are not reducible to what judges say.[106] Who has

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99. *See generally* COOLEY, *supra* note 12, at 351–59; James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315 (1999); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585 (2009); Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305 (1988); Ryan C. Williams, *The One and Only Substantive Due Process Clause* 120 YALE L.J. 408 (2010).

100. *See generally* Chapman & McConnell, *supra* note 11; Matthew J. Franck, *What Happened to the Due Process Clause in the* Dred Scott *Case? The Continuing Confusion over "Substance" versus "Process,"* 4 AM. POL. THOUGHT 120 (2015).

101. *See, e.g.*, Chapman & McConnell, *supra* note 11, at 1680 ("We emphasize that our argument here is confined only to the Due Process Clauses. . . . We take no position here on whether other provisions of the Constitution . . . empower courts to engage in . . . the judicial recognition of rights originating in something other than positive law, in the teeth of legislative enactments to the contrary."). *But see id.* at 1725–26; Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?*, 5 N.Y.U. J.L. & LIBERTY 1 (2010); Michael W. McConnell, *Ways to Think About Unenumerated Rights*, 2013 U. ILL. L. REV. 1985, 1993–94.

102. *See* Kainen, *supra* note 10, at 102–23.

103. *See* COOLEY, *supra* note 12, at 357–64; Kainen, *supra* note 10 at 89.

104. *See* Williams v. Register of W. Tenn., 3 Tenn. 214, 217 (1812) ("The obligation contracted by the State, to issue a grant, or grants, to Dillon, or his assignee, we have no doubt the State is morally bound to comply with.").

105. Ely, *supra* note 99, at 323.

106. McConnell notes that the natural law was "binding on Parliament itself." McConnell, *Natural Rights and the Ninth Amendment*, *supra* note 101, at 21.

the ultimate authority to decide when a citizen or the legislature has transgressed vested rights, and what remedies are available for those transgressions, are questions that can be bracketed. The object here is to make the concept of vested private rights intelligible, and to explain why it might be considered a source of power and obligation for judicial officers, legislators, and citizens alike, while also accounting for rules and institutions of legal change.

This Article is not about natural rights *per se*, and skepticism of natural rights should not be an obstacle to understanding the meaning of vested private rights. For one thing, the association between vested rights doctrine and natural law is not strictly necessary (though the association is commonly and sensibly made). All that is required for the doctrine to be coherent is *some* authority prior to and independent of the law-making sovereignty of government. That prior authority could be natural law, natural rights, or divine law. But it could also be customary law and other ancient traditions, or acts of private ordering such as contract formation and property conveyance. Vested rights doctrine has drawn upon all of these legal sources.

In particular, vested rights (and their correlative duties) should not be confused with *Lochner*-style natural abstract "rights." General liberties of property and contract, insofar as they are merely absences of legal duty, differ from vested rights (including vested liberties), which have been previously settled and specified to correlate with particular duties and to entail incidental rights and duties that mark out their normative contours. For example, one may have a vested liberty to continue to use one's land as one has used it in the past without committing a nuisance, but not a vested right to make any hypothetical use one might want to make of it in the future.

The difference between unvested (*Lochner*-esque) liberties and vested rights is one reason why facial challenges to regulatory burdens on private property invite less exacting judicial review than as-applied challenges. In *Village of Euclid v. Ambler Reality Co.*,[107] which yielded the Supreme Court's landmark decision approving zoning ordinances, the landowner had not yet

107. 272 U.S. 365, 384–85 (1926).

chosen any particular uses for his land and brought a facial challenge to the constitutionality of the ordinance as a whole. In as-applied challenges by land users who have been deprived or burdened in the exercise of particular uses of land, the more exacting review of *Nectow v. City of Cambridge*[108] is called for. "Although a zoning ordinance may be valid in its general aspects, it may nevertheless be invalid as applied to particular piece of property or a particular set of facts."[109]

II. THEORETICAL CHALLENGES AND THEIR LIMITATIONS

A. English Positivism

The objections of early positivists are now familiar: If a right is said to be vested because it imposes a constitutional duty upon the lawmaking sovereign then the claimant is just confused. Because law consists of commands of the sovereign, there are no constitutional rights, only what Bentham called "concessions of privileges." The sovereign cannot be bound "who has the whole force of the political sanction at his disposal." From the sovereign's point of view, rights have normative force only insofar as he chooses to recognize them; "they are not *laws*."[110]

If one takes a more modest view and considers a vested right as a right that is present and attached to an ascertained person, then to call a right vested is tautological; all rights are present and attached to a person. The only meaningful distinction is between rights and expectations ("chances or possibilities of rights," in Austin's terms[111]), or between rights to present enjoyment, such as a possessory estate, and expectations of future

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108. 277 U.S. 183, 185, 188–89 (1928).

109. Ziman v. Vill. of Glencoe, 275 N.E.2d 168, 171 (Ill. App. Ct. 1971) (citing People *ex rel.* Joseph Lumber Co. v. City of Chi., 83 N.E.2d 592 (Ill. 1949)). *See generally* Adam J. MacLeod, *Identifying Values in Land Use Regulation*, 101 KY. L.J. 55 (2012); Ahira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717 (2008).

110. JEREMY BENTHAM, *Of Laws in General*, *in* THE COLLECTED WORKS OF JEREMY BENTHAM 1, 16 (H.L.A. Hart & J.H. Burns eds., 1970).

111. 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 857 (R. Campbell ed., 5th ed. 1885).

enjoyment, such as a remainder.[112] The normative statement that a legislature should not deprive parties of vested rights is really a statement that those rights are inviolable against legislative sovereignty, a contention that Austin thought was false. All laws are justified on the basis of general utility, and non-vested rights are those the sovereign has determined should be abrogated in service to utility.

The collapse of Austin's conceptual critique of vested rights into a descriptive declaration of parliamentary sovereignty should not be attributed to sloppiness on Austin's part, but understood as an entailment of Austin's commitment that posited law is the only law worthy of the name.[113] If all laws are positive laws, and all positive laws are commands of the sovereign who possesses legislative power, then the retrospectivity of laws is, to put it colloquially, not a bug but a feature. The same would hold if laws result from judicial discretion. Austin ridiculed as a "childish fiction" the common law idea that adjudication involves declaring law rather than making it.[114]

Yet Austin's project was descriptive and his rejection of vested rights is not necessarily entailed in his positivism. An autonomous legal system *can* have vested rights; legislative supremacy is not universal among legal systems. Legislative sovereignty and judicial discretion are in various times and places constrained or limited in such a way that private rights are treated as vested.[115] To the extent that Austin's conceptual critique depends on the fact of parliamentary sovereignty, it cannot be universalized.[116]

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112. *See* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 121–22 (2d ed. 2012).

113. Contrast the common law jurists who identified unwritten and as-yet undeclared law as law. John Selden: "All the law you can name, that deserves the name of law, is reduced to these 2: it is either ascertained by custom or confirmed by act of parliament." POCOCK, *supra* note 82, at 296. Blackstone: "The municipal law of England . . . may with sufficient propriety be divided into two kinds: the *lex non scripta*, the unwritten, or common law; and the *lex scripta*, the written, or statute law." 1 BLACKSTONE, *supra* note 71, at *63.

114. AUSTIN, *supra* note 111, at 634.

115. *See generally* Wood, *supra* note 11; *see also* Kainen, *supra* note 10, at 102–11.

116. There are also practical difficulties with a strong, normative positivism. One is that by denying the lawful authority of rights from the perspective of the legislating sovereign, a strong positivist account undermines the security and stability of rights from the perspective of right holders. *See* Jeremy Paul, *The Hid-*

More recent positivist theories allow for the coherence of the concept of vested rights. What Hart called the "social sources of the law" include more than mere commands of the sovereign legislator.[117] Thus, it is theoretically possible that a right settled and specified by (for example) customary law would, under a rule of recognition, be accorded greater weight than a later, conflicting rule promulgated by a legislator or declared by a court. So long as at least one authority exists prior to and independent of the current legislative and judicial powers, vested rights are possible.[118]

Indeed, right claims constraining official action are asserted today in courts throughout the British Commonwealth, though they are typically grounded in either posited sources, such as written charters, or more abstract principles, such as personal autonomy. Customary rights and property rights have lost much of their efficacy. For example, the common law rule required the expropriator of property rights to pay just compensation.[119] That rule is now considered anachronistic except where preserved by statute.[120] Meanwhile, more novel rights have assumed the ambition to place limitations on legislative power in the United Kingdom and elsewhere in the Common-

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den Structure of Takings Law, 64 S. CAL. L. REV. 1393, 1411 (1991). Daniel Webster expressed this problem dramatically in 1829. "If at this period there is not a general restraint on legislatures, in favour of private rights, there is an end to private property." Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 646 (1829); *see also* 2 STORY, *supra* note 14, § 1399, at 273 ("That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon a legislative body, without any restraint.").

117. HART, *supra* note 7, at 269.

118. Nevertheless, for Hart rights and duties remain within the system of positive law itself. "[L]egal rights and duties are the point at which the law with its coercive resources respectively protects individual freedom and restricts it or confers on individuals or denies to them the power to avail themselves of the law's coercive machinery." *Id.*

119. *See* Sinnickson v. Johnson, 17 N.J.L. 129, 153 (1839); People v. Platt, 17 Johns. 195, 215–16 (N.Y. Sup. Ct. 1819); Gardner v. Newburgh, 2 Johns. Ch. 162, 165–66 (N.Y. Ch. 1816); Manitoba Fisheries Ltd. v. The Queen (1978), [1979] 1 S.C.R 101, 118 (Can.); Att'y Gen. v. De Keyser's Royal Hotel, Ltd. [1920] AC 508 (HL) 514 (appeal taken from Eng.); 1 BLACKSTONE, *supra* note 71, at *139.

120. *See, e.g.*, Mariner Real Estate Ltd. v. Nova Scotia (Att'y Gen.) (1999), 177 D.L.R. 4th 696, para. 66 (Can. N.S. C.A.); Steer Holdings Ltd. v. Manitoba, [1992] 21 R.P.R. (2d) 298, 298 (Can. Man. Q.B.); France Fenwick & Co. v. The King [1927] 1 K.B. 458 at 465 (appeal taken from Eng.); TOM ALLEN, THE RIGHT TO PROPERTY IN COMMONWEALTH CONSTITUTIONS 162–200 (2000).

wealth, as courts entertain rights claims that have not been given recognition in positive law.[121] This development raises several challenges,[122] not least that judicial law-making is no less retrospective than legal change accomplished by a legislature.[123]

B. A Limiting Case: Free English Soil

The law as practiced by lawyers routinely relies upon the distinction between vested and unvested rights for purposes other than limiting legislative power. Unvested future interests are subject to the Rule Against Perpetuities while future interests that have vested in interest (though not necessarily possession) are not.[124] And vested rights perform work in conflict of laws, such as where a right of recovery under the law of one state is enforced in the courts of another state.[125]

The implications of vesting for the powers of state sovereigns naturally varies according to constitutional structure. The English doctrine of parliamentary supremacy entails, *inter alia*, that Parliament has power to give its acts retrospective application by stating so expressly. Thus, in *West v. Gwynne*,[126] the Chancery Division ruled that a statute prohibiting landlords from exacting fines in consideration of consent to assign a lease annulled contrary lease covenants made before enactment; Parliament's manifest purpose was to interfere with lessors' existing rights.[127] The lessor's "right" to exact a fine was not a vested private right but merely a privilege that Parliament had power to terminate.[128]

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121. One of these is the asserted right to receive medical assistance in suicide, which was not recognized by courts in the United Kingdom, *see* Nicklinson v. Ministry of Justice [2014] UKSC 38, [66], but was given constitutional recognition by the Supreme Court of Canada, *see* Carter v. Canada [2015] 1 S.C.R. 331 (Can.).

122. *See generally* GRÉGOIRE WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS (2009); PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING (Grant Huscroft et al. eds., 2014).

123. *See* Philip Sales & Richard Ekins, *Rights-Consistent Interpretation and the Human Rights Act 1998*, 127 L.Q.R. 217, 218–19 (2011).

124. THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY 110–13 (2010).

125. *See* Loucks v. Standard Oil Co., 120 N.E. 198, 201–02 (N.Y. 1918).

126. (1911) 2 Ch 1.

127. *Id.* at 13.

128. *Id*. at 4.

Yet Parliamentary sovereignty has limits. Statutes impairing private rights are presumed to be prospective only,[129] and vested rights limit the scope of new privileges created by statutes.[130] More broadly, the canon of charitable construction—which does not allow an attribution of unjust intention to Parliament absent clear language of such an intention—limits the exercise of power to change law insofar as it requires courts to avoid unjust interpretations of positive laws, even where the unjust result would be required by a literal reading of the enactment.[131] Parliament is not presumed to have abrogated inviolable rights and other conclusive norms of natural justice.[132]

Inviolable legal rights are known in English jurisprudence even alongside Parliamentary supremacy. They are found even in Blackstone's *Commentaries*, tempering and qualifying Blackstone's more-famous endorsement of Parliament's power to alter law by an express statement of intention. Not all of what Blackstone called the "absolute" rights of life and limb, liberty of movement, and property are inviolable in the strongest sense.[133] Rather, the inviolable rights are found among the rights and duties of the "superior" law, which "no human leg-

129. State Comm'n on Human Relations v. Amecon Div. of Litton Sys., Inc., 360 A.2d 1, 4 (Md. 1976); Lauri v. Renad [1892] 3 Ch 402 at 421.

130. *See* Phillips v. Pembroke Real Estate, Inc., 819 N.E.2d 579, 584–85, 585 n.12 (Mass. 2004).

131. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 49–62 (1911); Pleak v. Entrada Prop. Owners' Ass'n, 87 P.3d 831, 834–36 (Ariz. 2004); 1 BLACKSTONE *supra* note 71, at *42, *54, *86–87, *91, *254.

132. *See* HELMHOLZ, *supra* note 82, at 116–17. So strong was the imperative to preserve the integrity of the Crown and Parliament's intention to do justice that judges were sometimes called upon to "construe statutes quite contrary to the letter." *Id.* at 116; *see also, e.g.*, Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889).

133. "Absolute rights" in Blackstone's account are liberties secured by the municipal law. Because the protection of municipal law is both a security and a substitute for natural liberty, extended in exchange for one's relinquishment of natural liberty when one enters society, the contours of the absolute rights are coterminous with the contours of the natural liberties in exchange for which they are created. 1 BLACKSTONE, *supra* note 71, at *123–25; *see also* Hamburger, *supra* note 64. They are absolute, not in the sense of being pre-political and immutable, but rather because an individual cannot be deprived of them by the sovereign unless he has first been adjudicated to have committed some wrong act—generally, a crime—that entailed the forfeiture of one's liberties according to the law of the land. *See* 1 BLACKSTONE, *supra* note 71, at *126.

islature has power to abridge or destroy, unless the owner shall himself commit some act that amounts to forfeiture."[134]

One such right that was widely discussed at the time of the American founding is the doctrine of free English soil.[135] Blackstone located it within both the superior law and the absolute rights of English civil law. He considered the doctrine in his discourse on the "Absolute Rights of Individuals"[136] in English common law, where he declaimed that the "spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and so far becomes a freeman."[137]

In the late eighteenth century, this emancipation right sat at the boundary between inviolable rights and legislative sovereignty. The problem of chattel slavery in the British Empire was a problem of the conflict between the laws of nature and the laws of man in certain colonies.[138] English common law did not recognize slavery because slavery was understood to be contrary to reason.[139] Yet the positive laws of England's American colonies and their Spanish colonial neighbors did recognize slavery by local custom and positive legislation. The inevitable conflict produced a well-known workaround and a lesser-known conceptual limitation on the power of legislatures to change law.

The landmark case is *Somerset v. Stewart*.[140] Stewart purchased Somerset as a slave in Virginia and later traveled to England with Somerset in his company. While in England, Somerset sought his freedom with the assistance of friends

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134. 1 BLACKSTONE, *supra* note 71, at *5.

135. Like the inviolability of life today, free English soil was not always uncontroversial. *Compare* Chamberlain v. Harvey (1696) 91 Eng. Rep. 994; 1 LD. Raym. 146, *and* Smith v. Gould (1706) 92 Eng. Rep. 338; 2 LD. Raym 1275, *with* Pearne v. Lisle (1749) 27 Eng. Rep. 47; Amb. 76 (Ch.). But that the doctrine did not always enjoy universal assent does not prevent its being studied as a coherent legal doctrine.

136. 1 BLACKSTONE, *supra* note 71, at *122.

137. *Id.* at *127.

138. *See generally* JUSTIN BUCKLEY DYER, NATURAL LAW AND THE ANTISLAVERY CONSTITUTIONAL TRADITION (2012).

139. *See id.* at 37–73.

140. (1772) 98 Eng. Rep. 499; Lofft. 1.

made there. Stewart then detained Somerset in the vessel of a Captain Knowles with the intent to sell Somerset into slavery in Jamaica.

Before allowing a habeas corpus petition to remove Somerset from the vessel and set him at liberty, Lord Mansfield ruled that slavery cannot be tolerated in England and cannot be resumed after emancipation.[141] Stewart and his agent Knowles thus had a binding duty to deliver Somerset up for his liberation, notwithstanding the positive claim-rights Stewart had acquired in Somerset's labor by operation of Virginia law, Knowles's sovereign power over his ship as its captain, the goods and benefits to be derived from Stewart's plans for Somerset, or any other reason.

Furthermore, Stewart's "property" in Somerset, derived from positive law, was not vested. Mansfield explained:

> The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law.[142]

The positive law of slaveholding, resting on no reasons external to itself, was the only reason that could be offered in support of Somerset's enslavement. The sovereignty of the Virginia legislature was confined within Virginia. Stewart's positive rights acquired in Virginia enjoyed no enforcement in England, notwithstanding the usual requirements of interstate comity, and no other reasons could justify defeating Somerset's right to enjoy his freedom. In England, Stewart's duty to relinquish Somerset was absolute and conclusive.

The obvious question raised is whether the slaveowner's right is re-established if the slave and master return to the jurisdiction where slavery is authorized. Some read the admiralty case of *The Slave, Grace*[143] to limit the doctrine of *Somerset* in this

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141. *Id.* at 504.

142. *Id.* at 510.

143. (1827) 166 Eng. Rep. 179; 2 Hagg. 94.

way.[144] Grace, a slave, traveled to England with her mistress, then returned to Antigua. Two years later, the collector of customs in Antigua alleged that Grace had been illegally imported, having become a "free subject of His Majesty" while in England.[145] This collector subsequently took possession of Grace under a procedure to remedy illegal importation of property. A judge of the Vice-Admiralty Court ordered Grace to be returned to her master. The High Court of Admiralty affirmed, not on the ground that Grace had gained emancipation and then lost it upon her return to Antigua, but instead on the ground that the record did not establish that she had gained emancipation.[146]

As an alternative ground for the decision, the court disputed Mansfield's characterization of slavery as founded only in positive law. Slavery is indistinguishable from villenage, the court asserted, and villenage is an ancient English custom.[147] On the basis of this contestable[148] assertion, the court opined that a slave arriving in England is not emancipated without some act of manumission.[149] "The slave continues a slave, though the law of England relieves him in those respects from the rigours of [the colonial slave] code while he is in England; and that is all that it does."[150] The court noted Coke's maxim that a villein

144. PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 16–17 (1981); EARL M. MALTZ, SLAVERY AND THE SUPREME COURT, 1825–1861, at 168 (2009).

145. The Slave, Grace (1827) 166 Eng. Rep. 179, 180; 2 Hagg. 94, 99 (n. 129) 180.

146. *Id*. at 181.

147. *Id*. at 183–84.

148. Pollock and Maitland were of the opinion that a serf, though a freeman concerning his equals, was called a serf only because Bracton had no word for slave. 1 SIR FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 436 (Liberty Fund, 2d ed. 2010) (1895). "[H]e was a *servus* and his person belonged to his lord." *Id*. at 438. Yet the status of serfdom "at many points comes into conflict with our notion of slavery," insofar as the serf has all the rights of a freeman with respect to those who are not his lord. *Id*. at 438. Even as against his lord, the serf's status "seems better described as unprotectedness than as rightlessness." *Id*. at 440. A fugitive serf who acquired a seisin of liberty could appeal to the king's court, where the lord seeking his return would encounter a "leaning in favor of liberty." *Id*. at 440–41. Furthermore, serfs bore many of the public duties of freemen. *Id.* at 44–46. Thus, Pollock and Maitland could not call the status of serfdom slavery. *Id*. at 438.

149. *See* The Slave, Grace (1827) 166 Eng. Rep. 179, 185; 2 Hagg. 94, 112–13.

150. *Id.* at 187.

freed for an hour is free forever, but, contradicting its earlier assertion, opined that slavery is not the same as "ancient villenage."[151] The court insisted that "[v]illenage did not travel out of the country," while slavery is "prevalent in every other part of the world, and has existed at all times."[152] This was not a limitation on the right of emancipation but a confused attack on its jurisprudential foundation and a wholesale rejection of the doctrine itself.

Other decisions suggest that the emancipation right is binding law from the perspective of public lawmakers and officials. This can be inferred from Mansfield's allowance of habeas corpus over Somerset's person. It can be viewed more directly in the seriatim opinions in *Forbes v. Cochrane*.[153] Forbes was a British merchant living in Pensacola in the Spanish province of West Florida and operating a cotton plantation in East Florida, a Spanish province that allowed slavery. Thirty-eight slaves escaped from the plantation into a British man of war lying a mile out to sea off Cumberland Island, which the British had recently taken from the Americans in the War of 1812. The British commander, Rear Admiral Sir George Cockburn, allowed Forbes to attempt to persuade the slaves to return. The former slaves were not persuaded, and Cockburn thereafter refused to deliver them to Forbes. Instead, at the direction of Vice Admiral Sir Alexander Inglis Cochrane, Cockburn took the former slaves to Bermuda pending adjudication of their status.[154]

Forbes complained that Cochrane and Cockburn had deprived him of his property. The court framed the issue more narrowly: Did Cochrane and Cockburn act contrary to their duties as naval officers? The rule of decision was emancipation on free English soil (a British warship constituting English soil when at sea).[155] Justice Best stated the operation and implications of the doctrine as follows:

> The moment they put their feet on board of a British man of war, not lying within the waters of East Florida, (where, un-

151. *Id.* at 186.
152. *Id.*
153. (1824) 107 Eng. Rep. 450; 2 B. & C. 448.
154. *Id.* at 450–53 (Best J).
155. *Id.* at 458.

> doubtedly, the laws of that country would prevail,) those persons who before had been slaves, were free. The defendants were not guilty of any act prejudicial to the rights which the plaintiff alleges to have been infringed. Those rights were at an end before the defendants were called upon to act. Slavery is a local law, and, therefore, if a man wishes to preserve his slaves, let him attach them to him by affection, or make fast the bars of their prison, or rivet well their chains, for the instant they get beyond the limits where slavery is recognised by the local law, they have broken their chains, they have escaped from their prison, and are free. These men, when on board an English ship, had all the rights belonging to Englishmen, and were subject to all their liabilities.[156]

In short, Cockburn harbored no slaves. Cockburn had no duty to hand the refugees over to Forbes—in fact, he had a duty to prevent the use of force upon them, as any such force exerted on freemen would constitute a trespass to person.[157]

Justice Bayley thought that because English law recognized no universal basis for slavery rights, Forbes's action could not be maintained without a factual showing of legal authority. Because slavery is antithetical to general law, each assertion of right by a putative slave owner required proof of the local laws and particular transactions that generated the ownership claim.[158] Justice Holroyd concurred on the same ground. Forbes had not shown that his right to own the slaves was grounded in the municipal laws of East or West Florida, and he could claim no "general right" to hold slaves because "according to the principles of the English law, such a right cannot be considered as warranted by the general law of nature."[159]

On the view of Justices Bayley and Holroyd, from the perspective of naval officers and judicial officials the emancipation right is a prima facie exclusionary reason against the assertion

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156. *Id.* at 457.

157. *Id.* at 457–58.

158. He concluded that the officers did not act in bad faith by failing to investigate the legal status of these thirty-eight. The captain of an English man of war cannot be expected to inquire into the legal status of every escaped servant who comes into his vessel because his duties to the Navy often require him to leave his station at a moment's notice, and he cannot afford to send crew members ashore in order to perform an investigation. *Id.* at 454–55 (Bayley J).

159. *Id.* at 455 (Holroyd J).

of ownership. It can be overcome only by a discrete category of countervailing reasons in combination. The category is limited to evidence of a positive law authorizing the purchase of human beings, coupled with sufficient evidence of an actual purchase of the human being over which ownership is being asserted, together with residence of the enslaved within the jurisdiction of the positive law allowing slavery. Given that legislative formalities and title assurance schemes vary in different jurisdictions, the category could easily be narrowed further by requiring strict compliance with formal requirements, such as codification, compliance with the Statute of Frauds, and record notice. The right of emancipation is a very strong prima facie reason, categorical in nature.

Furthermore, once the slave reaches English soil, the category of countervailing reasons is reduced to nil. Justice Holroyd opined:

> The law of slavery is, however, a law in invitum [by force of law; without consent; obeyed reluctantly?]; and when a party gets out of the territory where it prevails, and out of the power of his master, and gets under the protection of another power, without any wrongful act done by the party giving that protection, the right of the master, which is founded on the municipal law of the particular place only, does not continue, and there is no right of action against a party who merely receives the slave in that country, without doing any wrongful act."[160]

Once a slave puts his foot on English soil, "his slavery is at an end."[161] Forbes's rights in the slaves were extinguished and the British officers did not act contrary to their duties.

The refusal of English courts to extend comity to the laws of Florida and Virginia reveals how strongly the emancipation right operated in the deliberations of the judges themselves. The opinions reveal a concern that an English court which gave judicial recognition to the slavery laws of Florida would go beyond what reason and judicial integrity allow a judge to do, whatever other obligations a judge might have to apply the duly-posited law of a non-hostile sovereign. Justice Bayley wor-

160. *Id.* at 456.
161. *Id.*

ried that, by asking the court to declare the actions of the naval officers a wrong, Forbes was asking them to make the law of England an "active" participant in slavery; implied in such a declaration would be a ruling that the slaves were property.[162] Justice Best thought the judicial obligation not to give legal effect to slavery laws even more conclusive and obligatory. Slavery is a *malum in se* crime, he opined, and therefore never lawful. He characterized slavery as "a relation which has always in British Courts been held inconsistent with the constitution of the country."[163] "For our convenience or our gain it ought not to be allowed to exist."[164] The law of East Florida "is an anti-christian law, and one which violates the rights of nature, and therefore ought not to be recognised here."[165]

Here is the answer to Austin's claim that the declaratory part of law is a "childish fiction."[166] The right of emancipation determined the deliberations of the justices in *Forbes*; it was not determined by them. The maxim that courts must not "permit themselves to be used as instruments of inequity and injustice"[167] imposes on judicial officers a binding obligation. A court has an obligation to preserve its integrity, at least to the extent of refusing to sanction intrinsically unjust acts that would introduce incoherence into the law.[168] The concern expressed by Justices Bayley and Best was thus consistent with an understanding of the judicial tradition of which they were part.

Justice Best went further in obiter dictum. In an open disparagement of Parliamentary supremacy, he opined that whatever a legislature might do, judges must not give legal recognition to any such relation as slave-master, because as a matter of "natural right" and the "genius of the English constitution," "human beings could not be the subject matter of property."[169]

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162. *Id.* at 454 (Bayley J).

163. *Id.* at 458 (Best J).

164. *Id.* at 457.

165. *Id.* at 460.

166. AUSTIN, *supra* note 111, at 634.

167. Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 86 (N.J. 1960) (quoting United States v. Bethlehem Steel Corp., 315 U.S. 289, 326 (1942) (Frankfurter, J., dissenting)).

168. *See* Hall v. Hebert, [1993] 2 S.C.R. 159, 176 (Can.).

169. *Forbes* (1824) 107 Eng. Rep. at 459 (Best J). On the other hand, Justice Best opened his opinion by insisting that he had no intention of "trenching upon the

Even acts of the British Parliament creating positive rights of slavery in the West Indies could not bind the court:

> If, indeed, there had been any express law, commanding us to recognise those rights, we might then have been called upon to consider the propriety of that which has been said by the great commentator upon the laws of this country, "That if any human law should allow or injoin us to commit an offence against the divine law, we are bound to transgress that human law."[170]

That last sentence is a quotation taken from Blackstone's description of the "Nature of Laws in General," where Blackstone insists that municipal law cannot "be suffered to contradict" natural and divine law, upon which it is founded.[171] This does not mean that Best was correct about where (if anywhere) the boundaries of Parliamentary sovereignty lie. But as a conceptual matter, it is not the case, as Austin supposed and Bentham asserted, that a vested right is a meaningless concept. No logical or necessary incompatibility stands between a doctrine of vested private rights and the supremacy of the legislative power over the judicial. The doctrine *is* in tension with the idea that courts must give effect to express, retrospective legislative enactments. But that understanding of legislative sovereignty is conventional and contingent.

The right of emancipation on English soil proved not to be an absolute right because one reason was strong enough to defeat it. That reason was the right of Parliament to change the law,

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local rights of the proprietors of lands in our West India Islands," who had acquired rights "to the services of their slaves . . . . under the encouragement of the Legislature of this country, and they ought not to be put in jeopardy by any power in this country, unless a complete compensation be given to them by the public for the capital which they have been encouraged to embark in such property." *Id.* at 457.

170. *Id.* at 458.

171. 1 BLACKSTONE, *supra* note 71, at *39, *42. By contrast to the indifferent points of law on which natural and divine law leave humans at liberty to specify legal norms, Blackstone thought that natural and divine rights and duties create binding obligations regardless of what the municipal law declares. He took on board Locke's account of the exchange of natural liberties for civil rights, but he also had a separate category for the divine and natural rights (life and liberty) and duties (for example, maintenance of children and *mala in se* offenses) of the "superior" law, which "no human legislature has power to abridge or destroy . . . unless the owner shall himself commit some act that amounts to a forfeiture." *Id.* at *54.

even in unjust directions. More precisely, when it has exercised its power to change law Parliament has an absolute, exceptionless, and vested claim-right to be obeyed (and those under its sovereignty have a correlative absolute duty to obey). Drawing on the tradition of natural and absolute rights that Blackstone purported to celebrate, American jurists such as Story objected to precisely this conception of Parliament's rights.

C. Legal Realism

American legal realists made a more radical critique of the idea of vested rights. For legal realists, retrospective laws are both unavoidable and unproblematic; all laws upset some expectations, even those expectations that are styled "rights." As one realist expressed the view, "There is no such thing as a law that does not extinguish rights, powers, privileges, or immunities acquired under previously existing laws. That is what laws are for."[172]

In the realist account, rights can be altered at will because rights are not reasons in themselves. Legal realists inherited from earlier pragmatists (especially Oliver Wendell Holmes, Jr.) a concept of right as a special form of prophecy about one's expectation of realizing value or avoiding an unpleasant consequence.[173] The concept of *vested* rights has the limited utility of enabling lawyers to "forecast with some degree of confidence" the fate of retroactive and retrospective laws that will be challenged in court.[174]

In the work of Felix Cohen,[175] Walter Wheeler Cook,[176] and other legal realists, rights emanate and derive their authority from state sovereignty exercised in judicial power.[177] This ren-

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172. Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 233 (1927).

173. *See* Robert L. Hale, *Value and Vested Rights*, 27 COLUM. L. REV. 523 (1927); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

174. Smith, *supra* note 172, at 248.

175. *See generally* Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. Rev. 809 (1935).

176. *See generally* Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924).

177. Leading property scholars in the United Kingdom now also locate the authority of property norms in "judge-made rules." *See, e.g.*, ROBERT MEGARRY &

ders the powers of private lawmakers contingent, because private rights owe their existence to the judgments of courts. Contracts are not contracts because people made mutual promises but only because and insofar as courts impose consequences for breach.[178] Property norms and institutions also are contingent upon sovereign action or abstention.[179] The realist view also makes any assertion of a vested right appear circular:[180] The court should not allow interference with the right because it is vested; this right is vested if the court says it is vested.

Joseph Beale's "vested rights" theory, on which the First Restatement of Conflicts was predicated, briefly established a rival to the realists' skeptical account.[181] But in short order Beale was viewed as having been thoroughly discredited—"brutally murdered,"[182] in one colorful account—by those "archangels of doctrinal destruction,"[183] legal realists.[184] It is not difficult to see why; Beale's "vested rights" were not the vested rights of American common law constitutionalism, nor the natural rights of classical liberalism, but rather formal norms that appeared to legal realists as arbitrary elements of a "mechanical

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WILLIAM WADE, THE LAW OF REAL PROPERTY 8 (Charles Harpum et al. eds., 8th ed. 2012).

178. In *Coombes v. Getz*, 285 U.S. 434 (1932), Justice Cardozo dissented from the majority's ruling in favor of a vested right of contract arising out of California because he deemed the right not vested but contingent. His reasoning was quintessentially realist. "The meaning of the California Constitution is whatever the courts of California declare it to be. The obligation of the petitioner's contract is whatever the law of California attached to the contract at the hour of its making." *Id.* at 450–51 (Cardozo, J., dissenting).

179. As Professor Henry Smith observes, the realist view of property entails that "the state could always withdraw or alter its endorsement of an owner's decisional power." Henry E. Smith, *Emergent Property*, *in* PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 327 (James Penner & Henry E. Smith eds., 2013).

180. *See* MERRILL & SMITH, *supra* note 112, at 122.

181. *See* Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2455–58 (1999).

182. Nicholas D. Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1087–88 (1956).

183. *Id.* at 1107.

184. Roosevelt, *supra* note 181, at 2458–61. Little, if anything, remains of Beale's vested rights approach to the conflicts of laws in practice. *See* Lawrence K. Griffith, *Conflict of Laws—The Supreme Court Deals Death Blow to "Vested Rights" Doctrine*, 57 TUL. L. REV. 178, 180 n.14 (1982).

jurisprudence."[185] Beale wanted rights to exist as part of the "unwritten law," prior to the judicial decisions in which they are given legal effect.[186] Yet he did not accept that rights and duties are settled and specified by authorities other than the sovereign state. What Beale termed "rights" are mere interests until "created by law" as rights.[187] And Beale expressly rejected private ordering, customary norms,[188] and natural law[189] as sources of rights.

Beale thus shared with his realist critics a thin concept of rights. Like the realists, he rejected notions of superior law or a priori norms.[190] Like much twentieth-century American jurisprudence, this thin concept of rights can be traced back to Holmes. For Holmes, right, duty, and obligation are illusions if considered as such.[191] Rather, "a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court—and so of a legal right."[192] This perspective on law pre-

185. Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2075–78 (1995).

186. *See* 1 JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS §§ 3.1–3.4, at 20–25 (1935).

187. *See id.* §§ 8A.6–8A.9, at 62–67.

188. "In the legal sense," Beale insisted in an early work, "all rights must be created by some law. A right is artificial, not a mere natural fact; no legal right exists by nature. A right is a political, not a social thing; no legal right can be created by the mere will of parties." 3 JOSEPH BEALE, A SELECTION OF CASES ON THE CONFLICT OF LAWS 501 (1902). In Beale's view, law annexes upon an event (not an intention) a certain consequence, which is styled "the creation of a legal right." *Id.*

189. "Law as the lawyer knows it is absolutely distinct from any rule of conduct based on a moral ground no matter how strong." 1 BEALE, *supra* note 186, § 4.11, at 44.

190. *See* Sebok, *supra* note 185, at 2087–90. Similar presuppositions frustrate the attempted coherence of post-realist attempts to explain and justify vested rights which take on board the assumption that rights are legal constructs, which result or not depending upon their recognition by legal and political actors. For example, see the discussion in Craig J. Konnoth, *Revoking Rights*, 66 HASTINGS L.J. 1365, 1428–38 (2015).

191. To understand the norms of private law one must view them as prophecies of what courts will do, Holmes insisted, because the law is properly understood from the perspective of the bad man, and the bad man "cares only for the material consequences which such knowledge enables him to predict," and does not find "his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience." Holmes, *supra* note 173, at 459.

192. *Id.* at 458.

serves the form of right. Thus preserved, the right is not recognizable as a right in a meaningful sense. It gives rise to no sense of obligation cognizable from the perspective of the putative duty-bearer, much less a judge. It does not provide any reason for action in itself. To say that a right is vested is only to say that its infringement will prove costly, and it will prove costly *as a result of* a judicial ruling forbidding retroactive or retrospective application of a statute or ordinance. To say that it will prove to be vested is simply to predict the outcome of the judicial ruling, which is not itself determined by the right but determinative of it.

So on the view of a pragmatist or realist, to understand the concept of vested right properly, one must "leave the matter of definition to follow rather than precede the discussion," for "the distinction between vested and non-vested rights . . . is of use primarily as a basis on which to classify decisions after they have already been reached on other grounds."[193] It is the fear of bad consequences, and not a promissory obligation or duty of self-exclusion, that performs the work in the reasoning of a putative duty-bearer, and some assessment of social advantage that performs the work in the reasoning of a judge. Rights and duties are merely signals, shorthand symbols for complex predictions, and no more.

Predictions are no more valuable than their efficacy for accurately foretelling future events, a utility that can often be measured empirically but can claim no normative force, least of all for the judge,[194] and only instrumentally and contingently for the putative duty-bearer. If it is more efficient to disregard "duties" and "obligations," to violate "rights," then any rational utility maximizer will choose that course. A commenter in the *Yale Law Journal* stated with confidence in 1925, "it is impossible to say that a property interest is so sacred to-day that it may not be taken away to-morrow."[195]

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193. Smith, *supra* note 172, at 231, 246.

194. Kermit Roosevelt observed the "obvious problem" with the realists' predictive theory of law, "that it fails to explain the thinking of a judge deciding a case, whose attempts to discern the correct rule of law are surely not attempts to predict his own behavior." Roosevelt, *supra* note 181, at 2460 n.63.

195. Comment, *The Variable Quality of a Vested Right*, 34 YALE L.J. 303, 306 (1925).

D. Persistence of Vested Rights in American Law

Ultimately, the idea of vested rights and duties is more incompatible with realist and pragmatist accounts than it is with English positivism. Realists and pragmatists are committed, as positivists are not, to the external perspective of the scientist who views the actions of those who interact with law and assesses the results and consequences of their actions. This makes it rather difficult for the realist to account for the internal point of view of those who understand vested rights and duties to be reasons for their own choices and actions.[196]

The problem is that American constitutional law is more complex than legal realism contemplates. People understand themselves to have binding reasons to honor rights as such, and officials understand their deliberations and actions to be governed by the existence of rights. Rights matter and vesting matters, though they matter for some constitutional purposes and not others in varying degrees and with different implications.

Indeed, the variety of implications of vested rights doctrine illustrates its importance, but also makes its definition difficult. Some common examples:

- Those rights known in common law must be adjudicated by a jury,[197] while privileges created by positive enactments may be adjudicated by any institution the legislature provides.[198]
- Repeal of a statute declaring a common law norm does not alter rights vested under the statute, while

196. Hart criticized the theorist who keeps "austerely to this extreme external point of view and does not give any account of the manner in which members of the group who accept the rules view their own regular behaviour." HART, *supra* note 7, at 89–90.

197. *See, e.g.*, *Ex parte* Moore, 880 So.2d 1131, 1134–35 (Ala. 2003); People v. One 1941 Chevrolet Coupe, 231 P.2d 832, 843 (Cal. 1951); Wisden v. Superior Court, 124 Cal. App. 4th 750, 754 (Ct. App. 2004); Anzaldua v. Band, 550 N.W.2d 544, 551 (Mich. Ct. App. 1996).

198. *See, e.g.*, Stevenson v. King, 10 So.2d 825, 826 (Ala. 1942); Franchise Tax Bd. v. Superior Court, 252 P.3d 450, 458 (Cal. 2011); Young v. City of LaFollette, 479 S.W.3d 785, 793 (Tenn. 2015).

repeal of a statute that departed from the common law norm restores the common law norm.[199]

- The Full Faith and Credit Clause entitles foreign judgments to a finality[200] that is not accorded to foreign positive laws, unlitigated rights claims, and procedures.[201]
- Legislatures are constrained in their power to alter the civil legal significance of acts or omissions after occurrence,[202] for example by preventing trial judges from retroactively awarding new statutory rights of recovery after commission of a wrongful act (if the recovery is not remedial).[203]
- Land use laws prohibit retrospective changes to a land use regulation that would invalidate an application already applied for or relied upon.[204]
- An expropriation of property rights requires a government to pay just compensation.[205]
- Where a government causes damage to private property it cannot abrogate the right of recovery by repealing the law on which recovery is predicated.[206]

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199. *See* Roberts v. Johnson, 588 P.2d 201, 204 (Wash. 1978).

200. *See* Kremer v. Chem. Constr. Corp, 456 U.S. 461, 470 (1982).

201. *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 232, 249 (1998); Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 501–02 (1939).

202. *See* Robinson v. Crown Cork & Seal Co, Inc., 335 S.W.3d 126, 139–43 (Tex. 2010).

203. *See* Anderson v. Memphis Hous. Auth., 534 S.W.2d 125, 127–28 (Tenn. Ct. App. 1975). The court in that case used the term "retrospective" but it is apparent from the facts of the case that the problem was with the statute's retro*active* application to a wrong performed before the statute's enactment.

204. *See, e.g.*, Recycle & Recover, Inc. v. Georgia Bd. of Nat. Res., 466 S.E.2d 197, 199 (Ga. 1996); Town of Sykesville v. W. Shore Commc'ns, Inc., 677 A.2d 102 (Md. Ct. Spec. App. 1996).

205. *See, e.g.*, Sinnickson v. Johnson, 17 N.J.L. 129, 143–45 (1839); People v. Platt, 17 Johns. 195, 215 (N.Y. 1819); Gardner v. Newburgh, 2 Johns. Ch. 162, 166 (N.Y. Ch. 1816); Lucas v. S.C. Coastal Council 505 U.S. 1003, 1007 (1992).

206. *See* Ettor v. City of Tacoma, 228 U.S. 148, 156 (1913) ("The right to compensation was a vested property right.").

Many state constitutions provide even stronger protections for vested rights. Some private rights are vested in the strong or focal sense that they cannot be altered by retrospective changes of state law.[207] Many estates and future interests cannot be destroyed by statute—not only a fee simple absolute but even a right of entry or reversion.[208] Water rights gained by first appropriation (in those states that employ the first-appropriate doctrine) cannot be divested by legislation.[209] Legislatures are prohibited from creating new duties that would alter a legal title.[210] Property may not be taken from one owner and conveyed to another, even with compensation[211] (though this security has been weakened to varying degrees by expansive interpretations of public use requirements[212]). A cause of action for a tortious wrong committed cannot be divested by retrospectively changing the elements of the tort,[213] nor can an action for enforcement of a note be foreclosed by a statute forbidding a remedy.[214] Some contracts are constitutionally protected from impairment by subsequent legislation.[215]

One strand of the fundamental rights jurisprudence concerning marriage and family holds that the pre-political, jural relations of marriage and natural parentage are beyond the competence of legislatures and courts to alter, while state-created

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207. *See In re* Marriage of Howell, 361 P.3d 936, 941 (Ariz. 2015), *rev'd on other grounds sub nom.* Howell v. Howell, 137 S. Ct. 1400 (2017).

208. *See* State v. Goldberg, 85 A.3d 231, 240–47 (Md. 2014).

209. *See* San Carlos Apache Tribe v. Superior Court *ex rel.* Cty. of Maricopa, 972 P.2d 179, 189 (Ariz. 1999) (en banc).

210. *See* Fowler Props., Inc. v. Dowland, 646 S.E.2d 197, 199–200 (Ga. 2007); Muskin v. State Dep't of Assessments & Taxation, 30 A.3d 962, 971–73 (Md. 2011).

211. *See* Sadler v. Langham, 34 Ala. 311, 330 (1859); Nesbitt v. Trumbo, 39 Ill. 110, 118 (1866); Wild v. Deig, 43 Ind. 455, 459 (1873); Taylor v. Porter & Ford, 4 Hill 140, 143–44 (N.Y. 1843).

212. *See* Lockridge v Adrian, 638 So.2d 766, 771 (Ala. 1994) ("[T]he taking of a private property for a private use is constitutional provided that there exists a valid public purpose for the taking."); Cty. of Wayne v. Hathcock, 684 N.W.2d 765, 783 (Mich. 2004) (noting three contexts where transferring a condemned property to a private entity would be appropriate).

213. *See* Van Fossen v. Babcock & Wilcox Co., 522 N.E.2d 489, 497–98 (Ohio 1988).

214. *See* Riggs, Peabody & Co v. Martin, 5 Ark. 506, 508 (1844).

215. *See* King County v. Taxpayers of King Cty., 949 P.2d 1260, 1271–72 (Wash. 1997) (en banc) (holding that the right to issue bonds pursuant to state act was a vested right which could not be affected by subsequent state legislation).

institutions and relationships, such as foster care and adoption, can be altered by whatever process the state deems sufficient.[216] This suggests intriguing questions about the vestedness of marital property. In the nineteenth century, state courts invoked vested rights concepts to declare unconstitutional *both* the English common law doctrine of coverture,[217] by which the property of a married woman came under her husband's control at marriage,[218] and retrospective application of the Married Women's Property Act,[219] by which coverture was abolished. Obviously, these courts disagreed as to when the property rights at issue vested and by what authority, and therefore came to opposing conclusions—divesting the wife at marriage was unconstitutional in one, divesting the husband by statute in the other. But in both cases vested private rights performed the normative work.

In light of this evidence, what sustains skepticism of the existence of vested private rights? The realist or pragmatic view approaches the matter from the perspective of the claimant who cares only whether his expectations will be realized, his desires satisfied. In fact, many moral agents act as if they and others have vested rights, and those rights are reasons for action, regardless of consequences. An economist or realist might say that such people are mistaken; they confuse expectations for rights. Austin might say that they confuse their possibilities of acquiring rights for rights. Yet neither of those explanations accounts for the internal point of view of the person, including the legislator or judge, who understands herself to be obligated with respect to a right or duty,[220] and who takes that right or

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216. *See* Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2571–72 (2013) (Scalia, J., dissenting); *id.* at 2574–75 (Sotomayor, J., dissenting); Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 845 (1977); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925). The pre-political source and fundamental nature of the natural family's liberty and the parents' power impose limitations on "the competency of the state." Meyer v. Nebraska, 262 U.S. 390, 403 (1923). The distinction between the vested rights of the natural family and the non-rights of adoption have precedent in English common law. HELMHOLZ, *supra* note 82, at 96–97.

217. *See* Jones v. Taylor, 7 Tex. 240, 246–47 (1851).

218. Natural rights arguments were used to establish the unconstitutionality of both coverture and slavery. Hamburger, *supra* note 64, at 956–57 n.133.

219. *See* White v. White, 4 How. Pr. 102, 109 (N.Y. Sup. Ct. 1849); Nat'l Metro. Bank of Wash. v. Hitz, 12 D.C. (1 Mackey) 111, 119–21 (1881).

220. *See* HART, *supra* note 7, at 90.

duty as a conclusive reason for her decisions.[221] From the perspective of a law-abiding duty bearer, the question is not whether he can expect his desires to be satisfied or his expectations to be met. Rather, the question is what should he do or not do? In other words, the matter is one of obligation.

What H.L.A. Hart called the "predictive interpretation of obligation" ignores and discounts the internal point of view of the law-abiding citizen who understands law to be a reason for her choices and actions, quite apart from consequences. This internal perspective of law makes sense of obligation in a way that the predictive or bad-man interpretation cannot. Hart says that one who adheres strictly to Holmes's external perspective on law, observing only the scientific correlation between legal signals and consequences, is like "one who, having observed the working of a traffic signal in a busy street for some time, limits himself to saying that when the light turns red there is a high probability that the traffic will stop."[222] However, to treat the traffic signal merely as a sign *that* traffic will stop misses entirely the perspective of the drivers themselves who are under law and therefore view the traffic light as a signal *for* them to stop.[223] This causes the legal scientist to "miss out a whole dimension of the social life of those whom he is watching."[224] This is the dimension of acting "in conformity to rules which make stopping when the light is red a standard of behaviour and an obligation,"[225] which is the "internal aspect" of law seen from the internal point of view of those who live under law.

This dimension is shared both by the system of rules generally and by that part of the system that consists of duties to others. It is that facet of the internal dimension of law—private obligation—that makes sense of the concept of private rights. Attention to the practical point of private law, as to the practical point of law generally, opens to view both the desirability and the possibility of vested rights and their correlatives—directive, obligation-creating duties. Private law exists to an-

221. *See generally id.* at 79–91; FINNIS, *supra* note 5, at 314–20; FINNIS, *supra* note 74, at 23–45.

222. HART, *supra* note 7, at 90.

223. *See id*.

224. *Id.*

225. *Id.*

swer the question of what one should do or not do in his dealings with this person or agent. Property specifies one's rights and duties with respect to things.[226] Tort identifies which harmful actions are wrong and empowers those harmed by wrongful conduct to obtain redress.[227] Contract tells one which promises one must honor.[228] Private law is a special kind of normativity that directs practical reasoning primarily by supplying reasons for action and only secondarily by specifying (not predicting) consequences for breach of one's duties and violations of others' rights. And one can comprehend reasons not to allow legislative powers to abrogate or alter at least some of those rights when one consider the perspective of those good lawmakers who understand themselves bound by duties, and who can themselves appreciate the obligations of private duty-bearers. The next part takes up consideration of that perspective.

III. THE FOCAL MEANING OF VESTED PRIVATE RIGHT

A. Discerning a Focal Meaning

Notwithstanding the practical value of vested private rights and duties, grasping the concept as a matter of speculative inquiry remains difficult. Defining the concept of vested private rights would not be a productive exercise if the definition were tautological, if elements of the definition beg the question of which characteristics are essential and which are incidental, or if a precise definition required so many caveats that the exceptions swallowed the rule. In light of the variety of forms that vested private rights take in law, and the number of exceptions and caveats to their recognition in positive law, those pitfalls seem to lurk in the path that leads to any precise definition.

Some progress can be made in bridging over those pitfalls by developing a focal meaning of vested private right. A focal

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226. *See generally* ADAM J. MACLEOD, PROPERTY AND PRACTICAL REASON (2015); PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW (James Penner & Henry E. Smith eds., 2013).

227. Benjamin C. Zipursky, *The Inner Morality of Private Law*, 58 AM. J. JURIS. 27, 40 (2013); *see generally* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (2012).

228. *See* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981).

meaning establishes what is most essential about the phenomenon to be studied, while avoiding the difficulties of achieving definitional precision.[229] It enables one to avoid overly simplistic meanings that must be artificially applied in univocal fashion to different states of affairs.[230] It enables one to differentiate between stronger and weaker—central and peripheral—instances of the phenomenon, and to evaluate different instances with references to a central case that most fully instantiates the essence of the type under consideration. [231]

To ensure that the focal meaning developed here accurately captures what is important about the doctrine and to avoid errors of identification and analogy, careful reflection is warranted concerning what must be essentially true of a vested private right for it to have meaning from the practical point of view of those who encounter it and who must decide how, if at all, it will affect their choices and actions. In this reflection, the shortcomings and limitations of the theoretical critics are instructive. It is worthwhile to recall (and imitate) H.L.A. Hart's critique of command theories of law generally, and legal realism in particular. Hart criticized command theories for their overly exclusive focus on the external perspective of one who observes legal phenomena and their neglect of the internal point of view of the law-abiding person.[232] By excluding the internal point of view from consideration, command theorists missed the basic concept of law as a norm that does not merely *oblige* by operation of the consequences or threat of sanction attached to it, but *obligates* by operation of the reason for action that it presents to moral agents who respond to law in practical deliberations, choices, and actions.[233] Recovering a perspective on the concept

229. *See* FINNIS, *supra* note 5, at 9–11.

230. *Id.* at 10.

231. The discernment that one meaning is central or focal and another peripheral or secondary involves a judgment about importance and significance. Therefore, neutrality as between central and peripheral instances is impossible; moral considerations cannot be avoided. *See id*. at 11–18. So, scholars do well to "assess importance or significance in similarities and differences within their subject-matter by asking what would be considered important or significant in that field by those whose concerns, decisions, and activities create or constitute the subject matter." *Id.* at 12.

232. *See* HART, *supra* note 7, at 50–99.

233. *See id*. at 79–91.

of obligation enabled Hart's "fresh start" in analytical jurisprudence.[234] It opened up new understandings of the operation of legal systems as unions of primary and secondary rules.[235]

Hart critiqued on more precise grounds the basic claims of legal realism, which Hart called "'rule-scepticism,' or the claim that talk of rules is a myth, cloaking the truth that law consists simply of the decisions of courts and the prediction of them."[236] Though this bracing realism makes a "powerful appeal to a lawyer's candour,"[237] it is ultimately untenable. The precise premises of his argument[238] are less important here than the fundamental insight underlying them: that "it cannot be doubted that at any rate in relation to some spheres of conduct in a modern state individuals do exhibit the whole range of conduct and attitudes which we have called the internal point of view."[239] From that point of view, legal norms such as rules, rights, and duties are neither illusory nor mere tools of prediction but rather are obligatory reasons for action, including judicial action.[240]

What early English positivists and American legal realists excluded from consideration when examining the possibility of vested private rights is instructive for present purposes. Realists denied that vested rights exist because they understood rights to be mere shorthands for complex predictions about what officials will do in fact. Implicit in this denial was an acknowledgement that one who understands rights and duties to *direct* and *determine* practical and judicial deliberation and judgment would understand rights and duties to be meaning-

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234. *See id*. at 79.

235. *See id*. at 91–99.

236. *Id.* at 136.

237. *Id.*

238. A strong version of realism that denies the reality of both primary and secondary rules "is indeed quite incoherent; for the assertion that there are decisions of courts cannot consistently be combined with the denial that there are any rules at all." *Id.* at 136. A moderate version of realism, which concedes that there must be rules constituting courts is a non-starter. "For it is an assertion characteristic of this type of theory that statutes are not law until applied by courts but only sources of law, and this is inconsistent with the assertion that the only rules that exist are those required to constitute courts." *Id.* at 137.

239. *Id.*

240. *See id*. at 136–47.

ful as such. Precisely insofar as rights and duties do not direct and determine deliberation and judgment, the realists thought, they are not intrinsically meaningful. Precisely insofar as rights have no persistence when altered or abrogated by a legislative power, the positivists thought, rights are not vested. The consensus emerges that vested rights would be real things if they directed and determined deliberation and judgment, and if they were resistant to subsequent legal change.

Corwin's description of the doctrine affirms this consensus. In Corwin's statement, the American doctrine of private vested rights in its "most rigorous form—setting out with the assumption that the property right is fundamental, treats any law impairing vested rights, whatever its intention, as a bill of pains and penalties, and so, void."[241] The norms arising out of the doctrine are (1) a private property right and (2) a disability upon the legislator, correlating with an immunity in the property right owner from having his right altered by legislation, which is to say that the lawmaker lacks power to alter the property-right owner's legal status.

As Corwin's definition suggests, vested rights doctrine was hewn from the raw materials of property law.[242] Nevertheless, the idea can be generalized beyond the property context. To begin with, a central case of a private *right* must conclusively resolve practical questions for a moral agent (generally, a duty-bearer) in a way that imposes an obligation. If the right is fully conclusive and fully right—that is, entirely determined and consistent with what justice forbids and requires—then it excludes from further consideration any reason from among the universe of potential reasons for acting or omitting to act. To be fully right-like, it must fully exclude from deliberations all other reasons.[243] There must be no first- or second-order reason extant that might reasonably defeat the right in the deliberations of the agent. It must be peremptory, conclusive, non-discretionary, and fully binding. Therefore, the most central

241. Corwin, *supra* note 28, at 255 (emphasis omitted).

242. *See id.*; *cf.* MERRILL & SMITH, *supra* note 112, at 121–22 (explaining that a fee title of Indian lands was not absolute ownership, but an exclusive right to purchase the right of occupancy).

243. *See generally* JOSEPH RAZ, PRACTICAL REASON AND NORMS (1999).

case of a vested right is a right that imposes an exceptionless duty: an inviolable right.

To be *vested*, the central instance must be resistant to alteration by public officials after the fact, at least to the extent of excluding various first-order reasons from the officials' deliberations and decisions. It must be law not only from the perspective of the duty-bearer but also from the perspective of the officials. Rather than being merely a privilege created by positive law and contingent upon the lawmaker's forbearance, it must perform the work that Austin and Holmes thought impossible: it must constrain legislative will, judicial discretion, and executive force in meaningful ways.

Thus, two essential characteristics of a focal meaning of vested private right stand out. Call them "personal directiveness" and "public indefeasibility." Personal directiveness means that the right supplies a fully conclusive, exclusionary reason for action to a duty-bearer or identifiable class of duty-bearers. Public indefeasibility means that the powers of public officials to recognize, adjudicate, or change the law in such a way as to alter the right's personal directiveness are limited.

The personal directiveness of a right consists in its obligatory strength, the normative momentum, and direction of the reason that it supplies to the practical reasoning of an agent to act or refrain from acting.[244] To be fully personally directive, the right must either be specified as a conclusive, three-term jural relation, identifying the duty-bearer, right-holder, and action or omission that is required (for example, Sam has a right to receive a $1000 scholarship from State University today), or must be an inviolable duty of abstention in its universal formulation, such as the duty not to enslave. It must close or foreclose deliberation about what is to be done. It must bind, it must control, and it must obligate.

The second characteristic—public indefeasibility—is normative momentum directed toward the practical reasoning of a grantor, licensor, law-making sovereign, executive officer, judge, or other person with authority to change, adjudicate, or

244. Thus, absolute rights are specified with respect to the relevant actor's intention, not the action's unintended side effects. *See* John Finnis, *Absolute Rights: Some Problems Illustrated*, 61 AM. J. JURIS. 195, 195–200 (2016).

enforce the law. The most robust, central, or essential instance of a publicly-indefeasible right entails a Hohfeldian immunity against abrogation or alteration.[245] That robust sense of vestedness is rare in jurisdictions that maintain Parliamentary or legislative sovereignty. Weaker senses of indefeasibility than absolute immunity are more common. A right can be resistant to defeasance without being entirely immune from abrogation.

In this more comprehensive (though less robust) sense, a vested private right disables the otherwise-empowered agent from altering the right or imposes upon the agent some liability for doing so, such as just compensation for expropriation. Both Hartian positivist and common law jurisprudences can account for indefeasibility. Viewed in Hartian terms as part of a system of rules, the vested right acts as an exception to the general rules of change, limiting the powers conferred by secondary rules of change. Viewed as part of a tradition of norms, including rights, wrongs, duties, and obligations, the vested right is a superior reason that defeats other reasons for action.

Insofar as it imposes an obligation on officials and legislators not to change the law out of which it arises, the vested right is indefeasible. The attractiveness of indefeasibility is not difficult to perceive from the perspective of right-holders and duty-bearers. Indefeasibility has obvious economic and utilitarian value because it stabilizes expectations, facilitates alienability and trade, and incentivizes stewardship and maximization of the resource.[246] Less obviously, indefeasibility (rightly-settled, or perhaps not-unreasonably-specified) has moral and political value. People respond to rights and duties as reasons. Once they build plans of action—including life plans—on the basis of those reasons, the integrity of their plans depends to a large degree on the indefeasibility of those foundational reasons.[247] The indefeasibility of rights and duties enables human beings

245. *See* Christopher M. Newman, *Vested Use-Privileges in Property and Copyright*, 30 HARV. J.L. & TECH. 75, 80–81 (2016). Regarding Hohfeldian immunities and their relation to other rights generally, see Leif Wenar, *Rights*, *in* STAN. ENCYCLOPEDIA PHIL., at § 2.1 (last updated Sept. 9, 2015), https://plato.stanford.edu/entries/rights/ [https://perma.cc/5UFM-GHV8].

246. *See generally* Harold Demsetz, *Toward a Theory of Property Rights*, *in* PERSPECTIVES ON PROPERTY LAW 135 (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman eds., 3d ed. 2002).

247. *See generally* MACLEOD, *supra* note 226, at 94–121, 173–96.

to realize the good of integrity, which is an essential attribute of the good of moral freedom, which is sometimes called personal autonomy.[248] This good has important value for the political community as a whole, which occurs to one who reflects on the fate of political communities that do not respect the vestedness of property ownership and other private rights.[249]

B. Central Instances of Personally Directive Rights

Personal directiveness has at least two aspects of its own: completeness and conclusiveness. A complete legal norm accounts for all possible reasons for action that might bear upon the practical question. It leaves no exceptions or conditions precedent. A conclusive legal norm is not defeasible or alterable; it is not subject to conditions subsequent. It is the law's final answer to the practical question of what is or is not to be done.[250] A right or duty that is both fully conclusive and fully complete is inalterable and exceptionless. Rights or duties of this kind are relatively few, but they are not unknown.

An obvious example is the Thirteenth Amendment's prohibition against slavery. Each and every American has a conclusive

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248. Of course, this has limits. Autonomy can be exercised in pursuit of evil ends. And when exercised in pursuit of evil ends autonomy does not add value to a person's choice. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 120, 380–81 (1986). Thus, it makes sense to say that personal autonomy is not valuable in and of itself; its value is contingent upon, and derived from, the more basic reasons in favor of which it is exercised. *See* ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 175–80 (1993); Christopher Wolfe, *A Response to Joseph Raz*, *in* NATURAL LAW, LIBERALISM, AND MORALITY 135–136 (Robert P. George ed., 1996); Donald H. Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 S. CAL. L. REV. 995, 1075–85 (1989). Likewise, the stability of expectations and the persistence of rights and duties are not valuable in and of themselves. The value of each depends in large part on the justice of the particular rights and duties under consideration.

249. *See, e.g.*, EDMUND BURKE, SELECT WORKS OF EDMUND BURKE: VOLUME 2: REFLECTIONS ON THE REVOLUTION IN France 255–57 (Liberty Fund ed. 1999); PAUL JOHNSON, MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE NINETIES 92–93, 261–72, 724–28 (1992); RICHARD PIPES, PROPERTY AND FREEDOM 209–25 (1999); Richard Pipes, *Human Nature and the Fall of Communism*, 49 BULL. AM. ACAD. ARTS & SCI. 38 (1996).

250. But not just the law's final answer, for there can be absolute moral rights as well. As Professor John Finnis explains, "There are some absolute human (or natural) rights, because there are some kinds of acts that everyone has an indefeasible, exceptionless moral duty of justice not to choose and do." Finnis, *supra* note 244, at 195.

and exceptionless duty not to enslave another (who has not forfeited the right by committing a crime) and each and every one has a conclusive and exceptionless right not to be enslaved (provided, again, the right is not forfeited).[251] Another such right recognized at various times in Anglo-American legal history is the right not to be coerced to act contrary to conscience. Though it has lately fallen out of favor, at the time of the American founding this right was understood by many to be both inviolable and inalienable.[252] Indeed, early Americans were conditioned to accept the notion of private rights by their familiarity with religious liberty.[253]

The directiveness of an absolute right is best observed from the perspective of the duty-bearer, whose practical deliberations such a right directs. For rights are best understood as reasons for action—norms having practical meaning—that respond to the most elementary question of all practical inquiry: *What should I (not) do?* The person who bears the duty is the one who must either choose to act or choose not to act. In this sense, duty precedes right for purposes of both justification and understanding.[254] Rights both arise out of and correlate with duties when such rights have practical significance. [255]

Consider again the question whether to enslave another. Whatever conditions and qualifications might entangle attempts to understand whether there is an absolute right of freedom in the abstract, one can see clearly that one must never enslave another for any reason because one has complete and conclusive legal (and moral) reasons to refrain from enslaving. The right not to be enslaved, which correlates with those rea-

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251. The Thirteenth Amendment provides, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

252. *See* Barry A. Shain, *Rights Natural and Civil in the Declaration of Independence*, *in* THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND 116, 119–20 (Barry A. Shain ed., 2007); Vincent Phillip Muñoz, *Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion*, 110 AM. POL. SCI. REV. 369 (2016).

253. *See* Wood, *supra* note 11, at 1439; DANIEL L. DREISBACH & MARK DAVID HALL, THE SACRED RIGHTS OF CONSCIENCE, at xxvi–xxix (2009).

254. *See* FINNIS, *supra* note 5, at 205–10.

255. As a matter of history as well, duty arguably has priority over right. *See* Shain, *supra* note 252, at 119–20.

sons, is fully personally directive upon the practical deliberations, choices, and actions of the person who is contemplating whether to enslave another.

C. Central Instances of Publicly Indefeasible Rights

Whereas a fully personally directive right cannot be defeated in the duty-bearer's deliberations and choices, a publicly indefeasible right cannot be defeated by the political processes usually employed to bring about legal change. An indefeasible right is settled, specified, and vested by an authority that is independent of politics. It does not rest upon politics for its authority. This independent authority might be an ancient local custom or some other immemorial usage, an act of contract or other private ordering, an act of self-governance by a professional association, or something more transcendental such as Blackstone's "superior law." Such an independent authority need not be superior to political authorities in a comprehensive or hierarchical way, as the governor of a state is superior in executive power to the state secretary of transportation. It is enough that such an independent authority is competent to settle and specify the particular rights and duties at issue, and that the political authorities that are otherwise empowered to change law have conclusive reasons not to disrupt the judgments of those independent authorities.

A classic example is the public's title to land held in public trust by the state. In the landmark decision in *Illinois Central Railroad Co. v. Illinois*,[256] the U.S. Supreme Court ruled that the Illinois legislature could not convey title in the lakebed under Lake Michigan to the Illinois Central Railroad, even for purposes of enabling the railroad to construct at its own expense a wharf from which the public would benefit. The question, as the Court framed it, was "whether the legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago."[257] The Court answered no. The state holds title in lands submerged beneath navigable waters "by the common law,"[258] and it does not hold that title in its

256. 146 U.S. 387 (1892).
257. *Id.* at 452.
258. *Id.*

own right. "It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties."[259]

By framing the matter as one of the legislature's competence, the Court was posing the people's title as an inherent limitation on the legislature's power to change law. That the root of that title was not found in the state itself but in common law—ancient customary law that preceded Illinois' statehood—meant that the title could not be defeased by the mere exercise of political authority. "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."[260] In this statement the Court echoed a premise of the Declaration of Independence, that governments are instituted among men to secure their vested rights, not the other way around.

D. Penumbral and Peripheral Instances

The focal meaning of vested private right brings clarity to less focal meanings and less central instances. Not all private rights exert the same normative force upon the deliberations and judgments of private citizens and public officials as the right of emancipation on English soil. Many rights partake of some of the nature of that inviolable right but not in all respects, or not in the same degree. Some rights are categorical exclusionary reasons, but not fully exclusionary. Some rights may be altered by public officials, but only in particular ways or on particular conditions. And many right claims are not rights at all. The partial contingency of most legal norms is what justifies the positivists' and realists' skepticism of claims that certain private rights are vested. Yet that same contingency opens the possibility that at least some private rights are vested because legislative or judicial supremacy are themselves partially contingent, and opens to view in what senses and to what extents they might be vested rights.

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259. *Id.*

260. *Id.* at 453.

A right can impose an exclusionary reason upon duty-bearers without imposing an *absolute* exclusionary reason. Some rights exclude fewer categories from deliberation than others. Thus, a right can be a right though it is limited.[261] Some rights operate as exclusionary reasons for action upon the deliberations of duty-bearers, but, unlike free English soil, they do not exclude from deliberation and judgment *all* possible, first-order reasons for action. Instead, they exclude discrete categories of reasons. Without being fully specified in a conclusive judgment as a three-term jural relation, a right can impose a categorical duty of abstention upon some identifiable class of persons, for example, no one may enter Blackacre without Pat's permission except out of strict necessity to save a human life. The right excludes from consideration all categories of reasons but one—a strict necessity to preserve life.

Similarly, a right can be vested without being *inalterably* vested. Some rights are thus within the penumbra of the doctrine though not its center. This most often means that either:

1. The sovereign has no competence to apply a new criminal prohibition retroactively (that is, ex post facto);
2. The sovereign is required to internalize some cost of retrospective application that alters a legal status or jural relation (that is, compensation for expropriation of private property);
3. The sovereign may not impair the exercise of a liberty without an adjudication of forfeiture in a proceeding required by the law of the land (that is, due process requirements);
4. The sovereign must interpret its own laws and other positive rules in such a way as to avoid abrogating common law rights and duties when possible; or
5. Because the right was settled in common law, the parties are entitled to have adjudication of the right and its correlative duty performed by a common law institution, such as a civil jury.

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261. *Cf.* Hamburger, *supra* note 64, at 910–11 (arguing that natural rights at the time of the Founding were understood to be inherently limited by natural law norms such as prohibitions against defamation, obscenity, and fraud).

The status of vested rights is sometimes arrogated wrongly on behalf of peripheral instances of rights. Much skepticism of the concept of vested private rights is understandably directed toward non-central cases, such as usufructs and other context-dependent norms. Those rights are not absolute and conclusive in their abstract form, but rather must be settled and specified in deliberations and judgments that take in not one or two discrete categories of first-order reasons but rather many first- and second-order reasons for action. Indeed, except for the handful of absolute norms of prohibition, all other rights require some specification (for example, in a judgment resulting in a three-term Hohfeldian jural relation of the form *A* has a right that *B* do or not do *x*),[262] and some require quite a lot in the way of qualification, limitation, specification, and boundary drawing (for example, *A* has a right that *B* do or not do *x*, but not a right that *B* do or not do *y*) to mark out the first-order reasons that are and are not excluded from consideration.[263]

In short, perhaps the concept of vested private rights fell into disrepute in part because too much was claimed under its reputation.[264] When less-than-vested rights are identified using the same terminology as fully-vested or nearly-fully-vested rights, the category appears to be indeterminate at best and misleading at worst. It is therefore important to distinguish different senses of vested rights—especially stronger or more central instances—from weaker and more peripheral ones. The focal meaning developed here makes possible that project.

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262. *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning II*, *in* FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 65, 65–70 (Walter Wheeler Cook ed., 1923).

263. *Compare* WEBBER, *supra* note 122, at 116–46, *and* Bradley W. Miller, *Justification and Rights Limitations, in* EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY 93 (Grant Huscroft, ed. 2011), *and* John Oberdiek, *Specifying Rights Out of Necessity*, 28 OXFORD J. LEGAL STUD. 127 (2008), *and* John Oberdiek, *What's Wrong With Infringements? (Insofar as Infringements Are Not Wrong): A Reply*, 27 LAW & PHIL. 293 (2008), *and* Russ Shafer-Landau, *Specifying Absolute Rights*, 37 ARIZ. L. REV. 209 (1995), *with* FINNIS, *supra* note 5, at 198–230, *and* MACLEOD, *supra* note 226, at 173–96.

264. *Cf.* Kainen, *supra* note 10, at 105.

IV. CONCLUSION

Fully-vested private rights are few and their status is mistakenly appropriated for less-than-vested rights and privileges. But examining central instances of vested rights brings into focus a meaning of vested right that can be used to understand peripheral instances, which are more common. In light of the importance of vested rights to the practice of law and the moral agency of public officials, this study promises to bear fruit.

A BRAVE NEW WORLD OF TRANSGENDER POLICY

RYAN T. ANDERSON*

INTRODUCTION

On New Year's Eve 2016, a group of Roman Catholic nuns breathed a heavy sigh of relief just before the clock struck twelve. That night a federal judge placed a nation-wide injunction on a Department of Health and Human Services (HHS) mandate that would have forced all healthcare plans regulated under Obamacare to cover sex-reassignment procedures, and that would have forced all relevant healthcare workers to perform them.[1] Because of the judge's ruling, the hospital run by the nuns would be safe. So, too, would the health insurance plan they provide to their employees.

Think back to Hobby Lobby and the Little Sisters of the Poor, and their victories at the Supreme Court.[2] This Transgender Mandate was the HHS Contraception Mandate on steroids—or hormones, as the case may be. The federal judge enjoined the mandate not simply because it was likely to violate religious liberty—though it was—but also because it was likely to be contrary to the very words of the statute it purported to implement.[3] As this article explains, the healthcare transgender regulation was unlawful because HHS redefined the word "sex" to mean "gender identity" without legal authority to do so. In attempting to impose this "gender identity" policy, the HHS regulations would have penalized medical professionals and health care organizations that, as a matter of faith, moral conviction, or professional medical judgment, believe that

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1. *See* Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 681, 692, 696 (N.D. Tex. 2016).

2. *See* Zubik v. Burwell, 136 S. Ct. 1557 (2016) (*Little Sisters of the Poor*); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

3. *See Franciscan*, 227 F. Supp. 3d at 687–89.

maleness and femaleness are biological realities to be respected and affirmed, not altered or treated as diseases.[4]

On the same day that the HHS regulation was finalized, May 13, 2016, the Departments of Justice and Education sent a gender identity "Dear Colleague" letter to our nation's schools. This letter told schools that they must allow "students to participate in sex-segregated activities and access sex-segregated facilities consistent with their gender identity" because "both federal agencies treat a student's gender identity as the student's sex for purposes of enforcing Title IX."[5]

Title IX is a 1972 law banning discrimination on the basis of sex in federally funded education programs.[6] It was intended to protect women and girls from harassment and discrimination, to ensure that they receive equal opportunities in education. Forty-four years later, the Obama administration was unlawfully re-writing it to say that schools must allow boys unfettered access to the girls' bathrooms, locker rooms, dorm rooms, hotel rooms, and shower facilities. Anything less than full access to the sex-specific intimate facility of one's choice, apparently, is a transphobic denial of civil rights and equality.

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4. The Department of Health and Human Services finalized these regulations on May 13, 2016. The regulations reinterpret Section 1557 of the Affordable Care Act, which bans discrimination by sex, to cover gender identity, requiring coverage and performance of sex reassignment surgeries and access to facilities based on patients' chosen gender identity. The rule was placed under nationwide injunction on December 31, 2016. *See* Ryan T. Anderson, *New Obamacare Transgender Regulations Threaten Freedom of Physicians*, DAILY SIGNAL (May 13, 2016), http://dailysignal.com/2016/05/13/new-obamacare-transgender-regulations-threaten-freedom-of-physicians/ [https://perma.cc/DW8E-WYXF].

5. Press Release, U.S. Dep't of Educ., U.S. Departments of Justice and Education Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students (May 13, 2016), https://www.ed.gov/news/press-releases/us-departments-education-and-justice-release-joint-guidance-help-schools-ensure-civil-rights-transgender-students [https://perma.cc/GA4U-8J2G]; *see also* Catherine E. Lhamon & Vanita Gupta, *Dear Colleague Letter on Transgender Students*, U.S. DEP'T JUST. & U.S. DEP'T EDUC. 2–3 (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf [https://perma.cc/8P42-PCQQ]; Ryan T. Anderson, *Obama Unilaterally Rewrites Law, Imposes Transgender Policy on Nation's Schools*, DAILY SIGNAL (May 13, 2016), http://dailysignal.com/2016/05/13/obama-unilaterally-rewrites-law-imposes-transgender-policy-on-nations-schools/ [https://perma.cc/Y9L5-KBLY].

6. Education Amendments of 1972, Pub. L. No. 92-318, §§ 901–907, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. §§ 1681–1688 (2012)).

The Obama administration explicitly rejected compromises such as single-occupancy facilities, stating, "A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so."[7] And when it came to campus housing or hotels for off-campus trips, the Obama administration said that "a school must allow transgender students to access housing consistent with their gender identity and may not require transgender students to stay in single-occupancy accommodations."[8]

The guidelines also stated that a "school may not require transgender students to have a medical diagnosis, undergo any medical treatment, or produce a birth certificate or other identification document before treating them consistent with their gender identity."[9] The administration went on to say, "Gender identity refers to an individual's internal sense of gender."[10] In other words, sheer say-so makes it so. The Obama administration, in essence, entirely gave into the demands of transgender activists.

Prior to the Obama administration's actions, parents, teachers, and local school districts could have conversations about how best to accommodate the dignity, privacy, and safety concerns of students who identify as transgender while also addressing the dignity, privacy, and safety concerns of other students. Schools could create balanced solutions that were age-appropriate and nuanced given the type of institution: kindergartens and grade schools, high schools and colleges, and graduate schools and law schools could all adopt well-tailored policies. No one assumed that a one-size-fits-all federal mandate would be appropriate for students of all ages in all types of educational institutions.

Parents, teachers, principals, and school administrators, in conjunction with students, tried to find win-win solutions for all of the parties involved and came up with appropriately tailored proposals. Schools facing this issue were sensitive to the

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7. Lhamon & Gupta, *supra* note 5, at 3.
8. *Id.* at 4.
9. Press Release, U.S. Dep't of Educ., *supra* note 5.
10. Lhamon & Gupta, *supra* note 5, at 1 (emphasis omitted).

feelings of embarrassment and discomfort that students who identify as transgender would face were they to be required to share bathrooms or locker rooms with persons of the same biological sex. At the same time, they recognized that students of the other biological sex also had dignity, privacy, and safety concerns of their own.

The solution that schools generally settled upon was to give the student who identified as transgender limited access to other facilities—such as faculty facilities, the teacher's lounge, or the faculty locker room—or to provide single-occupancy restrooms for any student that did not feel comfortable using a multiple-occupancy intimate facility. They found a way to accommodate both the student who identified as transgender and the rest of the students. These nuanced solutions addressed all involved and reflected their dignity, privacy, and safety concerns.

These proposed solutions existed long before the recent surge in high-profile media attention on transgender issues, and details were being worked out at the local level without generating much controversy. But activists attacked these commonsense compromise policies as "transphobic." And so, on May 13, 2016, the Departments of Justice, Education, and Health and Human Services all capitulated to the demands of trans activists.

A few months later, on September 20, 2016, the Department of Housing and Urban Development finalized a rule that required homeless shelters, battered-women shelters, and other emergency shelters to "provide all individuals, including transgender individuals and other individuals who do not identify with the sex they were assigned at birth, with access to programs, benefits, services, and accommodations in accordance with their gender identity."[11] This new rule overturned a 2012 rule that exempted single-sex emergency shelters with

11. Press Release, U.S. Dep't. of Hous. & Urban Dev., No. 16-137, *HUD Issues Final Rule to Ensure Equal Access to Housing and Services Regardless of Gender Identity* (Sept. 20, 2016), https://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2016/HUDNo_16-137 [https://perma.cc/2894-H8WF]; *see also* Equal Access in Accordance With an Individual's Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64,763 (Sept. 21, 2016) (to be codified at 24 C.F.R. pt. 5) [hereinafter *HUD Rule*].

shared sleeping areas or bathrooms from President Obama's gender identity policy.

Previously, the administration was willing to admit that granting access to sex-specific shelters based on biology was not bigotry. Not so any longer. The new rule not only overturned that previous exemption for emergency shelters, it also contained no exemption for shelters run by religious organizations. And it paid no consideration at all to the particular vulnerabilities of people who need emergency shelters—women fleeing domestic and sexual abuse, or homeless people who themselves on average have higher rates of sexual abuse and mental health problems—and how gender identity policies might negatively impact these people.[12]

Examples of political overreach on "gender identity" can be multiplied. But these three examples are sufficient for now to help illustrate the problem. In healthcare, in education, and in housing, the government was attempting to impose a radical transgender agenda on citizens by redefining "sex" as "gender identity"—and then saying long-standing laws prohibiting discrimination on the basis of "sex" now require special privileges based on "gender identity."

This article explains why these new gender identity policies are unlawful and why they are bad policy. For example, when Congress passed Title IX of the Education Amendments in 1972, no one could have thought that "sex" meant "gender identity." "Sex" did not mean "gender identity" then, and "sex" does not mean "gender identity" now. Federal bureaucrats have unlawfully attempted to rewrite federal law. And in doing so they have attempted to impose a bad policy on the nation. The Obama administration turned the purpose of Title IX on its head and favored the concerns of students who identify as transgender while entirely ignoring the concerns of other students. As this article explains, valid safety, privacy, and equality concerns exist, and the Obama administration ignored them. States and local schools should take these concerns seriously and find solutions that respect all Americans.

Part of the problem in using long-standing antidiscrimination laws to now enforce "gender identity" policies is that there

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12. *See HUD Rule*, *supra* note 11.

is no clear understanding of what counts as "discrimination" on the basis of "gender identity." This article explains that commonsense policies regarding bodily privacy and sound medicine are now simply being redefined as "discrimination"—just as "sex" is being redefined as "gender identity."

This article closes with a roadmap on what needs to be done. In February 2017, the Trump administration took the first steps to reject the unlawful redefinition of "sex" from the Obama era.[13] Congress should ratify this action and prevent a future administration from undoing it by specifying that the word "sex" in our civil rights laws does not mean "gender identity" unless the people, through their elected representatives, explicitly say so. And the people should not say so: neither Congress nor the states should elevate "gender identity" to a protected class in our civil rights laws. Instead, they should let private institutions make their own policies, and they should specify that access to sex-specific facilities in public institutions is to be generally based on biology, but any individual uncomfortable with this should be given a reasonable accommodation. Meanwhile, the courts should respect the democratic process by refraining from imposing new meanings on existing antidiscrimination statutes.

I. PROMOTING GENDER IDEOLOGY AND PROLONGING GENDER DYSPHORIA

Gender identity policies are not simply about allowing citizens who identify as transgender to be free to live how they want to—they are policies meant to coerce the rest of us. In New York City, you can be fined up to $250,000 if you intentionally "misgender" someone by using the wrong pronoun, even if the person requests you use politically charged pro-

13. *See* Sandra Battle & T.E. Wheeler, II, *Dear Colleague Letter*, U.S. DEP'T JUST. & U.S. DEP'T EDUC. (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf [https://perma.cc/B78E-RFMR] (rescinding the Dear Colleague Letter on Transgender Students); *see also* Ryan T. Anderson, *Trump Right to Fix Obama's Unlawful Transgender School Policy*, DAILY SIGNAL (Feb. 22, 2017), http://dailysignal.com/2017/02/22/trump-right-to-fix-obamas-unlawful-transgender-school-policies/ [https://perma.cc/4FWF-P7VR].

nouns such as "ze" and "hir".[14] Indeed, a public school district in Oregon paid a teacher $60,000 because colleagues declined to use the pronoun "they" to describe the teacher.[15] The teacher, Leo Soell, does "not identify as male or female but rather transmasculine and genderqueer, or androgynous."[16] As UCLA Law Professor Eugene Volokh explains, "Soell wants people to call Soell 'they,' and submitted a complaint to the school district objecting (in part) that other schoolteachers engaged in 'harassment' by, among other things, 'refusing to call me by my correct name and *gender* to me or *among themselves*.'"[17] Gender identity policies quickly become politically correct speech codes.

This tendency becomes even more insidious in an educational setting, where gender identity policies quickly acquire an element of indoctrination. That is, they become part of a larger program promoting gender ideology. And they run the risk of prolonging gender dysphoria in students who otherwise would have naturally come to accept and embrace their bodies. Let us take each of these claims in turn.

A. Gender Indoctrination at School

First, gender identity policies in our nation's schools are not simply about respecting the dignity of students who identify as transgender. Instead, they are about forcing *all* students to embrace gender ideology. Policies disguised as "anti-bullying" programs are really anti-disagreement programs—no dissent on gender ideology will be tolerated. Consider a lawsuit filed against a public charter school in Minnesota, Nova Classical

14. *See* Eugene Volokh, *You can be fined for not calling people 'ze' or 'hir,' if that's the pronoun they demand that you use*, WASH. POST: VOLOKH CONSPIRACY (May 17, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/17/you-can-be-fined-for-not-calling-people-ze-or-hir-if-thats-the-pronoun-they-demand-that-you-use [https://perma.cc/4LFC-E66N].

15. *See* Eugene Volokh, *Claims by transgender schoolteacher (who wants to be called 'they') yield $60,000 settlement, agreement to create disciplinary rules regulating 'pronoun usage,'* WASH. POST: VOLOKH CONSPIRACY (May 25, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/25/claims-by-transgender-schoolteacher-who-wants-to-be-called-they-yield-60000-settlement-agreement-to-create-disciplinary-rules-regulating-pronoun-usage [https://perma.cc/USL9-VSHK].

16. *Id.*

17. *Id.* (emphasis added).

Academy. Parents of a five-year-old student sued the school because it was not accommodating enough of their "gender nonconforming" child.[18] Here's how part of the complaint reads:

> [W]e were told that the school was not willing to use effective materials like 'I Am Jazz;' would not ever conduct gender education, whether proactive or corrective, without first introducing delay and inviting or encouraging families to 'opt out;' and would not even—as a bare minimum—simply inform our child's classmates of her preferred name and pronouns, without first delaying for days and inviting or encouraging families to 'opt out' of this information.[19]

I Am Jazz is a children's book about Jazz Jennings, the star of a reality TV show on TLC that chronicles the life of Jennings, a biological male who came out as transgender as a toddler.[20] Because the school was not willing to impose this radical worldview on five-year-old kindergarteners without first notifying parents and allowing them to opt-out, it was sued. It is worth noting that the father of the five-year-old student at the center of the Minnesota lawsuit was "a PhD candidate in educational psychology at the University of Minnesota, where his research focuses on 'the creation and implementation of gender inclusive policies and practices in K–12 public schools.'"[21]

As a result of the lawsuit, the school eventually caved. The journalist, Katherine Kersten, explains:

> In January 2016, Nova's board of directors approved a comprehensive, interim "gender inclusion" policy. The policy later became permanent. Under the new policy, a student can choose his or her own gender without medical approval. The school must work with transgender students to "create

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18. *See* Kelsey Harkness, *Nationally Ranked School Counters Complaint of Transgender Discrimination*, DAILY SIGNAL (May 2, 2016), http://dailysignal.com/2016/05/02/nationally-ranked-school-counters-complaint-of-transgender-discrimination/ [https://perma.cc/84EL-Y5XZ].

19. *Id.*

20. *See* Jazz Jennings, *Jazz Jennings: When I First Knew I Was Transgender*, TIME (May 31, 2016), http://time.com/4350574/jazz-jennings-transgender/ [https://perma.cc/U7M7-CXNC].

21. Katherine Kersten, *Transgender Conformity*, FIRST THINGS (Dec. 2016), https://www.firstthings.com/article/2016/12/transgender-conformity [https://perma.cc/K8S6-7A78].

> a tailored gender transition plan." Students are entitled to use the bathrooms, locker rooms, and overnight-trip sleeping facilities of the opposite sex. They also have a right to demand that others address them using their "preferred name" and pronouns.[22]

Of course, this "gender inclusion" policy goes well beyond sex-specific intimate facilities and pronouns: it would encompass an entire curriculum. For example, under this new policy, "[a]ll K–5 students would read a book called *My Princess Boy*, 'which tells the story of a boy who expresses his true self by dressing up and enjoying traditional girl things.'"[23] Here is how Emily Zinos, a mother who ended up having to pull her child out of Nova, put it:

> With sexual difference erased from all policy and practice at Nova, I had to face the prospect of my children sharing locker rooms with the opposite sex, learning bogus theories in science class about gender existing on a spectrum, and being punished for violations of "preferred" pronoun use. Up to this point, Nova had always taken its time in selecting curricula, at times writing its own textbooks. Now, unsubstantiated claims of bullying were used to pressure committees to approve materials and policies that were anti-scientific and that supplanted parental authority. This didn't sound like the school I had signed up for—this was ideological indoctrination.[24]

In a follow-up essay, Zinos explains what is at stake with gender identity policies at schools:

> [S]chools will teach children to accept an ideology that is predicated on the lie that biological sex plays second fiddle to a self-proclaimed, subjective gender identity, and that the sex of one's body is mutable or even irrelevant. This isn't just an idea that you can tuck away in a unit study or an anti-bullying presentation. It will inevitably find its way into every aspect of a school and make a deep impression on the developing minds of children. For example, girls, under the regressive mandates of anti-bullying and gender inclusion

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22. *Id.*

23. *Id.*

24. Emily Zinos, *Time for Parents to Resist Transgender Activism*, FIRST THINGS (Jan. 20, 2017), https://www.firstthings.com/web-exclusives/2017/01/time-for-parents-to-resist-transgender-activism [https://perma.cc/W9RD-2UDA].

> policies, would have to agree to call boys in their locker room "girls," effectively losing their rights to free speech and to privacy from males. And science—particularly biology—would die a quick death at the hands of a concept that necessarily eradicates observable facts about human sexuality. Gender ideology in the curriculum is a lie enshrined as truth.[25]

There will always be something taught about sex, gender, and gender identity in our nation's schools. The questions are whether what is taught will be true or false, and whether it will respect parental authority or undermine it. And another question: whether it will help children or harm them. Zinos asks these questions to other parents:

> Will we allow our young and vulnerable children to be fed a false anthropology rather than teaching them to speak the truth boldly? Will we consent to our children's sterilization rather than patiently guiding them toward an appreciation of their bodies? Will we treat our children's mental health issues with double mastectomies rather than demand that doctors provide a true remedy?[26]

B. Prolonging Gender Dysphoria

The first step in answering these questions correctly is to resist the efforts to indoctrinate our nation's children. Here Zinos and the other parents at Nova who opposed gender ideology find support from medical experts. In an amicus brief to the Supreme Court of the United States, Drs. Paul McHugh, Paul Hruz, and Lawrence Mayer explain how gender identity policies in schools run the risk of prolonging gender dysphoria which may otherwise have naturally resolved itself. They write:

> It is well-recognized, too, that repetition has some effect on the structure and function of a person's brain. This phenomenon, known as *neuroplasticity*, means that a child who is encouraged to impersonate the opposite sex may be less likely to reverse course later in life. For instance, if a boy repeated-

25. Emily Zinos, *Biology Isn't Bigotry: Christians, Lesbians, and Radical Feminists Unite to Fight Gender Ideology*, PUBLIC DISCOURSE (Mar. 6, 2017), http://www.thepublicdiscourse.com/2017/03/18894/ [https://perma.cc/2EYY-2Z4S].

26. *Id.*

> ly behaves as a girl, his brain is likely to develop in such a way that eventual alignment with his biological sex is less likely to occur. Obviously then, some number of gender dysphoric children who would naturally come to peacefully accept their true sex are prevented from doing so by gender-affirming policies like those mandated by the Fourth Circuit.[27]

At issue in the case that was pending before the Supreme Court—before the Trump administration reversed President Obama's policy that caused the lawsuit[28]—was a Fourth Circuit court ruling giving deference to an Obama administration interpretation of a regulation implementing Title IX to require schools to generally "treat transgender students consistent with their gender identity."[29] But as Drs. McHugh, Hruz, and Mayer conclude, "policies such as those at issue in this lawsuit will cause some young adults who would have realigned with their true sex to instead attempt to change it through surgery."[30]

In an expert declaration to a federal district court, Dr. Hruz elaborated:

> Since the vast majority of pre-pubertal children with gender dysphoria (80–95%) will revert back to a gender identity consistent with their sex, forced societal cooperation with transgender identification carries the high risk of interfering with eventual desistence. With currently available data, it is not possible to accurately predict those individuals who will desist from those who will persist in transgender identity.[31]

In another expert declaration, he continues:

> One might expect that such social affirmation measures would interfere with known rates of gender resolution. Any activity that encourages or perpetuates transgender persistence for those who would otherwise desist can cause signif-

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27. Brief of Dr. Paul R. McHugh, M.D., Dr. Paul Hruz, M.D., Ph.D., and Dr. Lawrence S. Mayer, Ph.D. as Amici Curiae supporting Petitioner at 16, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, No. 15–2056 (2017), 2017 WL 219355, at *16 (footnote and citation omitted) [hereinafter *McHugh Brief*].

28. *See* Battle & Wheeler, *supra* note 13.

29. *See* G. G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 715 (4th Cir. 2016), *vacated*, 137 S. Ct. 1239 (2017).

30. *McHugh Brief*, *supra* note 28, at 20. .

31. Rebuttal Expert Declaration of Paul W. Hruz, at 8–9, United States v. North Carolina, No. 1:16-cv-00425-TDS-JEP (M.D.N.C. Oct. 6, 2016).

> icant harm, including permanent sterility, to these persons. This is particularly concerning given that children are likely incapable of making informed consent to castrating treatments.[32]

Policies such as the one adopted by Nova run the risk of prolonging the struggles of transgender students rather than alleviating them.

II. GENDER IDENTITY MANDATES ARE BAD POLICY

Even if one agreed entirely with the claims of transgender activists about the nature of gender identity, enacting their preferred public policies still does not follow—their preferred policies entirely ignore competing considerations. In this and the next two sections—on privacy, safety, and equality—I present arguments that need to be taken into account when crafting public policy for everyone, even if one agrees with gender ideology.[33] First up, privacy.

A. Privacy

The Obama gender identity guidelines ignore legitimate privacy concerns. Sex-specific intimate facilities exist in the first place to provide a sufficient level of bodily privacy. This is something that people on both sides of the political spectrum once understood. Justice Ruth Bader Ginsburg, for example, in her majority opinion for the Supreme Court forcing the Virginia Military Institute to become coeducational, wrote that such a change "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements."[34]

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32. Expert Declaration of Paul W. Hruz, Exhibit H, at 38, Defendants' and Intervenor-Defendants' Brief in Opposition to the United States' Motion for Preliminary Injunction, United States v. North Carolina, No. 16-00425 (M.D.N.C. Aug. 17, 2016) [hereinafter *Hruz Expert Declaration*].

33. The next three sections draw on a report I co-authored with Melody Wood for The Heritage Foundation. *See* Ryan T. Anderson & Melody Wood, *Gender Identity Policies in Schools: What Congress, the Courts, and the Trump Administration Should Do*, HERITAGE FOUND. (Mar. 23, 2017), http://www.heritage.org/education/report/gender-identity-policies-schools-what-congress-the-courts-and-the-trump [https://perma.cc/5LYG-PTY6].

34. United States v. Virginia, 518 U.S. 515, 550 n.19 (1996).

Indeed, Justice Ginsburg has been consistent over the years in response to concerns about privacy. When some critics argued that the Equal Rights Amendment, a predecessor of Title IX that never became law, would have required unisex intimate facilities, Ginsburg pushed back. In 1975, when Justice Ginsburg was a law professor at Columbia University, she wrote an op-ed for the *Washington Post* explaining that a ban on sex discrimination would not require such an outcome: "Again, emphatically not so. Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy. Individual privacy, a right of constitutional dimension, is appropriately harmonized with the equality principle."[35] In other words, the Constitution requires protection for the right of bodily privacy, and equality claims do not override it.

Justice Ginsburg's colleague, Justice Anthony Kennedy, makes a related point that acknowledging biological differences is not the same as engaging in stereotyping, and thus not a violation of equality: "To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real."[36] We need to be clear on which sex differences are real and which are merely stereotypes. Labeling everything a stereotype or a social construct disserves everyone.

Many courts have defended the bodily privacy rights of people in a variety of settings.[37] The U.S. Court of Appeals for the

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35. Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, WASH. POST, Apr. 7, 1975, at A21; *see also* Eugene Volokh, *Prominent Feminist: Bans on Sex Discrimination 'Emphatically' Do Not 'Require Unisex Restrooms'*, WASH. POST: VOLOKH CONSPIRACY (May 9, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/09/prominent-feminist-bans-on-sex-discrimination-emphatically-do-not-require-unisex-restrooms [https://perma.cc/P83L-VAQB].

36. Nguyen v. INS, 533 U.S. 53, 73 (2001).

37. The U.S. Court of Appeals for the Fourth Circuit, for example, has ruled that prisoners have a right to bodily privacy. With the exception of true emergencies, prisoners have a right not to be seen in a state of undress by guards of the opposite sex. *See* Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981) (affirming a judgment in favor of a female prisoner whose clothing was forcibly removed by male guards and noting that although individuals "in prison must surrender many rights of privacy," it remains true that "[m]ost people . . . have a special sense of

Fourth Circuit has iterated "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns."[38] As the State of North Carolina has explained, the Department of Justice's prison regulations follow this principle: "[T]hose regulations tightly restrict 'cross-gender' strip searches, pat-down searches, and visual body cavity searches, and also require policies that generally 'enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia.'"[39]

Privacy is clearly a paramount concern. But the 2016 Obama Administration's "Dear Colleague" letter instructs schools that they may not notify students (or their parents) about whether they will have to share a bedroom, shower, or locker room with a student of the opposite biological sex.[40] The Women's Liberation Front (an organization from the left) and the Family Policy Alliance (an organization from the right) point out the double standard when it comes to whose privacy is being protected: "It is truly mind-boggling that informing women as to which men might have the 'right' to share a bedroom with them is an 'invasion of privacy,' but it is *not* an invasion of privacy to invite those men into women's bedrooms in the first place."[41]

It is entirely reasonable for people not to want to see the opposite sex in a state of undress, regardless of their gender identity. Likewise, it is entirely reasonable for people not to want to be seen in a state of undress by people of the opposite sex, regardless of their gender identity. The public interest law firm Alliance Defending Freedom (ADF) explains this long-running American practice:

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privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating").

38. Faulkner v. Jones, 10 F.3d 226, 232 (4th Cir. 1993).

39. Defendants' and Intervenor-Defendants' Brief in Opposition to the United States' Motion for Preliminary Injunction at 68, United States v. North Carolina, No. 16-00425, (M.D.N.C. Aug. 17, 2016) (citations omitted) (quoting 28 C.F.R. § 115.15(c)–(d)).

40. *See* Lhamon & Gupta, *supra* note 5.

41. Brief of Women's Liberation Front and Family Policy Alliance as Amici Curiae Supporting Petitioner at 6, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S.Ct. 1239 (2017) (No. 16-273), 2017 WL 192762 (emphasis in original) [hereinafter *WoLF & FPA Brief*].

> In the late 1800s, as women began entering the workforce, the law developed to protect privacy by mandating that work place restrooms and changing rooms be separated by sex. Massachusetts adopted the first such law in 1887. By 1920, 43 of the (then) 48 states had similar laws protecting privacy by mandating sex-separated facilities in the work-place. Because of our national commitment to protect our citizens, and especially children, from the risk of being exposed to the anatomy of the opposite sex, as well as the risk of being seen by the opposite sex while attending to private, intimate needs, sex-separated restrooms and locker rooms are ubiquitous in public places.[42]

This concern is particularly heightened for minors, especially as children go through puberty and rightly desire bodily privacy. "Specifically," adds ADF, "minors have a fundamental right to be free from State-compelled risk of exposure of their bodies, or their intimate activities, such as occur within restrooms and locker rooms, to the opposite biological sex."[43]

Bodily privacy is also of particular concern to women who have been victims of sexual abuse. Seeing a naked male body, particularly the genital area, can function as a traumatic trigger. Whether the naked male body they suddenly see in front of them belongs to a man who identifies as a woman (and has not had surgery) or a man who identifies as a man (and has not had surgery) is of no moment to survivors of sexual abuse who are caught in that situation.

Safe Spaces for Women, a group that "provides survivors of sexual assault with care, support, understanding and advice,"[44] recently submitted an amicus brief to the Supreme Court explaining how gender identity policies can negatively affect such women:

> Safe Spaces for Women has a strong interest in ensuring that the voices of women who have suffered sexual abuse are heeded when policies are made that may directly affect their

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42. Verified Complaint for Injunctive and Declaratory Relief at 55, Students & Parents For Privacy v. U.S. Dep't of Educ., No. 16-4945 (N.D. Ill. May 4, 2016), 2016 WL 2591322.

43. *Id.* at 56.

44. Brief of Safe Spaces for Women as Amicus Curiae in Support of Neither Party at 1, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, No. 16-273 (2017), 2017 WL 74871, at *1 [hereinafter *Safe Spaces for Women Brief*].

> physical, emotional, and psychological well-being. This includes policies that require educational institutions covered by Title IX to admit to female showers, locker rooms, and restrooms biological males who identify as female. While Safe Spaces for Women bears no animus toward the transgendered community, it is deeply concerned that . . . . survivors of sexual assault are likely to suffer psychological trauma as a result of encountering biological males—even those with entirely innocent intentions—in the traditional safe spaces of women's showers, locker rooms, and bathrooms.[45]

The brief goes on to note that the Obama Administration issued its guidance "without giving those affected a voice in the process . . . . improperly circumvent[ing] the notice and comment process when that process was needed most."[46] As the brief further notes:

> Women who have suffered sexual assault are especially sensitized to the risks posed to their physical and emotional wellbeing by allowing biological males to enter the traditional safe spaces of women's showers, locker rooms, and restrooms. Moreover, these women are vulnerable to suffering emotional trauma as a result of encountering biological males in those spaces—including those with entirely innocent intentions.[47]

Several families have expressed similar concerns to the Supreme Court. Consider the declaration of Y.K., the parent of several minor children, including C.K.:

> C.K. currently attends a middle school within the Charlotte-Mecklenburg School System. She is required to change clothes at school for curricular activities, which includes undressing in front of other students within a large open single-sex locker room.
>
> She is not aware of any private single-stall changing facilities. But even if those were available, she would feel ostracized from the rest of her peers by being required to change away from the rest of the girls in order to avoid undressing in front of a male or seeing a male undress in front of her.

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45. *Id.* at 2.
46. *Id.* at 2–3.
47. *Id.* at 3.

> She experiences anxiety, discomfort, and embarrassment at the thought of having to change in front of a boy or a man, and the fact that a male may profess a female gender identity does not reduce her anxiety. She also fears that some men may profess a female identity as a pretense to access the locker room where she is changing.
>
> C.K. has been afraid and anxious about returning to school this year because of the school system's new policy regarding sex-specific restrooms, locker rooms, and changing facilities. Her anxiety has been slightly allayed because the new policy is currently on hold as a result of a recent Supreme Court ruling, but nonetheless the thought that she will have to undress in the presence of males, and be subject to males undressing in front of her, once that policy goes back into effect, is deeply distressing to her.[48]

Consider also the declaration of S.H., a fourteen-year-old who attended an Illinois public middle school:

> My former public middle school feeds into a public high school which permits males into female restrooms, based upon whether they profess a female gender identity. The high school district adopted this policy a couple of years ago, without notifying the parents of this change. The school district also let one student have access to locker rooms formerly reserved for the opposite sex.
>
> . . . .
>
> The idea of permitting a person with male anatomy—regardless of whether he identifies as a girl—in girls' locker rooms, showers and changing areas, and restrooms makes me extremely uncomfortable and makes me feel unsafe as well.
>
> Even the idea that a boy or man is allowed in those areas makes me anxious and fearful, regardless of whether I ever encounter them in any of those places.
>
> I feel unsafe because I am concerned that a boy or man can access the girls' facilities by just professing a female identity, and that would allow them to take advantage of the school's policies in order to see me and my friends as we have to un-

48. Declaration of Y.K., Exhibit O, at 2–3, Defendants' and Intervenor-Defendants' Brief in Opposition to the United States' Motion for Preliminary Injunction, United States v. North Carolina, No. 16-00425 (M.D.N.C. Aug. 17, 2016).

> dress for school classes. They could take pictures of us with their phones and then post them to the internet.
>
> I would feel especially violated in the event that the school district's policy enabled a person with male genitalia, regardless of what gender that person professes, to see me partially or fully undressed. I also do not want to be exposed to male genitalia in any way while in facilities formerly designated for girls only.[49]

Finally, consider the testimony of J.S., recounted in the Safe Spaces for Women amicus brief:

> In Washington state the Human Rights Commission passed a Washington Administrative Code allowing men who gender identify as female to enter women's locker rooms, spas, and restrooms. As a survivor of childhood molestation and rape, the passage of this law left me feeling vulnerable and exposed in areas [in which] I should be protected. I worked for many years to heal from the emotional, physical, and spiritual effects of the trauma inflicted by my childhood attacker. Depression, panic attacks, suicidal thoughts, Post Traumatic Stress Disorder, and physical phantom pains are a legacy of my past abuse.
>
> I had been panic-attack free for over a decade when Washington's law went into effect. Now, using a public bathroom is very difficult and has led to many panic attacks. I have not entered a public women's locker room in over a year. Before Washington's law was passed, if I encountered a man in the woman's bathroom or locker room, management, staff, police and the general public would all have been there to protect my privacy and safety. This is no longer the case. To be in a position where I am left exposed, separate from others and no longer have a voice is the same position I was in as a child of eight.[50]

American law recognizes that an interest in bodily privacy exists—not just for workers or students, but for prisoners as well—particularly in an undressed state.[51] If this is true in the case of prisoners, who do give up certain rights upon incarcera-

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49. Declaration of S.H., Exhibit Q, at 1–3, Defendants' and Intervenor-Defendants' Brief in Opposition to the United States' Motion for Preliminary Injunction, United States v. North Carolina, No. 16-00425 (M.D.N.C. Aug. 17, 2016).

50. *Safe Spaces for Women Brief*, *supra* note 45, at 15.

51. *See, e.g.*, Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981).

tion,[52] why would it not also be true for minor students, almost all of whom are subject to a law mandating their attendance at school?

Some members of the political left, even today, seem to understand this basic interest in privacy. Maya Dillard Smith, former head of the American Civil Liberties Union of Georgia, resigned from her position with the ACLU after it came out in support of transgender access to formerly single-sex spaces:

> I have shared my personal experience of having taken my elementary school age[d] daughters into a women's restroom when shortly after three transgender young adults over six feet with deep voices entered . . . . My children were visibly frightened, concerned about their safety and left asking lots of questions for which I, like many parents, was ill-prepared to answer . . . . Despite additional learning I still have to do, I believe there are solutions that can provide accommodations for transgender people and balance the need to ensure women and girls are safe from those who might have malicious intent.[53]

As Professor Jeannie Suk Gersen of Harvard Law School has written in the *New Yorker*, "The discomfort that some people, some sexual-assault survivors, in particular, feel at the idea of being in rest rooms with people with male sex organs, whatever their gender, is not easy to brush aside as bigotry."[54]

B. Safety

The Obama gender identity guidelines also ignore legitimate safety concerns. In addition to protecting privacy, sex-specific intimate facilities also exist to protect girls and women from male predators. The concern is not that people who identify as transgender will engage in inappropriate acts. Rather, the concern is that predators will abuse these new gender identity pol-

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52. *See id.*

53. Jessica Chasmar, *Ga. ACLU leader resigns over Obama's transgender bathroom directive*, WASH. TIMES (Jun. 2, 2016), http://www.washingtontimes.com/news/2016/jun/2/maya-dillard-smith-georgia-aclu-leader-resigns-ove/ [https://perma.cc/5HYF-RF95].

54. Jeannie Suk Gersen, *The Transgender Bathroom Debate and the Looming Title IX Crisis*, NEW YORKER (May 24, 2016), http://www.newyorker.com/news/news-desk/public-bathroom-regulations-could-create-a-title-ix-crisis [https://perma.cc/423F-VUZH].

icies to gain readier access to victims. Several experts have testified about precisely this problem, and recent events confirm their insights.

Consider the expert testimony of Kenneth V. Lanning, a veteran of forty years in law enforcement who specializes in preventing and solving sex crimes. A former FBI Supervisory Special Agent, he was assigned to the Behavioral Science Unit and the National Center for the Analysis of Violent Crime at the FBI Academy in Quantico for twenty years. Lanning has consulted on thousands of sex crimes and has published an essential book, *Child Molesters: A Behavioral Analysis*, now in its fifth edition.[55]

Lanning identifies the problem that "gender-identity based access policies" (GIBAPs) create for sex-specific intimate facilities: "the problem with potential sex offenses is not crimes by transgendered persons. The problem . . . is offenses by males who are not really transgendered but who would exploit the entirely subjective provisions of a GIBAP . . . to facilitate their sexual behavior or offenses."[56] As Lanning explains:

> [A]llowing a man, based only on his claim to be [a] transgendered woman, to have unlimited access to women's rest rooms, locker rooms, changing rooms, showers, etc. will make it easier for the type of sex offense behavior previously described to happen to more women and children. Such access would create an additional risk for potential victims in a

55. KENNETH V. LANNING, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS FOR PROFESSIONALS INVESTIGATING THE SEXUAL EXPLOITATION OF CHILDREN (5th ed. Nat'l Ctr. for Missing & Exploited Children 2010), http://www.missingkids.com/en_US/publications/NC70.pdf [https://perma.cc/N7QA-XF4E].

56. Expert Declaration and Report of Kenneth V. Lanning, Exhibit M, at 1, 12, Defendants' and Intervenor-Defendants' Brief in Opposition to the United States' Motion for Preliminary Injunction, United States v. North Carolina, No. 16-00425 (M.D.N.C. Aug. 17, 2016) [hereinafter *Lanning Expert Declaration*].

Retired Sheriff Tim Hutchison agrees: "The risks of GIBAPs do not come from transgender use of public facilities that do not line up with birth certificates. Rather, non-transgender male sex offenders who prefer female victims will use GIBAPs to obtain better access to their victims for different types of sex crimes." Expert Opinion of Sheriff Tim Hutchison (Retired), Exhibit N, at 8, Defendants' and Intervenor-Defendants' Brief in Opposition to the United States' Motion for Preliminary Injunction, United States v. North Carolina, No. 16-00425 (M.D.N.C. Aug. 17, 2016) [hereinafter *Hutchison Expert Declaration*].

> previously protected setting and a new defense for a wide variety of sexual victimization . . . .[57]

Tim Hutchison, the retired sheriff of Knox County, Tennessee, which includes the City of Knoxville and the University of Tennessee, agrees. Drawing on more than thirty-three years of experience in law enforcement, he testifies to what many local law enforcement officials know: "Public restrooms are crime attractors, and have long been well-known as areas in which offenders seek out victims in a planned and deliberate way."[58] More specifically, Hutchison states that "[a]ccess policies to restrooms based on 'gender identity' create real and significant public safety and privacy risks, especially in women's and children's restrooms/dressing rooms. These incidents are already occurring."[59]

Part of the problem is that many sex crimes depend on intent, which will be harder to prove with gender identity policies. Lanning explains that predators "will use the cover of gender-identity-based rules or conventions to engage in peeping, indecent exposure, and other offenses and behaviors."[60] Additionally, Lanning argues that "[c]laims that existing laws are sufficient to address abuse of GIBAPs and similar social customs by male sex offenders are particularly weak, because the specific types of illegal conduct most likely to be encouraged by the policies are intent-based offenses."[61] Hutchison notes that "[p]eople pushing for the adoption of GIBAPs are downplaying or dismissing serious and legitimate public safety concerns because they do not see (or maybe do not want to see) the problem."[62]

Gender identity policies also lack a clear and objective definition and standard of who belongs where. Lanning elucidates the problems created by the subjectivity inherent in GIBAPs:

> [O]bjective standards are also important to effective law enforcement. Law enforcement officers and prosecutors will be

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57. *Lanning Expert Declaration*, *supra* note 56, at 13.
58. *Hutchison Expert Declaration*, *supra* note 56, at 6–7.
59. *Id.* at 7.
60. *Lanning Expert Declaration*, *supra* note 56, at 13.
61. *Hutchison Expert Declaration*, *supra* note 56, at 15.
62. *Id.* at 7.

> less likely to record, investigate, or charge indecent exposure or peeping offenses in a GIBAP environment, because there is no objective standard for determining whether someone born a male can lawfully be present in a women-only facility. It would be more difficult to prove lascivious intent when self-reported gender identity drives access rights, and easier to accuse law enforcement personnel of discrimination. This is made even more difficult when that self-reporting need not be corroborated in any way whatsoever.[63]

And just as fear of being accused of bigotry or discrimination can make law enforcement personnel less likely to investigate or enforce sex crime statutes, Lanning contends that the same fear can make women less likely to report certain forms of sexual misconduct, such as peeping and indecent exposure:

> Under such policies, the very real victims of such conduct—women deliberately exposed to the male genitals of an exhibitionist, for example—would be forced to consider whether the exposure was merely the innocent or inadvertent act of a transgendered individual. Moreover, because GIBAPs and similar social conventions link facility access to self-reported gender *identity*, a victim may be unwilling to report an exhibitionist appearing to be a male for fear of being accused of bigotry or gender identity discrimination. As a result, reporting of public-facility sex crimes is likely to *decrease* as a result of GIBAPs and similar social conventions, even as the actual number of offenses *increases*.[64]

This danger is particularly acute with children, who are already less likely to report abuse. "With a GIBAP in effect," explains Hutchison, "sex crimes would increase, but an even larger percentage of those crimes would go unreported. In fact, children often delay reporting of sexual abuse until adulthood."[65] According to Hutchison, many women are likewise afraid to make reports of sex crimes: "The decrease in reporting would not just be because victims and bystanders would be less certain that a violation had occurred. Most women are already afraid to report suspected crime or suspicious activity if

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63. *Lanning Expert Declaration*, *supra* note 56, at 18.

64. *Id.* at 14 (emphasis in original).

65. *Hutchison Expert Declaration*, *supra* note 56, at 10.

they think that people will label them for making a report."[66] Potential accusations of bigotry and transphobia could exacerbate this dangerous phenomenon. So although "it is good that society is becoming more accepting of different people," Hutchison concludes, "the fear of being accused of bigotry creates a public safety risk."[67]

Sheriff Hutchison illustrates the difficulties in the new conventions: "Is a biological male who displays his private parts to a woman while coming out of a women's restroom stall a flasher or transgendered? What about the biological male whose eyes wander while in a women's locker room?"[68]

Many women have already been victimized by men entering women's spaces:

- In Toronto, a man posed as a transgender woman ("Jessica") to sexually assault and criminally harass four women—including a deaf woman and a survivor of domestic violence—at two women's shelters. Previously, he had preyed on other women and girls whose ages ranged from as young as five to as old as fifty-three.[69]
- In Virginia, a man presented as a woman in a long wig and pink shirt to enter a women's restroom at a mall to take pictures of a five-year-old girl and her mother.[70]
- In Washington, a man used a women's locker room at a public swimming pool, and when staff asked him to leave, the man claimed that "the law has

66. *Id.*

67. *Id.*

68. *Id.* at 12.

69. *See* Sam Pazzano, *Predator who claimed to be transgender declared dangerous offender*, TORONTO SUN (Feb. 26, 2014), http://www.torontosun.com/2014/02/26/predator-who-claimed-to-be-transgender-declared-dangerous-offender [https://perma.cc/KB2Z-GMKD].

70. *See Man Dressed as Woman Spies into Mall Bathroom Stall in Virginia, Police Say*, NBC WASH. (Oct. 14, 2015), http://www.nbcwashington.com/news/local/Man-Dressed-as-Woman-Spies-Into-Mall-Bathroom-Stall-in-Virginia-Police-Say-332934761.html [https://perma.cc/Q2PE-96Q7].

changed and I have a right to be here."[71] He later returned while young girls were using the locker room to change for swim practice.[72]

- In Toronto, two separate occurrences of voyeurism took place on campus after the University of Toronto implemented a policy of gender-neutral bathrooms. In both cases, individuals used their cell phone cameras to film women showering, prompting the University of Toronto to revise its new policy.[73]
- In Minnesota, a biologically male high school student who identifies as female was allowed access to the girls' locker rooms, where the student danced "in a sexually explicit manner—'twerking,' 'grinding,' and dancing like he was on a 'stripper pole,'" and flashed his underwear while dancing.[74]
- In Milwaukie, Oregon, Thomas Lee Benson was arrested for dressing as a woman to enter the women's locker room at an aquatic park, having been convicted previously of sexual abuse, purchasing child pornography, and unlawful contact with a child.[75]
- In Everett, Washington, a man wearing a wig and a bra was arrested for entering the women's bathroom at Everett Community College and admitted

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71. Mariana Barillas, *Man Allowed to Use Women's Locker Room at Swimming Pool Without Citing Gender Identity*, DAILY SIGNAL (Feb. 23, 2016), http://dailysignal.com/2016/02/23/man-allowed-to-use-womens-locker-room-at-swimming-pool-without-citing-gender-identity/ [https://perma.cc/N2XL-6FHJ].

72. *See id.*

73. *See* Jessica Chin, *University of Toronto Gender-Neutral Bathrooms Reduced After Voyeurism Reports*, HUFFINGTON POST CANADA (Oct. 6, 2015), http://www.huffingtonpost.ca/2015/10/06/u-of-t-bathrooms-voyeurism_n_8253970.html [https://perma.cc/J2QH-NXRJ].

74. Kelsey Harkness, *Minnesota Students and Parents File Lawsuit Against Obama's Bathroom Mandate*, DAILY SIGNAL (Sept. 8, 2016), http://dailysignal.com/2016/09/08/minnesota-students-and-parents-file-lawsuit-against-obamas-bathroom-mandate/ [https://perma.cc/H58Q-7MW7].

75. *See* Rick Bella, *Cross-dressing sex offender released to community supervision*, OREGONIAN (May 3, 2012), http://www.oregonlive.com/milwaukie/index.ssf/2012/05/cross-dressing_sex_offender_re.html [https://perma.cc/E7J4-FSXQ].

> under police questioning that "he was the suspect in an earlier voyeurism incident."[76]

Similar incidents have taken place in the United States at several Target stores since the company announced, in April 2016, its policy of allowing bathroom and fitting room access in accordance with gender identity, rather than biological sex.

- In July 2016, Sean Patrick Smith, a biological man who identifies as a woman and was wearing a wig and dress, was charged with secretly recording an eighteen-year-old girl changing into swimwear in a Target fitting room in Idaho.[77] Although Smith claims that he is transgender, he admitted to police to having recorded women undressing in the past for the "same reason men go online to look at pornography."[78]
- In September 2016, customers saw a man taking pictures of women changing in the stall next to him at a unisex Target dressing room in Brick, New Jersey.[79]

Melody Wood and I documented over 130 examples of men charged with using bathroom, locker room, and shower access to target women for voyeurism and sexual assault in a recent report we authored for The Heritage Foundation.[80] Intimate facilities are already places where woman can feel unsafe, so why remove essential safeguards?

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76. *See Police: Man in bra and wig found in women's bathroom*, KOMO NEWS (Mar. 15, 2012), http://komonews.com/archive/police-man-in-bra-and-wig-found-in-womens-bathroom [https://perma.cc/RV6S-3ZTY].

77. *See* Niraj Chokshi, *Transgender Woman Is Charged with Voyeurism at Target in Idaho*, N.Y. TIMES (Jul. 14, 2016), https://www.nytimes.com/2016/07/15/us/target-transgender-idaho-voyeurism.html [https://perma.cc/D654-JRRV].

78. Affidavit of Probable Cause for Warrantless Arrest Under I.C.R. 5 at 1–2, Idaho v. Sean Patrick Smith, Dist. Ct. of the Seventh Jud. Dist., State of Idaho, County of Bonneville, Magis. Div., Case No. CR-16-8468, http://assets.eastidahonews.com/wp-content/uploads/2016/07/13132732/state-of-idaho-vs-smith-affadavit.pdf [https://perma.cc/F6YH-Z5D7].

79. *Man seen reaching under stall with phone in Target dressing room in New Jersey*, WABC TV (Sept. 12, 2016), http://abc7ny.com/news/man-seen-reaching-under-stall-with-phone-in-nj-target-dressing-room/1508431/ [https://perma.cc/LX8M-HUGJ].

80. *See* Anderson & Wood, *supra* note 34, at 25.

The safety risks created by gender identity policies are partly a result of the nebulous concept of gender identity. President Obama's gender identity guidelines provided no legal criteria for determining who is a "transgender" person.[81] Other institutions, including the U.S. Department of State, the Olympics, and the NCAA, require actual evidence for determining gender identity and deciding who shall be treated as transgender.

Lanning points out that "[t]he State Department requires a statement from an attending physician stating that he or she has a doctor/patient relationship with the subject, and stating that the subject has completed or is in process of appropriate clinical treatment for gender transition."[82] He adds that this "is very different from the subjective standard in . . . the Department of Justice/Education guidelines, which allow people to use female-only facilities based solely on their subjective 'internal sense' of gender identity."[83] The Olympics requires men who identify as women to "demonstrate that their testosterone level has been below a certain cutoff point for at least one year before their first competition."[84] The NCAA allows a man who identifies as a woman to compete on a women's team only "if the athlete obtains a doctor's certification of the subject's intention to transition to a woman, and that hormone therapy has actually begun."[85]

Lanning concludes that "[s]uch objective standards are also important to effective law enforcement."[86] Hutchison concurs:

> If someone could enter a public facility based entirely upon their "internal sense of gender," then law enforcement personnel, bystanders, and potential victims would have to be able to read minds in order to determine whether a man entering a women's facility was really transgender or was instead there to commit a sex offense . . . [T]he non-transgender male sex offender would simply have to claim

81. *See supra* notes 9–10.
82. *Lanning Expert Declaration*, supra note 56, at 17.
83. *Id.*
84. *Id.* at 17–18.
85. *Id.* at 17.
86. *Id.* at 18.

> that his "gender identity" was female to make successful prosecution difficult if not practically impossible.[87]

In other words, objective definitions and standards are necessary for our laws to work.

C. Equality

The Obama-era gender identity guidelines undermine the equality purposes of Title IX for girls and women. Many women worry that the original purpose of Title IX—working toward women's equality in education—is in danger when "sex" is redefined to mean "gender identity." This leads to harms in educational opportunity and in legal equality for biological girls and women.

In an amicus brief submitted to the Supreme Court, the Women's Liberation Front (WoLF) and the Family Policy Alliance (FPA), while generally disparate politically, jointly acknowledge the dangers of redefining sex for women: "[R]edefining 'sex' to mean 'gender identity' is a truly fundamental shift in American law and society. It also strips women of their privacy, threatens their physical safety, undercuts the means by which women can achieve educational equality, and ultimately works to erase women's very existence."[88]

WoLF and the FPA argue that redefining Title IX would particularly affect women's educational access by allowing scholarships that were intended only for women to become available to biological men who identify as women. This undermines the original purpose of Title IX: "Congress enacted Title IX as a remedial statute for the benefit of women, and granting Title IX rights to men who claim they are women *necessarily violates* the rights Congress gave women in this law."[89] In addition, allowing anyone who identifies as a woman to be considered a woman erases the very meaning of womanhood in law: "When the law requires that any man who wishes (for whatever reason) to be treated as a woman *is* a woman, then 'woman' (and 'female') lose all meaning. With the stroke of a pen, women's

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87. *Hutchison Expert Declaration*, *supra* note 56, at 11.

88. *WoLF & FPA Brief*, *supra* note 42, at 1.

89. *Id.* at 28 (emphasis in original).

existence—shaped since time immemorial by their unique and immutable biology—has been eliminated by Orwellian fiat."[90]

Another brief, filed on behalf of the Women's Liberation Front (WoLF), highlights the strange development of Title IX protections. Originally intended to ensure educational rights for women, they are now being used to *deny* women privacy, safety, educational opportunity, and equality: "The idea that women and girls must surrender their rights and protections under Title IX—enacted specifically to secure women's access to education—in order to extend Title IX to cover men claiming to be women is a jaw-dropping act of administrative jujitsu."[91] WoLF stresses that this redefinition of sex is a way to erase the legal standing of women:

> Redefining "sex" to mean "gender identity" means that the sex-class comprising women and girls now includes men, with all the physiological and social characteristics that come with being male (and vice-versa). Likewise, the agencies make little effort to keep up the pretense that "transgender" is a coherent descriptor; under their policy a transgender person is simply any person who claims to be so, and that person's "sex" is whatever they say it is whenever they say it. By rendering men legally indistinguishable from women, the policy threatens to extinguish the very meaning (and independent legal existence) of women.[92]

There are concerns about athletic fairness for women and girls as well. If biological males play on women's sports teams, they often have an advantage. In Alaska, high school girls have already lost medals in track competitions because of their inability to compete with a male who identifies as a girl. In a video put out by the Family Policy Alliance's Ask Me First campaign, one of the girls who raced against this athlete talks about the unfair aspects of allowing biological males to compete in races against girls: "There was obviously one girl in each of those races who did not get to compete because of this athlete. It's not fair scientifically—obviously male and female are made

90. *Id.* at 18 (emphasis in original).
91. *Id.* at 2.
92. *Id.* at 16.

differently. There are certain races for males, and certain races for females, and I believe it should stay that way."[93]

Girls are also on the losing end when students who identify as transgender taking hormones compete against them in sports. In February 2017, a biological girl taking testosterone as part of a "transition" process won the Texas state championship in girls' wrestling, completing an undefeated season against other girls (who were not taking testosterone supplements).[94] Accommodations should be reached so that biological girls can compete on a level playing field instead of being forced to compete and lose against biological males or biological girls who are taking male hormones that can enhance their performance.

The words "girl" and "women" mean something, and in the words of rape survivor Kaeley Triller Haver, "When gender identity wins, women always lose."[95]

III. AGENCY REDEFINITION OF "SEX" AS "GENDER IDENTITY" IS UNLAWFUL

Frequently these "victories" for gender identity come through unlawful bureaucratic actions. Consider what took place in education and healthcare. The Obama administration simply attempted to rewrite a federal law as it wished the law had been written originally. In 1972, when Congress passed Title IX of the Education Amendments, no one thought that "sex" meant "gender identity." The phrase "gender identity" did not even exist outside of some esoteric psychological publications, and the word "gender" had been coined only recently

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93. Family Policy Alliance, *Ask Me First About Fairness: Tanner*, YOUTUBE (Aug. 2, 2016), https://www.youtube.com/watch?v=Jk_CKFkm8sI [https://perma.cc/5HNC-QNP2]; *see also* Melody Wood, *The NBA's Transgender Bathroom Advocacy Could Point to End of Women's Sports*, DAILY SIGNAL (Aug. 1, 2016), http://dailysignal.com/2016/08/01/the-nbas-transgender-bathroom-advocacy-could-point-to-end-of-womens-sports [https://perma.cc/L2GP-CHQC].

94. *See* Associated Press, *Transgender Boy Wins Texas Girls' Wrestling Title*, N.Y. TIMES (Feb. 25, 2017), https://www.nytimes.com/2017/02/25/sports/transgender-boys-matches-with-girls-leave-all-unsatisfied.html [https://perma.cc/YLE3-ZVK2].

95. Ryan T. Anderson, *Biology Isn't Bigotry: Why Sex Matters in an Age of Gender Identity*, Remarks at The Heritage Foundation (Feb. 16, 2017), http://www.heritage.org/gender/commentary/biology-isnt-bigotry-why-sex-matters-the-age-gender-identity [https://perma.cc/T84H-HK4J].

in contradistinction to sex. Yet the "Dear Colleague" letter and the HHS transgender mandate both entailed redefining "sex" as "gender identity." Indeed, the healthcare law contained no antidiscrimination policy of its own; it simply incorporated Title IX's language. So the debate over the meaning of "sex" in Title IX has implications not only for education but also for healthcare. Thankfully, contrary to what the Obama administration wished, the term "sex" is not ambiguous and therefore cannot legitimately be redefined by executive branch agencies to mean "gender identity."[96]

Federal courts agree that the meaning of the word "sex" is not ambiguous. There was no ambiguity in the original text of Title IX, which was passed to prevent sex discrimination. At the time, the word "sex" was clearly used to refer to the biological and physiological differences between men and women. In his opinion on the "Dear Colleague" guidance, federal Judge Reed O'Connor stated that the reinterpretation of sex as gender identity was directly contrary to the original intent and meaning of the law as applied in its implementing regulations: "[I]t cannot reasonably be disputed that DOE complied with Congressional intent when drawing the distinctions in § 106.33 based on the biological differences between men and women . . . [T]his was the common understanding of the term when Title IX was enacted, and remained the understanding during the regulatory process that led to the promulgation of

96. Neither the letter issued by an acting deputy assistant secretary in the Department of Education, *see* Letter from James A. Ferg-Cadima, Acting Deputy Assistant Sec'y for Policy, Office for Civil Rights, U.S. Dep't of Educ., to Emily Prince, (Jan. 7, 2015), http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf [https://perma.cc/DW8E-RRRU], nor the 2016 Obama Administration's "Dear Colleague" letter, *see* Lhamon & Gupta, *supra* note 5, went through the appropriate rulemaking process under the Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.). The APA requires that binding agency regulations must be subject to public notice and comment before finalization. *See* 5 U.S.C. § 553. Because the Title IX guidance letters did not follow proper administrative procedure, courts should not give them deference. These letters are note even entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997), because they do not offer a plausible alternative interpretation of the unambiguous word "sex." *See also* Ed Whelan, *Fourth Circuit Inflicts Sex Change on Title IX—Part 2*, NAT'L REV.: BENCH MEMOS (Apr. 25, 2016, 4:18 PM), http://www.nationalreview.com/bench-memos/434535/fourth-circuit-transgender-ruling [https://perma.cc/86NM-Y6TX].

§ 106.33."[97] The fact that the implementing regulations allowed separate toilet, locker room, and shower facilities for the different sexes shows that Title IX was to be implemented on the basis of biological sex and that it acknowledged legitimate differences between the sexes with respect to privacy concerns.

Judge Kim R. Gibson, another federal district judge, has similarly made clear that Title IX was never intended to include protections on the basis of gender identity: "Title IX does not prohibit discrimination on the basis of transgender itself because transgender is not a protected characteristic under the statute."[98] In particular, his opinion in a case involving the University of Pittsburgh defends the right of schools that receive federal funding to establish bathroom and locker room policies on the basis of sex: "[T]he University's policy of requiring students to use sex-segregated bathroom and locker room facilities based on students' natal or birth sex, rather than their gender identity, does not violate Title IX's prohibition of sex discrimination."[99]

Significantly, Judge Gibson's opinion also makes the case that only Congress, not the courts, can expand the scope of Title IX:

> Title IX's language does not provide a basis for a transgender status claim. On a plain reading of the statute, the term "on the basis of sex" in Title IX means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex. The exclusion of gender identity from the language of Title IX is not an issue for this Court to remedy. It is within the province of Congress—and not this Court—to identify those classifications which are statutorily prohibited.[100]

Judge Gibson's reasoning is correct. Title IX was intended to prevent discrimination on the basis of sex, not on the basis of

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97. Texas v. United States, 201 F. Supp. 3d 810, 833 (N.D. Tex. 2016) (citing 34 C.F.R. § 106.33). Section 106.33 reads as follows: "Comparable facilities. A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

98. Johnston v. Univ. of Pittsburgh, 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015).

99. *Id.* at 672–73.

100. *Id.* at 676–77 (footnotes omitted) (citation omitted).

gender identity. Congress, not courts or federal agencies, has the ability to change the scope of Title IX, but until it does so, gender identity protections cannot be considered within the scope of Title IX.

Judge Paul Niemeyer points to these same legal realities in his dissenting opinion in the Fourth Circuit case of *G.G. ex rel. Grimm v. Gloucester County School Board*.[101] He notes that "the majority's opinion, for the first time ever, holds that a public high school may not provide separate restrooms and locker rooms on the basis of biological sex,"[102] and further explains that:

> This holding completely tramples on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes . . . . [S]chools would no longer be able to protect physiological privacy as between students of the opposite biological sex.
>
> This unprecedented holding overrules custom, culture, and the very demands inherent in human nature for privacy and safety, which the separation of such facilities is designed to protect. More particularly, it also misconstrues the clear language of Title IX and its regulations. And finally, it reaches an unworkable and illogical result.[103]

Frequently these legal redefinitions of "sex" to mean "gender identity" claim the mantle of science in their defense, that modern science shows that sex *is* gender identity. On the contrary, sex is a biological reality based on an organism's organization. Professor Hruz, in his expert declaration to a federal district court, elaborates:

> The claims of proponents of transgenderism, which include opinions such as "Gender defines who one is at his/her core" and "Gender is the only true determinant of sex" must be viewed in their proper philosophical context. There is no scientific basis for redefining sex on the basis of a person's psychological sense of "gender." It is erroneous and poten-

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101. *See* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 730 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part), *cert. granted*, 137 S. Ct. 369 (2016), *vacated*, 137 S. Ct. 1239 (2017).

102. *Id.* at 730.

103. *Id.* at 730–31.

> tially damaging to equate these opinions as established medical fact.
>
> The prevailing, constant and accurate designation of sex as a biological trait grounded in the inherent purpose of male and female anatomy and as manifested in the appearance of external genitalia at birth remains the proper scientific and medical standard. Redefinition of what is normal based upon pathologic variation is not established medical fact.[104]

Professor Hruz concludes: "With regard to public restrooms and other intimate facilities, there is no evidence to support social measures that promote or encourage gender transition as a medically necessary or effective treatment for gender dysphoria."[105] Science does not support the redefinition of sex.

History does not support the redefinition of sex, either. The history of the words "gender," "gender identity," and "transgender" shows that they are not the same as "sex." Each of these words was coined precisely in contradistinction to "sex."[106] Furthermore, more recent legislative and executive branch actions show that "sex" does not mean "gender identity." Congress and the executive branch know how to make policy on the basis of "gender identity" when they want to do so. Congress has specifically included "gender identity"—as distinct from "sex" and listed alongside "sex"—in two bills: the Violence Against Women Reauthorization Act of 2013[107] and the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009.[108] The distinct inclusion of both gender identity and sex protections shows that gender identity was never intended to fall within the definition of sex. If Congress had intended to include gender identity protections within the scope of Title IX, it could have specified their inclusion, but it did no such thing.

President Barack Obama similarly showed that he understood "sex" and "gender identity" to be different categories. In his executive order barring federal contractors from "discrimi-

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104. *Hruz Expert Declaration*, *supra* note 33, at 8.

105. *Id.* at 11.

106. *See* Anderson & Wood, *supra* note 34, at 11–12.

107. Pub. L. No. 113-4, 127 Stat. 54, 118–26 (to be codified in scattered sections of the U.S. Code).

108. 18 U.S.C. § 249 (2012).

nation" on the basis of "sexual orientation and gender identity," he replaced existing protections on the basis of "sex" with protections on the basis of "sex, sexual orientation, gender identity."[109] In implementing an executive order placing "gender identity" alongside and in addition to "sex," President Obama showed that he did not consider gender identity protections to be legally included in protections on the basis of sex. Thus, he added "gender identity" to "sex."

Congress also knows how to reject "gender identity" provisions and has done so dozens of times. For example:

- The Employment Non-Discrimination Act[110] (ENDA), which would prohibit employment discrimination both on the basis of sexual orientation and on the basis of gender identity, has been introduced in almost every Congress since 1994 but has never been enacted.[111] Title VII of the Civil Rights Act of 1964[112] already bans discrimination on the basis of sex in employment, which begs the question as to why Members of Congress would attempt to pass a law for over two decades if such protection were there all along;
- The so-called Equality Act,[113] which would go beyond ENDA and add "sexual orientation and gender identity" (SOGI) to more or less every federal law that protects on the basis of race, has likewise never been enacted by Congress;[114] and

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109. Exec. Order No. 13,672, 79 Fed. Reg. 42,971–72 (July 21, 2014), https://www.gpo.gov/fdsys/pkg/FR-2014-07-23/pdf/2014-17522.pdf [https://perma.cc/MB4N-YAXT].

110. *E.g.*, Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013).

111. *See* Jerome Hunt, *A History of the Employment Non-Discrimination Act: It's Past Time to Pass This Law*, CTR. AM. PROGRESS (July 19, 2011), https://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/ [https://perma.cc/3AYD-4SMP].

112. 42 U.S.C. §§ 2000e–2(a) (2012).

113. H.R. 2282, 115th Cong. (2017).

114. *See* Ryan T. Anderson, *How So-Called "Equality Act" Threatens Religious Freedom*, DAILY SIGNAL (July 23, 2015), http://dailysignal.com/2015/07/23/how-so-called-equality-act-threatens-religious-freedom/ [https://perma.cc/S3K3-6X38].

- The Student Non-Discrimination Act,[115] championed by the Human Rights Campaign, which would "prohibit public schools from discriminating against any student on the basis of actual or perceived sexual orientation and gender identity," also has never become law.[116]

None of these bills attempting to establish legal protections on the basis of gender identity has been authorized by Congress. Agency redefinition of sex to include gender identity explicitly goes against congressional precedent, for Congress has been explicit as to when it does and does not intend to protect on the basis of gender identity. The burden is on transgender advocates to prove that statutory terms have always carried the meaning they prefer as opposed to its plain meaning, and they have failed.

IV. ENFORCING ORTHODOXY THROUGH ANTIDISCRIMINATION LAW

Another aspect of the problematic nature of gender identity policies is that they frequently take existing civil rights laws that protect on the basis of "race" and "sex" and add the phrase "gender identity." But race and sex are different than gender identity, and there is no reason to think that laws intended to combat racism and sexism will work well if gender identity is simply added to them.

A. Gender Identity Differs

Gender identity antidiscrimination laws penalize many Americans who believe that we are created male and female. These laws use the government and the power of the law to send the message that traditional convictions about human nature are not only false, but also discriminatory and rooted in animus. Gender identity policies attempt to impose by force of law a system of orthodoxy with respect to human nature: that

115. S. 439, 114th Cong. (2015); H.R. 846, 114th Cong. (2015).

116. *Student Non-Discrimination Act*, HUMAN RIGHTS CAMPAIGN (Nov. 6, 2017), http://www.hrc.org/resources/student-non-discrimination-act [https://perma.cc/8UG4-BSEA].

one can be male, female, neither, or some combination—regardless of biology.[117] These laws impose this orthodoxy by punishing dissent and treating as irrational, bigoted, and unjust the belief that men and women are biologically rooted.

Current gender identity laws lack the nuance and specificity necessary for cases they seek to address. They take the existing paradigm of public policy responses to racism and sexism and assume that this paradigm is appropriate for the policy needs of people who identify as transgender. This is misguided for both conceptual and practical reasons.

Conceptually, gender identity is unlike race and sex in important ways. Gender identity is not an objective, verifiable trait, but a subjective identity. Furthermore, unlike race and sex, gender identity is partly defined in terms of actions, and actions are subject to moral evaluation, while one's status in terms of race and sex is not. As a result, existing and proposed gender identity laws define "discrimination" much too broadly, penalizing people for simply seeking not to facilitate, support, or participate in actions—such as sex "reassignment" surgeries—that they reasonably deem to be unhelpful or immoral.[118]

Gender identity antidiscrimination laws are not about the freedom of people who identify as transgender to engage in certain actions, but about coercing and penalizing people who in good conscience cannot endorse those actions. These laws do this by coercing and penalizing people who act on an understanding of human sexuality that is at odds with the prevailing viewpoint that the government seeks to enforce. It is one thing for the government to allow or even endorse conduct that is

117. *See generally* RYAN T. ANDERSON, TRUTH OVERRULED: THE FUTURE OF MARRIAGE AND RELIGIOUS FREEDOM (2015).

118. People opposed to interracial marriage or racially integrated lunch counters could claim they were opposed to certain actions when blacks and whites did them together, but that stops the inquiry too soon. Why were they opposed? The reason they were against blacks and whites doing things together was an attitude of white supremacy that viewed and treated blacks as less intelligent, less skilled, and in some respects less human. They thus opposed blacks interacting with whites on an equal plane. One can and should hold that we are created male and female, with male and female created for each other, without holding any hostility toward people who identify as LGBT. *See generally* JOHN CORVINO, RYAN T. ANDERSON & SHERIF GIRGIS, DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION (2017). For more on this, see *infra* Part IV.C.

immoral to many citizens, but it is quite another thing for government to force others to condone and facilitate it in violation of their convictions.

There is also a practical difference between proposals for gender identity antidiscrimination policies and policies prohibiting discrimination on the basis of race or sex. The nature and extent of gender identity discrimination in the United States today is unlike racism and sexism when antidiscrimination laws were enacted (and unlike racism and sexism even today). When the Civil Rights Act of 1964 was enacted, blacks were treated as second-class citizens. Individuals, businesses, and associations across the country excluded blacks in ways that caused grave material and social harms without justification, without market forces acting as a corrective, and with the tacit and often explicit backing of government.

Blacks were denied loans, kept out of decent homes, and denied job opportunities—except as servants, janitors, and manual laborers. These material harms both built on and fortified the social harms of a culture corrupted by views of white supremacy that treated blacks as less intelligent, less skilled, and in some respects less human. Making it harder for blacks and whites to mingle on equal terms was not just incidental: it was the whole point. Discrimination was so pervasive that the risks of lost economic opportunities or sullied reputation were acceptable to the many who engaged in it. Social and market forces, instead of punishing discrimination, rewarded it through the collusion of whites (with heavy assistance from the state). Given the irrelevance of race to almost any transaction, and given the flagrant racial animus of the time, no claims of benign motives are plausible. Resort to the law was therefore necessary.[119]

However, a similar legal push is not necessary today. There is no widespread cisgender supremacy akin to white supremacy. There is no widespread treatment of people who identify as transgender as second-class citizens akin to Jim Crow. There are no denials of the right to vote, no lynchings, no signs over

119. Portions of this paragraph are adapted from JOHN CORVINO, RYAN T. ANDERSON & SHERIF GIRGIS, DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION 183–84 (2017).

water fountains saying "Trans" and "Cis." This is not to deny that there has been historic bigotry against those who identify as transgender or that it has vanished. It exists and should be addressed appropriately so that everyone is treated with dignity and respect. As with other forms of mistreatment, our communities must fight it. But the remaining instances simply cannot be compared to the systematic material and social harms wrought by racism in the 1960s and earlier. Put another way, the legal response that was appropriate to remedy the legacy of slavery and Jim Crow is not appropriate for today's challenges.

B. What is "Discrimination"?

The biggest problem with gender identity antidiscrimination policies is that they do not appropriately define what counts as discriminatory. To illustrate this, consider several different cases of putative "discrimination." The law must be nuanced enough to capture the important differences in these cases.

1. Invidious and Rightly Unlawful Discrimination

Racially segregated water fountains were one form of discrimination that took race into consideration—in a context where it was completely irrelevant—and then treated blacks as second-class citizens precisely because they were black. The entire point was to classify on the basis of race in order to treat blacks as socially inferior. As a result, such actions were rightly described as invidious race-based discrimination, and—given the entrenched, widespread, state-facilitated nature of the problem—they were rightly made unlawful.

Likewise, throughout much of American history, girls and women were not afforded educational opportunities equal to those available to boys and men. This form of discrimination took sex into consideration and then treated girls and women poorly precisely because of their sex, barring them from education in certain subjects or at certain levels despite being otherwise qualified. As with invidious racial discrimination, such treatment took a characteristic (in this case, sex) into consideration precisely to treat women as less than men. The law rightly deemed such actions invidious sex-based discrimination, and—again, given the entrenched, widespread, and state-facilitated nature of the problem—Title IX of the Education Amendments

was enacted to ensure that girls and women received equal educational opportunities.

2. *Appropriate and Rightly Lawful Distinctions That are not Classified as Discrimination*

When Title IX was enacted in 1972 and its implementing regulations were promulgated in 1975, the law made clear that sex-specific housing, bathrooms, and locker rooms were not unlawful discrimination. Such policies take sex into consideration, but they do not treat women as inferior to men or men as inferior to women. They treat both sexes equally *because* they take sex into consideration (they "discriminate"—in the nonpejorative sense of "distinguish"—on the basis of sex) precisely in a way that matters: by appreciating the bodily sexual difference of men and women in things such as housing, bathroom, and locker room policy.[120]

Would we really be treating men and women equally in anything but an artificial way if we forced men and women, boys and girls, to undress in front of each other? Yet we certainly would be treating people unequally if access to intimate facilities were based on factors wholly unrelated to privacy, such as race. As a result, policymakers did not consider sex-specific

120. During the debate on Title IX, there was concern that its enactment would mean the end of sex-specific educational programs and sex-specific intimate facilities like bathrooms, locker rooms, and showers. Because of this concern, Congress explicitly constructed Title IX to ensure that access to living facilities could take biology into account: Section 1686 states that "nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686 (2012).

Three years later, the Department of Health, Education, and Welfare's implementing regulations made clear that Title IX permits "separate toilet, locker room, and shower facilities on the basis of sex," so long as such facilities are "comparable to such facilities provided for students of the other sex." Comparable Facilities, 34 CFR § 106.33 (2016). The regulations thereby preserved sex-specific facilities while ensuring that women's facilities would not be inferior to men's and vice versa. *See* Comment, *Implementing Title IX: The HEW Regulations*, 124 U. PA. L. REV. 806, 826 (1976). Title IX was able to provide equal opportunities for women in education without violating their privacy. Its implementation over subsequent years shows that genuine differences between men and women could be acknowledged—in many sports, such as football and basketball, women do not compete on the same teams as men because of physical differences—while allowing women equivalent opportunities to participate in school and extracurricular activities.

intimate facilities as discriminatory in the first place, and laws explicitly reflected that commonsense understanding while rightly declaring racially segregated facilities to be unlawful. The lesson here is that not all distinctions in fact should be deemed unlawful discrimination.

3. Distinctions That are not Discriminatory at All

If sex-specific intimate facilities are an example of lawful, legitimate policies that take sex into consideration, pro-life medical practices are examples of policies that are legitimate and lawful because they do not take sex into consideration at all. That only women can get pregnant has no bearing whatsoever on the judgment of the conscientious doctor or nurse who refuses to kill the unborn. The insistence of LGBT activists that men actually can become pregnant highlights the point: pro-life medical personal refuse to do abortions on pregnant women *and* "pregnant men" (that is, women who identify as men).

Thus, we can identify three different types of cases:

1. Cases of invidious discrimination, in which an irrelevant factor is taken into consideration in order to treat people poorly based on that factor, as with racially segregated water fountains;
2. Cases of distinctions without unlawful discrimination, in which a factor is taken into consideration precisely because it is relevant to the underlying policy and people are not treated poorly, as with sex-specific intimate facilities; and
3. Cases with neither distinctions nor discrimination, in which a particular factor simply does not enter into consideration.[121]

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121. There is a fourth category of "discrimination": nonmalicious oversight or neglect. Consider the type of discrimination the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012), is meant to combat. Before enactment of the Americans with Disabilities Act of 1990, many movie theaters, for example, did not have wheelchair ramps. This was the result of an oversight with respect to the needs of people with disabilities, not because of any hostility toward them. Because such oversights were so widespread and contributed to the exclusion of people with disabilities from full participation in society, Congress acted.

C. Gender Identity Discrimination: Real and Imagined

Purported gender identity discrimination presents similar problems. *The Washington Post* recently reported on a woman who was suing a Catholic hospital for declining to perform a sex reassignment procedure on her that entailed removing her healthy uterus. In that report, the *Post* captures the conflation of real and imaginary discrimination:

> "What the rule says is if you provide a particular service to anybody, you can't refuse to provide it to anyone," said Sarah Warbelow, the legal director for the Human Rights Campaign. That means a transgender person who shows up at an emergency room with something as basic as a twisted ankle cannot be denied care, as sometimes happens, Warbelow said. That also means if a doctor provides breast reconstruction surgery or hormone therapy, those services cannot be denied to transgender patients seeking them for gender dysphoria, she said.[122]

The two examples given, however, differ in significant ways. A hospital that refuses to treat the twisted ankles of people who identify as transgender simply because they identify as transgender would be engaging in invidious discrimination, but a hospital that declines to remove the perfectly healthy uterus of a woman who identifies as a man is not engaging in "gender identity" discrimination at all. The gender identity of the patient plays no role in the decision-making process—just as pro-life physicians do not kill unborn babies, regardless of the sex or gender identity of the pregnant person, doctors do not remove healthy uteruses from *any* patients, regardless of how they identify themselves.[123]

As for the Human Rights Campaign spokesperson's claim that emergency rooms "sometimes" refuse to treat the twisted ankles of transgender patients, there is no evidence—including

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122. Sandhya Somashekhar, *Catholic groups sue over Obama administration transgender requirement*, WASH. POST (Dec. 29, 2016), https://www.washingtonpost.com/news/acts-of-faith/wp/2016/12/29/catholic-groups-sue-over-obama-administration-transgender-requirement [https://perma.cc/A39N-KDGN].

123. *See* Ryan T. Anderson, *How to Think About Sexual Orientation and Gender Identity (SOGI) Policies and Religious Freedom*, HERITAGE FOUND. (Feb. 13, 2017), http://www.heritage.org/marriage-and-family/report/how-think-about-sexual-orientation-and-gender-identity-sogi-policies-and [https://perma.cc/Y9YW-V7UZ].

on HRC's website—that it or anything similar in fact happens. Furthermore, if indeed this "sometimes happens," it seems reasonable to think that the media would focus so much attention on it that the hospital would reverse course within hours. It therefore seems highly unlikely that this alleged problem merits a governmental response.

Just as good healthcare does not discriminate on the basis of "gender identity," so too do good policies on sex-specific facilities. The bathroom, locker room, and housing policies at stake in this debate do not discriminate on the basis of gender identity. They make reasonable—and explicitly lawful—distinctions based on sex. All biological males, regardless of their gender identity, may use the men's room, and all biological females, regardless of their gender identity, may use the women's room. These policies do not even consider "gender identity." They classify on the basis of "sex" in a way that Title IX and its implementing regulations explicitly permit.

To discriminate on the basis of gender identity would be to say that students who identify with their biological sex can use the school water fountains, but students who identify as transgender cannot. That would be taking a student's transgender status into account where the factor has no relation to the issue at hand and would rightly be deemed discriminatory.

Nothing of the sort takes place when it comes to policies on bathrooms, locker rooms, showers, and sports teams. The gender identity of a student is not taken into account at all. The policy simply says that with respect to certain intimate facilities, entrance should be determined on the basis of anatomy, physiology, and biology. Bathroom, locker room, shower, and athletic team policies are based on objective external expressions of sex—biology, physiology, anatomy—and not on a subjective internal sense of gender.

In other words, it is not because some people wear suits and ties and others wear dresses that there are separate bathrooms and locker rooms for men and women. The existence of sex-specific intimate facilities is explained not by our internal sense of gender, but by our external manifestations of biology. The Obama administration's argument that this is gender identity discrimination is therefore misguided. Indeed, the Obama administration once knew as much. Recall our opening discussion

of the HUD emergency-shelter policy. Originally it banned discrimination on the basis of "gender identity" but recognized that access to shelters based on biology was not discrimination. It simultaneously said it was reasonable to have single-sex shelters (based on biology) while it attempted to eliminate unreasonable discrimination. Only in 2016 was it revised to embrace such a misguided understanding of discrimination.[124]

Not only is it misguided, but the Obama administration's view would *require* gender identity discrimination in schools. Under President Obama's view, gender identity overrules biology. Therefore, a school with students who are biologically male or female and who identify with their biological sex or with the opposite sex would have to grant and deny access to its showers and lockers according to Table 1.[125]

TABLE 1

Access to Lockers and Showers Under Obama Administration Guidance

ACCESS TO GIRLS' LOCKERS AND SHOWERS

Sex	Gender Identity	Access
Female	Female	Allowed
Female	Male	Allowed
Male	Female	Allowed
Male	Male	Denied

ACCESS TO BOYS' LOCKERS AND SHOWERS

Sex	Gender Identity	Access
Male	Male	Allowed
Male	Female	Allowed
Female	Male	Allowed
Female	Female	Denied

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The table illustrates that the only students who must be denied access are those who identify with their biological sex—that is, non-transgender students—which is a clear example of irrational gender identity discrimination under the Administration's own logic.

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124. *See HUD Rule*, *supra* note 11.

125. Ryan Anderson & Melody Wood, *Gender Identity Policies in Schools: What Congress, the Courts, and the Trump Administration Should Do*, HERITAGE FOUND. (Mar. 23, 2017), http://www.heritage.org/education/report/gender-identity-policies-schools-what-congress-the-courts-and-the-trump [https://perma.cc/XE2X-XSN8].

V. CONCLUSION

Our nation's civil rights laws that prohibit discrimination on the basis of sex, such as Title IX, were enacted to ensure that girls and women would have equal opportunities, particularly in education. But federal bureaucrats have undermined these civil rights laws by extending the scope of Title IX. Title IX has become a tool to force schools and programs receiving federal funding to allow biological boys in girls' restrooms, locker rooms, and sports teams. What can be done to return our civil rights laws to their original, laudable purpose of granting girls and women equal opportunity?

Congress should continue to refuse to elevate "gender identity" as a protected class in civil rights laws and it should prevent administrative agencies from doing the same. Congress should ensure that Title IX and other civil rights laws will continue to protect girls and women. There are three actions that Congress can take to preserve these civil rights laws.

First, Congress could specify that "sex" does not mean "gender identity" in civil rights law. Language included in the Civil Rights Uniformity Act of 2017,[126] for example, introduced by Representative Pete Olson (R-TX), would do exactly that. The act clarifies that for the purpose of interpreting civil rights statutes, the term "sex" does not mean "gender identity."[127] This would prevent current and future abuses of Title IX and other civil rights law and ensure that unelected bureaucrats and judges would not get to reshape policy affecting women and girls. Schools could continue to provide separate bathroom and locker room facilities and sports teams based on biological sex, not gender identity, and religious schools could continue to operate in accordance with their beliefs without having to fear agency action against them. At the same time, such legislation could leave the door open for reasonable accommodations of people who identify as transgender. Likewise, healthcare professionals and healthcare plans would not have to perform or cover sex reassignment procedures.

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126. H.R. 2796, 115th Cong. (2017).

127. *See id.*

Second, Congress could include language in a statute offering the same clarification but targeted to the specific federal laws that have already been abused, such as (among others) Title IX of the Education Amendments of 1972, Title VII of the Civil Rights Act of 1964, and section 1557 of the Affordable Care Act (the section that was reinterpreted to produce a transgender healthcare mandate). This would reiterate that when Congress referred to a person's "sex" in these laws, what the word referred to then is what it refers to now: biological reality, not gender identity. It would achieve in piecemeal fashion what the Civil Rights Uniformity Act would achieve in wholesale fashion.

Third, Congress, based on its power of the purse, could specify that the Departments of Education, Justice, and Health and Human Services, as well as the Equal Employment Opportunity Commission, may not use any funds to implement or enforce any new administrative gender identity directives or regulations against persons, institutions, schools, businesses, and governments that allegedly do not comply. Additionally, Congress could specify that these agencies may not revoke federal funding for any purported noncompliance with the Administration's gender identity directives.

The courts also have a role to play. They should not interpret "sex" to mean "gender identity" and should not usurp the authority of the representative branches of government to make policy in this area. In this way, the original purpose of Title IX and other laws banning sex discrimination can be restored. Instead of being used by unaccountable agencies and unelected judges to hold that schools cannot have separate restrooms and locker rooms based on biological sex or that healthcare plans and professionals have to support sex-reassignment therapies, prohibitions on sex discrimination can function once more to protect women and girls and ensure that they have equal access to healthcare and educational programs.

Finally, states and local governments have a role to play. They should not elevate gender identity as a protected class in their own civil rights and antidiscrimination statutes. They should, however, clarify how access to sex-specific facilities is to be governed. For example, while leaving private institutions free to establish their own policies, states and municipalities should clarify that access to sex-specific facilities in public insti-

tutions (such as schools) will primarily be based on biological sex, and that reasonable accommodations will be provided for anyone uncomfortable with such a policy.[128] By doing so, states and cities could respect the rights and ensure the continued protection of women and girls while also providing reasonable accommodations for any student who requests them, including those who identify as transgender.

Before the April 2015 prime-time interview with the celebrity then-known as Bruce Jenner, few Americans had ever had a conversation about transgender issues. Instead of encouraging such a conversation, however, and allowing parents, teachers, and local schools the time, space, and flexibility to find solutions that work best for everyone, the Obama Administration attempted to force a one-size-fits-all policy on the entire nation.

For most Americans, concerns related to students who identify as transgender are a new reality. Rather than follow the Obama Administration's rush to impose a top-down solution on the entire country, future administrations should respect federalism, local decision-making, and parental authority in education. The Trump administration's reversal of President Obama's policies is a welcome course adjustment in that direction. We should allow the American people to consider all relevant concerns and help to devise policies that will best serve all Americans. Congress should support such efforts, and the courts should respect them.

128. For example, adults who have undergone sex reassignment therapies and changed the sex on their legal IDs could be allowed access to sex-specific facilities in accordance with their new legal sex.

LAW AND POLITICS: WHAT IS THEIR RELATION?

LARRY ALEXANDER*

That is the topic about which I have been invited to speak. As a professional matter, I am afraid that although I know a few things about law, I know really nothing about politics. What I remember from my college courses in political science can be boiled down to the Harold Lasswell view that politics is about who gets what, when, and how.[1]

So I come to this topic with a very limited toolkit. Nevertheless, I shall take out my hammer and see if I can turn the topic into some nails. My forte, if I have one, is taxonomy and analysis. Not exciting perhaps, but I hope clarifying. And clarity is, in this as in so many matters, a necessary pre-condition for wise policy, and confusion is a recipe for disaster.

I begin with some stipulations. First, politics—as I shall be using the term—is the process of deciding what a group, or a part thereof, should do based on first-order practical reasons. First-order practical reasons are all-things-considered reasons, moral and prudential.[2] Those reasons may dictate that a particular action should be taken (or omitted) by a particular actor in a particular situation. But they may also dictate that all or many actors should take (or omit) a particular action in a range of situations.

Second, law—as I shall use the term—is those norms that, through the first-order practical reasoning of politics, those who have the authority to do so have decided should obligate those to whom those norms are addressed. Although it is perhaps not the only outcome of politics, it is the most significant outcome. The primary aim of politics is to produce the norms that are law.[3]

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1. *See generally* HAROLD D. LASSWELL, POLITICS: WHO GETS WHAT, WHEN, HOW (1936).

2. *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS 16 (1999).

3. *See* ARISTOTLE, NICOMACHEAN ETHICS bk. VI, at 98 (W.D. Ross trans., Batoche Books 1999) (c. 384 B.C.E.).

Third, legal norms can either be rules or standards. When they fully and clearly determine what the law's subject should do in a range of situations, they are rules. When addressed by rules, law's subjects are supposed to do what the rules require rather than what they believe their first-order practical reason dictates that they do.[4] When those norms do not fully determine what the law's subjects should do, but instead leave open a domain in which those subjects should follow the dictates of first-order practical reasoning, then those norms are to that extent standards.[5]

But why have rules at all? In other words, why not decide everything by means of first-order practical reasoning? Put differently, why is not our only law what I call the Spike Lee law: "Do the right thing."?[6] The Spike Lee law is the queen of standards. Lesser standards are circumscribed by rules. But what is the problem with the Spike Lee standard? To repeat, why have rules at all?

The answer is obvious. When I ask my first-year law students this question in their very first law school class, they have no trouble coming up with the right answer. In a society such as ours, people cannot agree on what "the right thing" to do is. There are many reasons why they cannot. First, they have different opinions about what the correct moral principles are. Second, even when they agree about moral principles at an abstract level, they disagree about how those principles apply. For they disagree about the factual matters on which correct applications of moral principles depend. And that means that at least some of the people, even if well motivated, will end up doing "the wrong thing." Moreover, because of these disagreements, they cannot coordinate their actions with those of others, and the lack of coordination will produce huge moral costs from everyone's perspective. Thus, settlement of what ought to be done is necessary to avert the moral costs of mistaken moral views, mistaken applications of correct moral views, and lack of coordination. Settlement is achieved by determinate rules. Even first-semester law students understand this when asked "Why not just the Spike Lee standard?"

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4. *Cf.* Raz, *supra* note 3, at 154–55.

5. *See* Kathleen Sullivan, *Foreword: The Justices of Rules and Standards,* 106 HARV. L. REV. 22, 57–61 (1992).

6. DO THE RIGHT THING (Universal Pictures 1989).

Having now discussed politics, law, and legal norms as either rules or standards and why rules are desirable, let me now turn to the topic of legal interpretation. Some—even members of the Harvard Law School faculty—believe that there is no one thing that interpretation is.[7] I agree that there are many things that can be called interpretation. But we should not get hung up on the word. What we need to ask in the legal context is what is the proper approach by those subject to laws when questions arise regarding the meaning of those laws.[8] That is the activity we should be interested in when the topic of legal interpretation is broached.

The important distinction here is between those to whom we have given the authority to determine what norms we should comply with—legislators—and those who are supposed to comply with the norms legislated by those with legislative authority. The latter group includes all the addressees of the laws, judges and ordinary citizens alike (as well as legislators in their capacity as ordinary citizens). But if judges and citizens are supposed to comply with the norms produced by those with the authority to produce them, then when those norms are promulgated and encoded in a text, judges and citizens are supposed to figure out what the norms are that the legislators encoded in that text.[9] In other words, they are supposed to figure out what the intended meaning of that text is,[10] not just any meaning that the text might have were it authored by other than its actual authors or for purposes other than conveying what norms those with the authority to do so determined should govern.[11] The legislators have decided upon such norms and have attempted to convey to the rest of us—judges and citizens alike—what those norms are in the only way possible, which is through symbols. The symbols are their code.[12] And if we do not seek to determine what they mean by their code, then we will not ascertain what norms they intend for us. That

7. *See* Cass R. Sunstein, *There is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193, 193–94 (2015).

8. *See* Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539, 540 (2013).

9. *See id.*

10. *See* Larry Alexander, *Telepathic Law*, 27 CONST. COMMENT. 139, 139–40 (2010).

11. *See id.* at 141.

12. *See id.* at 139.

would deprive them of the legislative authority that we purport to give them. Instead, we will have transferred that authority to others or to some mindless process, such as the meanderings of linguistic usage. A text, untethered from the meaning its authors intended to convey by means of it, is just a set of marks or sounds that can mean anything whatsoever. But as the code chosen by its actual authors to communicate the meaning they intend, it means what they intended it to mean. Any other meaning attributed to it reduces its authors—in this case, legislators—to nothing more than producers of marks or sounds. They will not be producers of legal norms, and thus they will not be what they are supposed to be—legislators.

So legal interpretation, properly understood, is the attempt to ascertain the legal norms with which the legislators have chosen to govern us and that they have communicated to us through symbols.[13] (How else could they communicate those norms to us? Through telepathy?[14]) But one more thing about legal interpretation must be kept in mind. When interpretation reveals that the enacted norm is a rule, the interpretive process continues to flesh out the rule's content. When, however, interpretation reveals that the enacted norm is a standard, the interpretive process is at an end.[15] For fleshing out the standard's content is a matter of first-order practical reasoning, which is not interpretation. Rather, it is politics.

To this point I have been laying groundwork. I have introduced politics, law, rules, standards, and interpretation. And I have distinguished between following rules and first-order practical reasoning. With these things in mind, let us return to the overarching topic, the relation of law and politics. In my opinion, the most important aspect of that relation is one I have written about often. It is what my friend and occasional coauthor Fred Schauer calls the "asymmetry of authority"[16] and what I call "the gap."[17] Both he and I believe it is the single

13. *See* Alexander, *supra* note 8.

14. *See* Alexander, *supra* note 10, at 142.

15. *But see* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 562–63 (1992).

16. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 128–34 (1991).

17. *See* LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW 54 (2001); Larry Alexander, *The Gap*, 14 HARV. J.L. & PUB. POL'Y 695, 695 (1991).

most important and revealing prism through which to view legal phenomena.

What is the gap, and why does it exist? Put succinctly, the gap is the difference between what rational legislators' first-order reasoning tells them they should require you to do and what your first-order reasoning tells you you should do.[18] The gap arises because our first-order reasoning can lead to differing conclusions, and, as I have said, determinate rules are necessary to settle what should be done and thus avert the moral costs of uncertainty, disagreement, and lack of coordination. But rules settle by being relatively simple, blunt, and rigid. They cannot capture all of the nuance and complexity to which first-order practical reasoning will attend. Even if everyone had the same values, and even if the legislators did their job perfectly and enacted the ideal set of rules, those rules would often dictate acts that some people's first-order practical reasoning would veto. In the case that our first-order practical reasoning vetoes the legislators' rules, we will face a dilemma. Our practical reasoning will tell us that the legislators' practical reasoning—politics—has led the legislators to require us to follow rules that our practical reasoning tells us we should not follow. Our standards tell us we need to implement them through rules that our standards also tell us to disobey. The value of following our first-order practical reasoning competes with the value of obeying the legislators' first-order practical reasoning—itself a product of our first-order practical reasoning.

There is, I believe, no way to eliminate this gap. The problem is not that we are not angels. The problem is that we are not omniscient gods. Omniscient gods could live by standards alone. "Do the right thing" would be the only law they would need, for they would know what is "the right thing" to do when someone disobeyed.

So we, who are not omniscient gods, need rules. But rules, even ideal rules, will prescribe conduct that some first-order practical reasoning rejects. To put it in its near paradoxical form, our first-order practical reasons dictate that we should have rules that dictate acts that some of our first-order practical reasoning rejects. Therein lies the gap.

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18. *See* Alexander, *The Gap*, *supra* note 17, at 695–96.

I will briefly discuss the various strategies offered to close the gap and tell you why I believe they all fail. One strategy—what Fred Schauer calls presumptive positivism[19]—tells us to put a thumb on the scales in favor of what the rules prescribe. The problem is that, first, this only narrows but does not close the gap, and second, and more fundamentally, our first-order practical reason can give no weight to such a presumption because the presumption competes with our first-order practical reasoning.

A second strategy, found in the writings of Joseph Raz, is to treat rules as exclusionary reasons.[20] Once a rule applies to us, we must not act on the reasons on which the rule is based.[21] The problem is that although rules purport to exclude acting for the reasons that the rule is based on if such an action differs from what the rule prescribes, this just restates the problem of the gap rather than solves it.[22] Or if it solves it, it does so by fiat.

A third strategy, one that looks more promising, is closing the gap by imposing sanctions on rule violators.[23] The thought is that the prospect of sanctions will align the actor's first-order reasons with what the rules require.[24] Unfortunately, this strategy too fails. For one thing, sanctions give actors prudential reasons to abide by rules. But they do not necessarily give actors moral reasons to do so.[25] And if the sanctions are severe enough to turn the prudential reasons into moral reasons, they need judges who are willing to apply them to rule violators who the judges know acted on their first-order practical reasons and for that reason do not deserve punishment. Moreover, the judges themselves are subject to the gap. The rules requiring them to sanction rule-violators may conflict with the judges' first-order practical reasons. And who will sanction the judges who follow their first-order reasons rather than the

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19. *See* Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 674–77 (1991).

20. *See* JOSEPH RAZ, THE AUTHORITY OF LAW 16–19 (1979).

21. *See id.* at 16.

22. *See* Larry Alexander, *Law and Exclusionary Reasons*, 18 PHIL. TOPICS 5, 8–10 (1990).

23. *See id.* at 6.

24. *See id.*

25. *See* RAZ, *supra* note 2, at 162–64.

rules? Unless judges are automatons when it comes to sanctioning rule-violators, sanctions will not eliminate the gap.[26] (Jeffrey Brand-Ballard has an entire book on the problem of the gap as it applies to judges.[27] I will at the end of this tell you of my own experience with judges' confronting the gap.)

A fourth strategy is deception. That is, close the gap in favor of rule-following by deceiving the public into believing that the rules align with their first-order practical reasons.[28] Make them into rule fetishists. This strategy is similar to what Bernard Williams called "government house utilitarianism," a reference to the idea he ascribed to Britain's colonial rulers that it would be more utilitarian to encourage the natives to abide by their local mores than to urge them to act as utilitarians.[29] The strategy is also reflected in Hare's two level utilitarianism, in which the "archangels" are conscious utilitarians and the "proles" are rule-followers, and in other two-level forms of consequentialism.[30] But the problems with deceptive theories for closing the gap are how to control the deceivers and how to keep the deceived hermetically sealed off from the knowledge that the deceivers possess.

A fifth strategy is just to protest that it is unfair for individuals to arrogate to themselves the privilege to disobey rules that their community has decided should be enacted and instead to act on the verdicts of their own first-order practical reason.[31] But if one's first-order practical reason tells one that abiding by the rules is unfair or immoral, in what sense is departing from the rules unfair?

The final strategy, one that might seem promising, is what Schauer called "rule-sensitive particularism."[32] The rule-sensitive particularist acts on his first-order practical reason,

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26. *See* ALEXANDER & SHERWIN, *supra* note 17, at 77–86.

27. JEFFREY BRAND-BALLARD, LIMITS OF LEGALITY: THE ETHICS OF LAWLESS JUDGING 3–4 (2010).

28. *See* ALEXANDER & SHERWIN, *supra* note 17, at 86–91; Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191, 1191–98 (1994).

29. *See* UTILITARIANISM AND BEYOND 16 (Amaryta Sen & Bernard Williams eds., 1982).

30. *See* R.M. HARE, MORAL THINKING: ITS LEVELS, METHODS, AND POINT 44–64 (1981).

31. *See* Alan Goldman, *The Rationality of Complying with Rules: Paradox Resolved*, 116 ETHICS 453, 467 (2006).

32. SCHAUER, *supra* note 16, at 99.

but his first-order practical reason takes into account the value of having rules and the consequent disvalue of undermining the rules by flouting them, which occurs if one's flouting the rules leads others to follow suit. This strategy will not eliminate the gap. One might flout the rules undetected, or one's flouting of the rules may not affect others' behavior for other reasons. But it should narrow the gap considerably, or so it might appear.

The problem is that the rule-sensitive particularist narrows the gap in the direction of compliance with rules only if most others are *not* rule-sensitive particularists but are rule fetishists. For the value of the rules that goes into the rule-sensitive particularist's calculus is highest when others are rule-followers. As more people become rule-sensitive particularists and are aware of that fact, less values will be attached to the rules. And if everyone were a rule-sensitive particularist, the value of the rules would be zero in their first-order practical reasoning.[33]

So here is the upshot. If we equate first-order practical reasoning, the reasoning we engage in under standards or when deciding what rules to enact, with "politics," and equate rules with "law," then while politics may tell us we should have law, politics seems simultaneously to tell us that we really cannot have it. Law may be for us like the intention to drink the vile liquid in Kavka's Toxin Puzzle: It would be good to have it, but perhaps we really cannot, unless we deceive ourselves.[34]

As I said, I think this gap between rules and first-order practical reasoning—between law and politics—is the most powerful prism through which to view legal phenomena. It can explain the fact that some judges prefer rules and some prefer standards—preferences frequently reflected in the opposition of the majority and the dissenters. It can explain changes in legal doctrines over time. When standards prevail, there is a movement to translate them into rules. But when rules prevail, there is a movement to wipe them away in favor of standards. This is a "grass is always greener" phenomenon because we want both the virtues of rules and the virtues of standards, and we cannot have them simultaneously.

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33. *See* Alexander, *The Gap*, *supra* note 17, at 699–701.

34. Gregory Kavka, *The Toxin Puzzle*, 43 ANALYSIS 33, 33–34 (1983).

I should add that the gap also explains our opposed reactions to bureaucrats. When they act under vague standards, we feel like Kafka's Joseph K.—totally at sea—and want to know what the rules are.[35] But when they act under rules and make no exceptions when first-order reasoning favors exceptions, they become caricatures in our eyes, soulless rule-following martinets. We want clear rules, except when we do not.

Finally, let me briefly relay the results of my experiment with judges and the gap. I was on a panel at both the west coast and the east coast conferences of federal bankruptcy judges. There were about 150 judges in my panel's audience at each conference, and no judges in the audience at the first conference were in the audience at the second. Our panel gave the audience three vignettes involving clear bankruptcy rules and fact patterns in which application of those rules would seem terribly unfair to a party. We asked the judges to consider whether in those vignettes they would follow the rules or depart from them and do what appears fair. We precluded all other options, including novel reinterpretations of the facts, dissembling, resigning, and so forth. Interestingly, in both conferences approximately half the judges said they would follow the rules and half said they would not. Half stood on one side of the gap and half on the other.

So here is the bottom line. I equate "law" with rules that settle determinately what must be done.[36] And I equate "politics" with first-order practical reasoning—the reasoning that produces the rules and the reasoning that standards invite. Politics leads to law, but politics then conflicts with it. The question for me is, if law is desirable, as I believe it is, is it actually possible, and if so, how?

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35. FRANZ KAFKA, THE TRIAL 70 (Richard Stokes trans., Modern Voices 2005) (1925).

36. *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

COMMENTS ON LARRY ALEXANDER'S *LAW AND POLITICS: WHAT IS THEIR RELATION?*

MATTHEW J. FRANCK*

Professor Alexander is a provocateur, which is altogether a good thing. And today, in giving us a capsule version of a problem he has thought about for a very long time,[1] he has not failed to provoke.

I, on the other hand, am coming to this problem for the first time, and my tentative reply to his very interesting remarks is that the "gap" of which he speaks is more starkly a problem in theory than it may prove to be in practice. It is an explanatory prism, yes—but an intractable problem? Maybe not.

"The gap" is this with respect to first-order moral reasoning: the difference between what the law requires and what you think you should do. As Alexander puts it, "rules . . . will prescribe conduct that some first-order practical reasoning rejects."[2] If they agree, the law is unnecessary, as we would do as it bids without its bidding. If they disagree, no good reason can be adduced to do as law bids, and so law fails.

Professor Alexander considers and rejects various possibilities for closing the gap. I am not quite convinced by each of his rejections. For example, when he speaks of "rule violators who the judges know acted on their first-order practical reasons and *for that reason* do not deserve punishment,"[3] I know of no reason to accept—without more—the conclusion that a rule violator acting on a conviction that a rule is wrong does not deserve punishment.

Be that as it may, what seems insoluble in theory is something we muddle through for the most part successfully in

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1. *See* Larry Alexander, *Can Law Survive the Asymmetry of Authority?*, 19 QUINNIPIAC L. REV. 463, 467 (2000); Larry Alexander & Frederick Schauer, *Law's Limited Domain Confronts Morality's Universal Empire*, 48 WM. & MARY L. REV. 1579 (2007).

2. Larry Alexander, *Law and Politics: What Is Their Relation?*, 41 HARV. J.L. & PUB. POL'Y 355, 360 (2018).

3. *Id.* at 360–61 (emphasis added).

practice. Professor Alexander himself admits that some strategies "narrow[] but do[] not close the gap" and taken together they may narrow it considerably.[4] As much as his paradox may trouble us, nonetheless we may observe that most people are lawabiding most of the time, that the instances in which they are scofflaws (for example, jaywalking) are of little consequence, and that the great clashes between the law and the truly conscientious moral reasoner are not high-frequency phenomena.

Moreover, his stark statement of the gap strips away some potentially important nuances. Is the law's command to us that we violate what we hold to be exceptionless prohibitions? This, thankfully, will be rare. Is the law's command that we fulfill a legal duty that is, for us, a matter of moral indifference? This is far more usual. And in all the space between that and the command to do a wrong our morality prohibits, there is a wide zone of greater and lesser conflicts.

When the gap opens up, there are also resolutions of the conflict it engenders that can themselves generate new legal rules or preserve the one at stake in the instant case. Among such modes of resolution are the rule of lenity in criminal law, the executive pardon power, the application of equity jurisprudence to "hard cases" or manifest absurdities, the controversial but practically unstoppable power of jury nullification, as well as more rarefied mechanisms such as federal and state religious freedom restoration acts and the power of judicial review itself. The last of these leads me to a further observation.

Professor Alexander's passing remark about a judge treating a rule violator's moral reasons as a ground to conclude he deserves no punishment[5] and his closing vignette about bankruptcy judges[6] suggest something about where the gap is truly problematic: namely, in the real-world behavior patterns of the judiciary, not in those of the citizenry generally. To put the matter baldly, Alexander-fashion: on a proportional basis, one may say with high confidence that practical rule-flouting occurs with greater frequency among judges than among the population as a whole.

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4. *Id.* at 360.
5. *Id.* at 360–61.
6. *Id.* at 363.

This, in particular, is a gap very much worth pondering, particularly as we come to the end of a week (at the time of this symposium) spent in Washington on an inconclusive, frustrating conversation between senators and a Supreme Court nominee, Neil Gorsuch, on the subject of the relation between law and politics. One of the things that makes the spectacle of this week so disheartening—with senators who want to know what results a judge will choose in future cases, and nominees who won't even comment on past ones—is that we are operating in an environment in which virtually everyone agrees that the Constitution simply is what judges say it is.[7] So the stakes are very high.

Professor Alexander and his sometime collaborator, Professor Frederick Schauer, have vigorously defended the consensus view of judicial supremacy, arguing that it performs an essential "settlement function."[8] I do not think that argument follows from, or even coexists easily with, the Alexander-Schauer thesis on the gap or the "asymmetry of authority."[9] It appears rather to be an effort to close the gap by fiat in one field of law.

But in fact, it exacerbates the gap. For when judges find that the rule of the Constitution chafes them, they push it aside in favor of first-order practical reasoning of their own, and then *call that* the law of the Constitution. They are encouraged to do this by the institutional armor provided by the doctrine of judicial supremacy and finality, as well as—in the lower courts—by the Supreme Court justices' determination in recent years to do as little work as possible and that work only of their choosing.[10]

So perhaps Professor Alexander can offer us some thoughts on how the putative settlement function of judicial supremacy can in practice lead to such unsettling results. Can this gap be closed?

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7. See, e.g., Eric J. Segall, The Constitution Means What the Supreme Court Says It Means, 129 HARV. L. REV. F. 176 (2016).

8. *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 467 (2000).

9. *See* Alexander & Schauer, *supra* note 1, at 1587–88.

10. *See* Matthew J. Franck, *The Problem of Judicial Supremacy*, 27 NAT'L AFF. 137, 140–42, 148 (2016).

COMMENTS ON ALEXANDER'S *LAW AND POLITICS: WHAT IS THEIR RELATION?*

JAMES R. STONER, JR.*

Professor Alexander delivers on his promise to bring clarity to the question of the relation of law and politics, although I am afraid that by the end of these remarks I will attribute to him a confusion or two. Fortunately, I do not agree with his supposition that confusion always leads to political disaster,[1] much less that clarity is a necessary condition for wise policy[2]—though I do agree that we are obliged as professors to do our best to be clear. I want to begin with a point of agreement between us, then suggest where I think he errs and what can be done to repair the fault.

I agree that what Alexander calls "rule-sensitive particularism"[3] is the most promising way to close the "gap" he identifies between legislated rules and what "first-order reasoning tells you you should do,"[4] that is, the gap between law and conscience. As he was counting through the strategies to close the gap, I was looking for this one and was pleased when I saw it. It corresponds, I think, to Aquinas's reason why, although there is no strict obligation to obey an unjust law, obedience ought sometimes to be given "to avoid scandal," that is, to avoid leading others, perhaps of less refined conscience, to think that laws can be disobeyed whenever they want.[5] I do not think the distinction is so rigid between the "rule-sensitive" and the "rule-fetishists," despite my reference to refinement. As Tocqueville noted that even the best philosopher relies on

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1. Larry Alexander, *Law and Politics: What Is Their Relation?*, 41 HARV. J.L. & PUB. POL'Y 355, 355 (2018).

2. *Id.*

3. *Id.* at 362.

4. *Id.* at 359.

5. 1 ST. THOMAS AQUINAS, SUMMA THEOLOGICA 1020 (English Dominican Friars trans., Benziger Bros. ed. 1947) (1265–1274) (I-II, q. 96, a. 4).

other minds for a million things,[6] so most of us find it necessary or convenient to rely on thousands of rules without inquiring too precisely into their desirability or justice, even if from time to time we raise objections to one or another. I like to think of myself as sensitive to the rules that govern the classroom and the duties and privileges of students and faculty, but I leave to others to worry about the details of paychecks and pensions and parking, and just follow the rules, however grudgingly—and that is just to consider university regulations, which are only a fraction of the rules I encounter in life.

Part of the gap between general rules and judgment in circumstances is what Aristotle identifies as properly settled by equity, the ability of a judge to recognize when the letter of the law would do an injustice against the intention of the author of the law.[7] Acting equitably requires good judgment, a little learning (to discern the legislator's intention), and good faith (to follow it), but it seems to me to be a step that an experienced judge learns to take, not a leap in the dark. Nor do I think, with Ronald Dworkin, that when a judge steps beyond the letter of the law, he necessarily substitutes his own opinions (that is, first-order judgments), unless of course he is looking for opportunities to do so.[8] If we can recognize bad faith in the marketplace, why can we not see the same in courts?

The error in Professor Alexander's argument, I think, is in equating politics with first-order judgments by individuals, or toggling back and forth between "a group or a part" and between "a particular actor" or "all or many actors."[9] Political life involves essentially thinking and acting in common, and if this sometimes issues in partisanship and even "groupthink," it is also the very source of political authority and political power, at least if Hannah Arendt is to be believed.[10] Because we are not only rational beings but also political animals, we tend to reason in groups, and thus imperfectly, accepting opinions as axioms and persuasive arguments as proofs. If this means that po-

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6. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 408 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835 & 1840).

7. ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 99–100 (Roger Crisp ed. & trans., Cambridge Univ. Press 2000) (c. 384 B.C.E.) (1137a–1137b).

8. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81–130 (1977).

9. Alexander, *supra* note 1, at 355.

10. HANNAH ARENDT, THE HUMAN CONDITION 200 (1958).

litical actors think less clearly than angels, I concede the point, but also note that in better polities and political movements, the thought of individuals bonded together is probably stronger than the thought of most every one of them on his own, as we learn reasons from one another, direct our imaginings to what others can similarly imagine, and develop a shared vocabulary for articulating our hopes and fears. I do not mean that this is merely an organic process of fellow feeling, though friendship and fellowship in politics should not be ignored. I do think that the gap between the group and the individual is not endemic but rather rare, and that what appears to be such a gap is more likely to be the friction at the interface of different groups or parties, where individuals find themselves separated, so to speak, from their usual pack.

Law emerges from shared thought and common opinion, not independent of them. This is obvious in the case of customary law, or common law, as we still call it, but it is also true of legislation, which generally passes only as a result of widespread agreement, not merely a momentary coincidence of wills. No small part of the confusion in our society between law and politics today results from our misunderstanding of the legislative power, which, when described as the law-making power, gives rise to the idea that law can be made from scratch, like a pie, or hewn from a mass, like a sculpture, typically best when done by a single artist. Instead, I think the legislative power should be defined as it is in Blackstone as the power to declare or to change the law.[11] That definition supposes that law always exists in any society—that, so to speak, authoritative public opinion abhors a vacuum—and the objective of legislative action is to encapsulate and settle that understanding in writing or, when wrongs or mischiefs are discovered, to remedy them by new enactments.

Thinking about law in that way—which, I think, reflects its reality—ought to discipline our expectations of political change and perhaps also our process of lawmaking, urging us to understand the state of the law before any new enactment and to carefully consider what needs reform and why. It ought to make us skeptical of grand schemes to refashion whole areas of law and policy, seeing that they need to be woven into the fab-

11. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *86.

ric of the law if they are to persist and accomplish their purpose. Sometimes striking reforms succeed and grow widely accepted—think of workers' compensation statutes in the early twentieth century, which replaced tangled webs of liability,[12] or maybe bankruptcy law, which was meant to allow individuals to disentangle themselves from their shortcomings without succumbing to them[13]—but reforms fail, I think, both when they create tangled webs of their own or when they pay scant attention to the need for law to be embedded in common, or at least widely shared, opinion, to win consent. And it would not be the least of the advantages of such a view of legislation that it might remind judges that changing the law is not *their* function. Applying established law to existing cases, jumping the inevitable gap between general rules and the myriad circumstances that differ person by person and case by case, in a way that does justice and attends to equity, is itself a noble task. Why do they not think so any more?

So to venture to answer Professor Alexander's concluding question about the relation of law and politics: Law is possible only when it emerges from politics, and ordinarily politics is most respectable when it acts to preserve and improve the law.

12. *See generally* PETER M. LENCSIS, WORKERS COMPENSATION: A REFERENCE AND GUIDE (1998).

13. *See generally* CHARLES J. TABB, LAW OF BANKRUPTCY (4th ed. 2016).

SECOND-BEST ORIGINALISM AND REGULATORY TAKINGS

INTRODUCTION

"[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[1] With this characteristically gnomic claim, Justice Holmes established the Supreme Court's modern doctrine of regulatory takings. This doctrine has had a far reaching impact on the country's property owners, city planning boards, and state land use commissions. Important questions hang upon the extent to which government may regulate the use and possession of property. May a state forbid the construction of any habitable buildings on your beachfront lot?[2] May a county temporarily prohibit the rebuilding of a summer camp that lies in a floodplain?[3] May the government demand a public easement to access the ocean in exchange for a permit to demolish your bungalow and replace it with a three bedroom home?[4] The Court's answers to these questions directly impact how millions of property owners may use and develop their homes and businesses, and the Court frequently addresses these issues. Including the October 2016 Term, the Supreme Court has heard a regulatory takings case in five of its last seven terms.[5] Recently, however, the fidelity of the Court's regulatory takings doctrine to the original meaning of the Constitution has been called into question.

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1. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). In *Mahon*, the Court found that a state law which prohibited the mining of coal in such a way as to cause subsidence of a structure used for human habitation constituted a taking of a coal company's rights to mine a coal deposit located beneath the surface of a house. *See id.* at 412–13. The company had specifically bargained for those rights, and the homeowner's deed expressly reserved the right to remove the coal to the company. *See id.* at 412.

2. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992).

3. *See* First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles, 482 U.S. 304, 308 (1987).

4. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828 (1987).

5. *See* Murr v. Wisconsin, 137 S. Ct. 1933 (2017); Horne v. Dep't of Agric., 135 S. Ct. 2419 (2015); Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013); Ark. Game & Fish Com'n v. United States, 133 S. Ct. 511 (2012); Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702 (2010).

In last term's *Murr v. Wisconsin*,[6] a dissenting Justice Thomas called for the Court to reexamine the entire doctrine of regulatory takings to ensure accordance with the original public meaning of the constitutional text.[7] Justice Thomas noted that the Supreme Court "has never purported to ground [its regulatory takings] precedents in the Constitution as it was originally understood."[8] He went further to state that "it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment."[9]

This Note is an answer to Justice Thomas's call. It concludes that the original public meaning of the Privileges or Immunities Clause did protect against regulatory takings. To reach this conclusion, I apply a novel form of originalism for answering constitutional questions where the text runs out. I analyze the neighboring doctrines of nuisance and eminent domain law as they were at the enactment of the Fourteenth Amendment. The structural interactions between legislatures and courts present in nuisance and eminent domain should apply to the regulatory takings question as well. Whether a nuisance exists, or a taking is for public use, is subject to judicial review under a deferential standard. While the legislature has latitude, the court will strictly enforce the limits on that latitude. In short, regulatory takings are protected against by the original public meaning of the Fourteenth Amendment because what legislatures may not do directly, they may not do indirectly.

The second-best originalism I will apply in this Note creates an objective criterion separate from a judge's policy preferences and respects democratic decisionmaking. It will provide long term benefits by providing guardrails from which constitutional doctrine will not depart, although its normative grounding is not consequentialist. This Note follows Professor Randy Barnett and Evan Bernick in their goal of creating an originalist

6. 137 S. Ct. 1933 (2017).

7. *See id.* at 1957 (Thomas, J., dissenting).

8. *Id.*

9. *Id.* (citing Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729 (2008)).

mode where "original meaning interpretation alone is not enough to resolve a controversy."[10] It goes further towards constraining the "spirit" prong. This Note takes part in the contemporary project of articulating a sophisticated originalism for hard cases, and applies that theory to the topic of regulatory takings.

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Justice Thomas's call to reexamine the original meaning of regulatory takings is grounded in extensive debate within the legal academy.[11] Scholars have argued that regulation did[12] and did not[13] constitute a taking at the ratification of the Fifth Amendment, that state courts increasingly recognized regulatory takings between the enactment of the Fifth and Fourteenth Amendments,[14] and that the Fourteenth Amendment may protect against regulatory takings.[15] The dispute stems partially from silence on the question of regulatory takings in the drafting and ratification debates concerning the Fifth Amendment. Whether colonial-era restrictions are analogous to contemporary planning boards is also contested. Finally, scholars disagree about the extent to which the colonial experience is relevant to the Fifth Amendment as applied today, given the

10. Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: the Judicial Duty of Good-Faith Constitutional Construction* (2017) at 1, https://ssrn.com/abstract=2913223 [https://perma.cc/F34J-EWT6].

11. *See, e.g.*, Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211 (1996) (focusing on pre-*Mahon* state court regulatory takings jurisprudence); Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U. L. REV. 601 (2015) (defending a standards based approach to regulatory takings based in the shifting understandings of "established property rights" through different moments in time); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) (arguing that the original understanding of the Takings Clause did not protect against regulations limiting the use of property); *see also* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (using Founding-era political theory and contemporary law and economics analysis to argue that a wide range of government regulations should be within the ambit of the Takings Clause).

12. *See* EPSTEIN, *supra* note 11, at ix.

13. *See* Treanor, *supra* note 11.

14. *See* Kobach, *supra* note 11.

15. *See* Rappaport, *supra* note 9.

absence of widespread judicial review and the small role the federal government played in daily life.

The most prominent voice for applying the Fourteenth Amendment approach, and the scholar cited by Justice Thomas, is Professor Michael B. Rappaport. Professor Rappaport has suggested that the relevant original public meaning for evaluating regulatory takings is the meaning in 1868, since local land use restrictions implicate the *incorporated* Takings Clause.[16] The public meaning of "takings" changed from the time the Fifth Amendment was ratified to the Fourteenth Amendment's drafting. Still, Professor Rappaport concedes that it is unclear how widespread that change was.[17] It is also possible that the original public meaning of the incorporated Takings Clause contained no meaning regarding regulatory takings at all. If that is true, a judge today facing a regulatory takings question could not say he reinforced the decision of the people who ratified the amendment—there was simply no such decision for that question. Given this lack of objective criteria, such a judge risks importing policy preferences into his decision.

The possibility that the original public meaning of the incorporated Takings Clause is agnostic towards regulatory takings may require the interpreter to apply what I will call "one-step originalism" and "second-best originalism." One-step originalism determines the meaning of a provision in its originating context, which includes the legal background against which the provision was enacted, and then applies that meaning to the issue before the court.[18] When the meaning of the text is underdetermined, but a judge is still committed to enforcing the original meaning of the text, she needs to perform a "second-best" form of originalism.

Originalist legal theorists have given great attention in recent years to how an originalist judge should answer a question where the original public meaning of the text is underdetermined. Professor Barnett describes the determination of original public meaning "interpretation" and the noninterpretative

16. *See id.* at 757.

17. *See id.* at 756.

18. The "thickest" form of one-step originalism can be called "original expected application." *See* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 429 n.6 (2007).

activity used when the text runs out "construction."[19] Not all originalists have accepted the interpretation-construction distinction,[20] and this Note does not wade into that debate.[21] This Note is concerned with how an originalist should act when the text runs out, and one must apply a "second-best" originalism. Originalists have proposed different methods for answering constitutional questions in the "second-best" zone. Early theorists of originalism proposed that the demonstrable public intentions of the constitutional framers should bind judges.[22] Professors John O. McGinnis and Michael B. Rappaport advocate "original methods originalism," by which judges apply "the interpretive methods that the constitutional enactors would have deemed applicable to it."[23] This Note focuses on Professor Barnett and Bernick's recent work, where they present an originalist method for underdetermined questions they call "good-faith constitutional construction."[24] Good-faith constitutional construction, Professor Barnett and Bernick claim, requires judges to adhere to the "letter and the spirit" of the constitutional provision.

This Note proposes an additional constraint for Professor Barnett and Bernick's "spirit" prong, which will greatly decrease judicial discretion and the potential for judicial over-

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19. *See* Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 419 (2013) ("When original meaning runs out, constitutional 'interpretation,' strictly speaking, is over, and some new *non*interpretive activity must supplement the information revealed by interpretation.").

20. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 13 (2012).

21. I believe the method I present in this Note is pure interpretation. Professor Barnett may consider it construction.

22. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 17 (1971); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695 (1976).

23. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751 (2009).

24. *See* Barnett & Bernick, *supra* note 10. I do not find the interpretation-construction distinction convincing or necessary. *Compare* Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011) (defining interpretation as "the activity of identifying the semantic meaning of a particular use of language in context" and construction as "the activity of applying that meaning to particular factual circumstances"), *with* Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1231 (2012) (arguing that the Constitution is a "no-construction zone"). For the purposes of this Note, I will use the terms interchangeably, much to Professor Barnett and Bernick's chagrin.

reach. When determining a provision's spirit, judges should first look to the original legal and constitutional background, found in neighboring doctrines, to see if a proxy for the spirit emerges. If that proxy sufficiently guides the court to answer the question before the court, the spirit inquiry ends there. In the context of takings, doctrines like the police power, nuisance, and economic regulation are horizontal to each other because they work as an interrelated package. Where nuisance ends, the police power ends, and the eminent domain power begins. This addendum will further constrain the discretion of judges, an essential component of originalist interpretive theories.[25]

This Note has three parts. In Part I, I contrast one-step originalism with "second-best" originalism and explain which category of constitutional question is appropriate for second-best originalism. That category consists of meanings that were neither contested nor relied upon during the framing of a constitutional provision. In Part II, I present the doctrine and history of regulatory takings. I survey academic research to show that, as a matter of one-step originalism, while the original public meaning of the Takings Clause did not affirmatively protect against regulatory takings, the original public meaning of the clause as incorporated through the Fourteenth Amendment is unclear. Finally, in Part III, I apply second-best originalism to the doctrine of regulatory takings, assuming that one-step originalism will never conclusively determine the meaning of the incorporated Takings Clause. I look to treatises and cases contemporaneous to the ratification of the Fourteenth Amendment to argue that regulatory takings should be understood through the structural understanding of nuisance, the police power, and public use eminent domain law. These doctrines serve as proxies for the "spirit" of the Takings Clause. In doing so, I provide an originalist account of why the Fourteenth Amendment protects against regulatory takings. The account represents an applied example of second-best originalism for answering constitutional questions when the text runs out.

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25. *See* Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice (March 24, 2017) (unpublished manuscript), https://ssrn.com/abstract=2940215 [https://perma.cc/WR7Y-2BMC].

I. ONE-STEP ORIGINALISM AND SECOND-BEST ORIGINALISM

Different categories of constitutional questions require different originalist interpretive approaches. Consider three categories of constitutional questions.[26] First, some were contested and decided. For instance, if one asks whether the enumerated rights in the Bill of Rights are exhaustive, the original public meaning answers the question.[27] Second, the answers to some questions were uncontested but relied upon. These questions require more work on the part of an originalist, but the original public meaning can still answer the question. Relied-upon questions are answered by determining the "applicable background convention[s] against which" a provision was enacted.[28] As Judge Easterbrook notes, a statute providing "whoever shall willfully take the life of another shall be punished by death" would plainly include "the police officer who shot and killed a terrorist just about to hurl a bomb into a crowd."[29] Yet the law treats rightly such officers "as heroes, not as murderers."[30] As a constitutional example, the Framers did not contest which of the "bundle of rights" were included in the word "property" in the Fifth Amendment. A congressional statute prohibiting the alienation of an estate would nonetheless fall within the original public meaning of "property" found in the Fifth Amendment.[31] While questions depending on an assumed

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26. A fourth category also exists, but is not relevant to the discussion at hand. This category consists of questions that were contested and explicitly left undecided. The long-term existence of slavery was the most obvious example of this question. *See* U.S. CONST. art. I, § 9, cl. 1 (prohibiting Congress from abolishing the slave trade before 1808). The original public meaning of the text is explicitly agnostic as to the constitutionality of an 1840 statute outlawing slavery, and therefore cannot answer the question. Whether the statute would run afoul of another provision is a separate inquiry. Very few contemporary constitutional questions fall into this category.

27. *See* U.S. CONST. amend. IX.

28. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2468 (2002).

29. Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1913 (1999).

30. *Id.*

31. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *138 ("The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and *disposal* of all his acquisitions, without any control or diminution, save only by the laws of the land." (emphasis added)); *cf. Hodel v. Irving*, 481 U.S. 704 (1987) (unanimously holding that a provision of the Indian Land Consolidation Act of 1983, which provided that small, heavily divided property interests

legal background may be more difficult to answer, the original public meaning can suffice.

For the third category of question—questions that were not contested and not relied upon—no amount of historical research will provide a conclusive answer.[32] For instance, the Framers and ratifiers did not vote on whether wiretapping[33] or thermal imaging[34] constituted a "search" as meant by the Fourth Amendment. They could not even contemplate such a question. Similarly, changes in Congress's institutional operation mean that contemporary recess appointments were not contemplated at the Framing.[35]

One-step originalism handles the first category easily and the second category with more legwork, but when it attempts to answer questions in this third category, it fails to satisfy its own normative justifications. Those commitments are principles of democratic legitimacy and the separation of powers. If the ratifiers did not contemplate the question, the judge is not enforcing their democratic decision. Without a conceptually separate criterion that can be critiqued and refuted, the judge risks importing his policy preferences and stepping outside the role of a judge.

The theory of originalism is justified by normative commitments to democratic legitimacy and the separation of powers. The separation of powers principle is a "thou shalt not" command rooted in the understanding that the democratically elected, politically accountable branches make policy decisions, and the undemocratic judiciary should not.[36] The democratic-legitimacy principle is essentially the positive mirror-image of the separation-of-powers principle, commanding that judges

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escheat to the property owner's tribe upon the death of the property owner, was a regulation that went "too far" and effected a taking).

32. Such as whether Congress may pass laws regulating human spaceflight.

33. *See* Katz v. United States, 389 U.S. 347 (1967); Olmstead v. United States, 277 U.S. 438 (1927).

34. *See* Kyllo v. United States, 533 U.S. 27 (2001).

35. *See* NLRB v. Noel Canning, 134 S. Ct. 2550 (2014).

36. Justice Thomas promotes originalism because "by tethering their analysis to the understanding of those who drafted and ratified the text, modern judges are prevented from substituting their own preferences for the Constitution." Justice Clarence Thomas, 2001 Francis Boyer Lecture AEI Annual Dinner: Be Not Afraid (Feb. 13, 2001), http://www.aei.org/publication/be-not-afraid/print/ [https://perma.cc/J4FQ-TJER].

should respect the values and policies the people have enacted through the Constitution until the people vote differently.[37] These two principles work to avoid "the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law," which is "that the judges will mistake their own predilections for the law."[38] Originalism aims "to reduce judicial discretion and maintain judicial impartiality" to avoid this danger.[39] It does so by relying on the original public meaning of the Constitution, the determination of which is conceptually divorced from a judge's policy preferences.[40]

For category-three questions, there is a greater risk that judges will substitute their policy preferences for the meaning of the Constitution. Originalism "establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself,"[41] but category-three questions cannot resort to that criterion. This is especially important at the Supreme Court, "where many of the usual limitations on judicial discretion, such as authority from a superior court or *stare decisis*, either do not exist, or do not exist with the same strength as with other courts."[42] As Professor Barnett and Bernick put it, "by articulating guidelines for how judges are to engage in good-faith construction and thereby enable observers to identify

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37. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 862 (1989) ("A democratic society does not, by and large, need constitutional guarantees to insure that its laws reflect 'current values.' Elections takes care of that quite well."); *see also* Thomas, *supra* note 36 ("[Originalism] places the authority for creating the legal rules in the hands of the people and their representatives, rather than in the hands of the judiciary. The Constitution means what the delegates of the Philadelphia Convention and of the state-ratifying conventions understood it to mean; not what we judges think it should mean.").

38. *See* Scalia, *supra* note 37, at 863. Other theorists reject this premise. For instance, H.L.A. Hart argued that the available legal materials provide legal answers to most legal questions. However, in the "penumbra" of hard cases where the legal materials run out, the judge should exercise his discretion in light of "aims, purposes and policies." H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 614 (1957).

39. Thomas, *supra* note 36.

40. *See* Scalia, *supra* note 37, at 864 ("Originalism does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.").

41. *Id.*

42. Thomas, *supra* note 36; *cf.* Brown v. Allen, 334 U.S. 443, 540 (Jackson, J., concurring in the judgment) ("We are not final because we are infallible, but we are infallible only because we are final.").

abuses of judicial discretion, we can make it both more likely that good-faith construction will take place and bad-faith construction will be detected and censured."[43] Where the original public meaning of the Constitution does not answer the constitutional question, an additional tool is needed.

Articulating a method for category-three questions, where the meaning is underdetermined, has been a concern of Supreme Court justices and academic commentators alike.[44] Justice Alito, a self-described originalist,[45] has highlighted the problems for democratic legitimacy and separation of powers that category-three questions present. In the oral arguments for *Brown v. Entertainment Merchants Association*,[46] which dealt with the sale of violent video games to minors, Justice Scalia told the advocate for the petitioners, "[Y]ou're asking us to create a — a whole new prohibition which the American people never — never ratified when they ratified the First Amendment."[47] Justice Alito found Justice Scalia's reliance on the democratic legitimacy principle misplaced. Justice Alito responded to Justice Scalia's question by quipping, "I think what Justice Scalia wants to know is what James Madison thought about video games. (Laughter.) Did he enjoy them?"[48] Justice Alito did not join Justice Scalia's majority opinion in *Brown*, noting that he "disagree[d] . . . with the approach taken in the Court's opinion."[49] He stated that in "considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution."[50] He invoked the separation of powers principle, warning that "we

43. Barnett & Bernick, *supra* note 10, at 29.

44. *See supra* notes 22–24.

45. *See, e.g.*, Matthew Walther, *Sam Alito: A Civil Man*, AM. SPECTATOR (Apr. 21, 2014), https://spectator.org/58731_sam-alito-civil-man/ [https://perma.cc/2J27-Y7KX] ("'I start out with originalism,' [Justice Alito] says. 'I do think the Constitution means something and that that meaning does not change . . . . But when you have to apply that to things like a GPS that nobody could have dreamed of then, I think all you have is the principle and you have to use your judgment to apply it. I think I would consider myself a practical originalist.'").

46. 564 U.S. 786 (2011).

47. Transcript of Oral Argument at 16, Brown v. Ent. Merch. Ass'n, 564 U.S. 786 (2011) (No. 08-1448).

48. *Id.* at 17.

49. Brown v. Ent. Merch. Ass'n, 564 U.S. 786, 806 (2011) (Alito, J., concurring in the judgment). Justice Alito was joined by Chief Justice Roberts.

50. *Id.* at 806.

should not hastily dismiss the judgment of legislators, who may be in a better position than we are to assess the implications of new technology."[51] Justice Alito's opinion underscores a blind spot for one-step originalist interpretation: uncontested and unrelied-upon questions do not satisfy the principles justifying original public meaning interpretation.

Professor Barnett has been the theorist of originalism perhaps most interested in the need for a "theory for how to construe a constitution when its meaning runs out."[52] Such a theory could be resorted to in category-three questions, where the original public meaning is underdetermined. His response is a judicial duty of good-faith construction, derived from the idea of the judge as a fiduciary of the citizenry.[53] Per Professor Barnett and Bernick, when the original public meaning of the text runs out, "judges should turn to the spirit of the relevant text."[54] Their account of how judges determine the spirit, however, is not entirely satisfactory.[55]

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51. *Id.*

52. Randy E. Barnett, *Interpretation and Construction,* 34 HARV. J.L. & PUB. POL'Y 65, 70 (2011). The interpretation-construction distinction itself does not substantially affect the analysis in this Note. Nonetheless, I prefer the interpretation nomenclature.

53. Barnett & Bernick, *supra* note 10, at 13 ("[T]he Constitution was designed to establish a government 'whose conduct would mimic that of the private-law fiduciary.'" (quoting Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239, 255-62 (2007)).

54. *Id.* at 34.

55. The "Letter and the Spirit" approach has a greater shortcoming beyond the ambit of this Note. What should a judge do when the letter and the spirit cannot be reconciled? For instance, let us assume the original public meaning of the Fourth Amendment did not exclude the exclusionary remedy. Instead, the legal remedy was a common law action for trespass. After incorporation, however, states could redefine the trespass action to extend only to private actors, nullifying the traditional trespass remedy. After incorporation then, it seems plausible that the *letter* of the Fourth Amendment forbade the exclusionary rule, while the *spirit* of the amendment required it (or a similar remedy). If a judge sides with the letter, he violates the spirit, and the theory becomes useless for just the sort of hard questions the theory purports to answer. If a judge sides with the spirit, he violates the letter. Professor Lawrence Lessig has advocated a theory of constitutional interpretation that advocates this approach, which he describes as translating the "framing value" of a provision into the contemporary world. *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1228–33 (1993) (applying his theory of interpretation as translation to the incorporation of the exclusionary rule against the states). Most troubling for an originalist, if Professor Barnett and Bernick allow the spirit to predominate over the letter, it means that the Fourth Amendment

Professor Barnett and Bernick's "spirit" inquiry can return a judge to the very pitfalls originalism seeks to avoid. Just as determining "the purpose" of a statute can be quixotic, so too "the spirit" of a constitution that was produced through debate and compromise. Does every provision have a single spirit, or multiple spirits? How do structural arguments inform more specific texts? Without a more objective methodology, a judge risks mistaking her own opinions and preferences for the true "spirit" of the provision.

To cabin the discretion inherent in the spirit determination, I propose that the judge should limit himself to original understanding of areas of law that have "local priority"[56] to the question at issue when possible. For certain questions of law, where one doctrine ends, another begins. One example is the question in *Jones v. United States*,[57] in which the Court determined that attaching a monitored GPS device to a car constituted a search within the meaning of the Fourth Amendment. Justice Scalia explained that the text of the Fourth Amendment "reflects its close connection to property" and that Fourth Amendment jurisprudence is "tied to common-law trespass."[58] Since placing and monitoring the device constituted a "physical trespass" against an "effect," the action constituted a search.[59] Where a constitutional provision has an analogue, a judge may look to those analogues to answer the question before the court.

To recap, there is a category of constitutional questions that were not decided nor relied upon during the framing of the Constitution. The original public meaning of the Constitution will always be underdetermined with regard to these questions. The justifications for originalism—democratic legitimacy and separation of powers—are not satisfied in the underdetermined category. Professor Barnett and Bernick's "good-faith construction" is an attempt to provide a constrained mode of judging for just this type of hard case. This theory requires that a judge be faithful to the text and the spirit of the constitution

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provided different answers to the same constitutional question in 1861 and 1961. For further discussion of Professor Lessig's approach, see *infra* note 170.

56. *Cf.* RONALD DWORKIN, LAW'S EMPIRE 250–54 (1986) (presenting the idea of local priority in negligence suits).

57. 132 S. Ct. 945 (2012).

58. *Id.* at 949.

59. *Id.*

where its text "runs out." I add the caveat that where horizontal analogous legal understandings can answer the question before the court, these doctrines should be relied upon as a proxy for the "spirit" of a provision. This will constrain judges, satisfying the separation of powers principle. That original meaning "touchback" will also function as a set of constitutional guardrails, limiting how far a doctrine can depart from the original public meaning and providing more democratic legitimacy than alternative interpretive theories.

II. REGULATORY TAKINGS: THE DOCTRINE AND THE HISTORY

The Takings Clause of the Fifth Amendment, which was incorporated against the states through the Fourteenth Amendment,[60] commands "nor shall private property be taken for public use, without just compensation."[61] It was not until the 1922 decision in *Pennsylvania Coal, Co. v. Mahon*[62] that the Supreme Court acknowledged that, in addition to government taking title to physical property, takings occur when government regulations on use go "too far."[63] In *Mahon,* the state legislature barred mining companies from using their support rights to extract coal when such extraction would cause subsidence of surface structures.[64] The Court's framework for determining when a regulation has gone "too far" has traditionally been the fact-intensive balancing test established in *Penn Central Transportation Co. v. City of New York*.[65] Under that framework, the Court balances the economic impact of the regulation, the reasonable investment-backed expectations of the

60. *See* Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897) (applying the Takings Clause of the Fifth Amendment against the State of Illinois through the Due Process Clause of the Fourteenth Amendment). Interestingly, the first time the Supreme Court faced an argument that a state government had violated a provision of the Bill of Rights was a Takings Clause claim against the state of Maryland. *See* Barron v. Baltimore, 32 U.S. 243, 250–51 (1833) ("[T]he provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States; and is not applicable to the legislation of the states.").

61. U.S. CONST. amend. V.

62. 260 U.S. 393 (1922).

63. *Id.* at 415.

64. *See id.* at 393–94 n.1.

65. 438 U.S. 104 (1978).

property owner, and the character of the government action to determine if the property owner is entitled to compensation.[66]

The Court has also protected property owners against regulatory "unconstitutional conditions."[67] For instance, if creating a public easement through homeowners' property constitutes a taking, conditioning the family's building permit on their agreeing to create the easement does too.[68] Under this doctrine, if the government conditions a property owner's permit, the condition must substantially further the governmental purposes that justify denying the purpose.[69] If the connection between the condition and the governmental purposes is too attenuated, the government must provide just compensation.[70] *Dolan v. City of Tigard*[71] added an additional requirement to the *Nollan v. California Coastal Commission*[72] "nexus test," requiring that a city's permit condition bear a "rough proportionality" to the nature and extent of the proposed development's impact.[73]

In *Lucas v. South Carolina Coastal Council*,[74] the Court held that *any* regulation which deprived a property owner of all economic use of his or her land required just compensation.[75] *Lucas* sparked the recent trend of the Court carving out certain governmental actions that categorically qualify as regulatory

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66. *Id.* at 124–25.

67. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828 (1987). While this doctrine is distinct from the question of *when* a regulation commits a taking, it is crucial to understand how cities and states may go about regulating property.

68. *See id.* at 831.

69. *Id.* at 834. More specifically, the doctrine is only implicated when the condition, if done directly by the government, would have been deemed a taking.

70. Both *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), and *Nollan* were 5-4 cases with Justice White casting the deciding vote. In both cases, Justices Brennan, Blackmun, Stevens, and Marshall sided with the government, while Chief Justice Rehnquist, and Justices Powell, O'Connor, and Scalia sided with the property owner.

71. 512 U.S. 374 (1994).

72. 483 U.S. 825 (1987).

73. *Dolan*, 512 U.S. at 391.

74. 505 U.S. 1003, 1030 (1992).

75. *See id.* at 1030. Justice Souter filed a separate statement to case, noting that he would "dismiss the writ of certiorari as having been granted improvidently." *Id.* at 1076 (statement of Souter, J.). He found the assumption that the regulation actually deprived the owner of the land's entire economic value implausible, and thus found that the Court was precluded from answering the questions presented. *Id.* For further discussion of the unusual factual posture of the case, see *infra* note 163.

takings regardless of the governmental interests.[76] Justice Scalia, writing for the Court, described two situations in which a government regulation qualifies *per se* as a taking requiring compensation, "no matter how weighty the public purpose behind it."[77] The first category exists when a regulation compels a property owner to suffer a physical invasion of his or her property.[78] *Lucas* established the second category, which exists where a regulation "denies all economically beneficial or productive use of land."[79]

Justice Scalia's opinion for the Court relied on the original meaning of the Takings Clause.[80] Justice Scalia acknowledged that "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all."[81] Nonetheless, his opinion relied on the "historical compact recorded in the Takings Clause," under which a government may only elimi-

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76. The fact-intensive balancing approach did not disappear from regulatory takings doctrine, but in certain instances it has been displaced. Justice O'Connor's plurality opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), applied the *Penn Central* test directly to the area of economic regulatory takings. *Id.* at 522–23. And the unconstitutional conditions doctrine, through both Justice Scalia's "essential nexus" test in *Nollan* and Chief Justice Rehnquist's "rough proportionality" test in *Dolan* are both ad hoc, factual inquiries.

77. *Lucas*, 505 U.S. at 1015.

78. A physical invasion taking is sometimes called a "*Loretto* taking" after *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto*, the Court held that a New York law requiring apartment building owners allow cable television infrastructure in their facilities constituted a taking, even though the facilities occupied approximately one and a half cubic feet of property. *See id*. at 438 n.16. Justice Blackmun dissented, joined by Justices Brennan and White, sharply criticizing the Court's application of a *per se* rule. In an opinion presaging his dissent in *Lucas*, he began, "If the Court's decisions construing the Takings Clause state anything clearly, it is that '[t]here is no set formula to determine where regulation ends and taking begins.'" *Id.* at 442 (Blackmun, J., dissenting) (quoting Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962)). Justice Blackmun cited *Mahon* and *Penn Central*, and would have followed *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), to find that no taking occurred. He argued that the application of the majority's categorical rule represented "an archaic judicial response to a modern social problem," and that "technological advances and new ways of living cannot come about through the application of rigid constitutional restraints formulated and enforced by the courts." *Loretto*, 458 U.S. at 455–56 (Blackmun, J., dissenting) (citation omitted).

79. *Lucas*, 505 U.S. at 1015 (citations omitted).

80. Recently, Chief Justice Roberts's opinion in *Horne v. Dep't of Agriculture*, 135 S. Ct. 2419 (2015), relied on "the principles of Magna Carta" the colonists brought with them to the New World to justify "protection against uncompensated takings of personal property." *Id.* at 2426.

81. *Lucas*, 505 U.S. at 1028 n.15. No specific theorists or works are cited.

nate all economically valuable use through the police power, and not the eminent domain power.[82] He dismissed evidence that colonists were not protected against regulatory takings as "entirely irrelevant" because they occurred prior to incorporation of the Takings and Just Compensation Clauses.[83] Finally, Justice Scalia relied on the drafting history of the Takings Clause. Unlike the draft originally proposed by James Madison, the adopted text of the clause is ambiguous as to whether it is limited to physical takings. Justice Scalia interpreted the clause to include protection against regulatory takings.[84]

Justice Blackmun, in dissent, presented an originalist argument that regulatory takings were not part of the original understanding of the Takings Clause. He claimed that the colonists were tolerant of government takings for public use without compensation,[85] and that the Founders intended the Takings Clause to protect only against direct appropriations, not regulatory takings.[86] Justice Scalia's majority opinion addressed the originalist argument in a single sentence and accompanying footnote,[87] while Justice Blackmun devoted roughly five full pages to the historical question.[88] Neither Justice, however, presented a satisfying originalist argument for their position.

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82. *See id.* at 1028–29.

83. *See id.* at 1028 n.15.

84. *See id.* ("No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation" (quoting Speech Proposing Bill of Rights (June 8, 1789), *in* 12 J. MADISON, THE PAPERS OF JAMES MADISON 201 (C. Hobson, R. Rutland, W. Rachal, & J. Sisson ed. 1979))).

85. *See id.* at 1056 (Blackmun, J., dissenting) ("The colonists . . . inherited . . . a concept of property which permitted extensive regulation of the use of that property for the public benefit—regulation that could even go so far as to deny all productive use of the property to the owner if, as Coke himself stated, the regulation extends to the public benefit . . . for this is for the public, and every one hath benefit by it." (quoting F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE 80–81 (1973) (internal quotation marks omitted)).

86. *See id.* at 1056 n.23 (Blackmun, J., dissenting) (citing William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 (1985)).

87. *See id.* at 1028 and n.15 (majority opinion) ("In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.").

88. *See id.* at 1055–60 (Blackmun, J., dissenting).

The Justices' originalist back and forth over the takings clause sparked an increase in scholarly attention to the historical meaning of the clause. Commentators found both Justice Scalia's and Justice Blackmun's accounts lacking.[89] Justice Scalia's account is both mistaken and incomplete. He claimed that "[p]rior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'"[90] But in 1888, the leading treatise on eminent domain acknowledged that regulations, in addition to direct appropriations, could require just compensation.[91] That treatise stated that the legislature may impose restraints "upon the use and enjoyment of property within the reason and principle" of its duty to protect for the general welfare.[92] Such infringements of the rights of use and enjoyment left a property owner without remedy. It was "a *regulation*, and not a *taking*, an exercise of *police* power, and not of *eminent domain*."[93] On the other hand:

> [T]he moment the legislature passe[d] beyond mere regulation and attempts to deprive the individual of his property, or of some substantial interest therein, under pretense of regulation, then the act becomes one of eminent domain, and is subject to the obligations and limitations which attend an exercise of that power.[94]

Justice Holmes cited that treatise in a 1902 opinion he wrote as Chief Justice of the Massachusetts Supreme Judicial Court, nineteen years before he authored the Court's opinion in *Ma-*

89. *See, e.g.*, Kobach, *supra* note 11, at 1221 ("Like Justice Blackmun, Justice Scalia neglected to conduct a more searching inquiry into the genesis of regulatory takings.").

90. *Lucas*, 505 U.S. at 1014 (majority opinion) (alteration in original) (citations omitted) (first quoting The Legal Tender Cases, 79 U.S. (12 Wall) 457 (1870); and then quoting Transp. Co. v. City of Chicago, 99 U.S. 635 (1878)).

91. *See* JOHN LEWIS, EMINENT DOMAIN § 6, at 14–15 (2d ed. 1888).

92. *Id.* at 14.

93. *Id.* (footnote omitted).

94. *Id.* at 15 (first citing Town of Lake View v. Rose Hill Cemetery Co., 70 Ill. 191 (1873); and then citing citing Commonwealth v. Bacon, 76 Ky. 210 (13 Bush) (1877)) (additional citations omitted).

hon.[95] Simply put, it is not true that *Mahon* marked the turning point in the judicial approach to regulatory takings.[96]

Justice Blackmun's analysis was also unsatisfying. While colonial practice may be more indicative of original public meaning than Justice Scalia acknowledged, he was correct that it does not conclusively establish the meaning of the Takings Clause. In particular, the original public meaning at the time of the Fourteenth Amendment—not the Fifth Amendment—should be the focus, since the case at issue involved the actions of the state of South Carolina.

Two commentators in particular have presented impressive one-step originalist approaches to the regulatory takings question.[97] Professor John F. Hart argues that colonial America did not protect property owners from regulatory takings, and therefore the original meaning of the Fifth Amendment did not protect against regulatory takings.[98] Professor Rappaport presents a more provisional claim: while the Fifth Amendment does not provide such protection, the original meaning of the Fourteenth Amendment may.[99] Professor Hart's and Professor Rappaport's arguments do not settle the issue. Accordingly, I offer a second-best originalist alternative to understanding regulatory takings in Part III.

Professor Hart argues that the original public meaning of the Takings Clause at the time of the founding did not include regulatory takings. The constitutional text does not explicitly address regulation of property, and Professor Hart claims that there is no evidence that the Founders intended the text to include regulations.[100] Therefore, the Court's doctrine of regula-

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95. Sawyer v. Commonwealth, 182 Mass. 245, 247 (1902).

96. For the major work discussing pre-*Mahon* regulatory takings thought, see Kobach, *supra* note 11.

97. For instance, see the informative roundtable discussion at the 2016 Federalist Society National Lawyers Convention, Property Rights and Environmental Law: Justice Scalia's Property Rights Jurisprudence (Nov. 19, 2016), https://youtu.be/ybSJI9bbnCs [https://perma.cc/6AUN-JH3P]. Professors John Echeverria and Ilya Somin's ideas are particularly illuminating.

98. *See* John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1253 (1996).

99. *See* Rappaport, *supra* note 9, at 732.

100. *See* Hart, *supra* note 98, at 1253. It is worth noting that Professor Hart is concerned with the intentions of the framers, not the original public meaning of the Constitution. This focus on original intent distinguishes the "Old Originalism"

tory takings is based in the constitutional text only if "land use regulation was confined to the prevention of nuisance when the Takings Clause was adopted."[101] Colonial regulation of land use was pervasive, and occurred in cases of nuisance as well as noninjurious uses. Since localities regulating land for noninjurious uses is not a recent development, it does not make sense to extend the Takings Clause to regulatory takings.[102]

Professor Hart presents a bevy of colonial land use regulations to demonstrate that colonial governments regulated private property without compensation or complaint. Massachusetts, New Netherlands, New York, and Delaware, for instance, all had colonial laws which required a property owner to improve and build upon his land, under penalty of forfeiting title.[103] Multiple colonies enacted laws requiring property owners to erect sufficient fencing around their land under penalty of a fine.[104] Some colonies required that mines not worked within a year of their discovery be appointed to other individuals who would work them productively.[105] Many colonies enacted a productivity regime under which a person could condemn land suitable for a mill or ironworks site; the landowner would lose his title to that condemned land unless he built a

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from the "New Originalism" focused on original public meaning. *See* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004).

101. Hart, *supra* note 98, at 1253. Professor Hart misses another possibility: that the Framers assumed that regulations would never arise to the level of deprivation that would require just compensation for the sake of justice.

102. *See id.*at 1258.

103. *See id.* at 1260–61. Massachusetts, for instance, had a 1634 ordinance which provided that "if any man that hath any greate quan[tity] of land graunted him, & doeth not builde upon it or im[prove] within three yeares, it shalbe []free for the Court to disp[ose] of it to whome they please." *Id.* at 1260 (alterations in original) (quoting Ordinance of Apr. 1, 1634, 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 114 (Nathaniel B. Shurtleff ed., Boston, Press of William White 1853). These regulations were independent from the grant of land the property owner received from a town or chartered company.

104. *See id.* at 1264 (footnote omitted). Professor Hart notes that the stated rationale for this law was not nuisance, but rather "the prosperity of the community." *Id.* (quoting Ordinance of Feb. 23, 1656, LAWS AND ORDINANCES OF NEW NETHERLAND, 1636–1674, at 218, 218 (E.B. O'Callaghan trans., Albany, N.Y., Weed, Parsons & Co. 1868)).

105. *See id.* at 1265 (citing Act of Mar. 2, 1640, 11 RECORDS OF THE COLONY OF NEW PLYMOUTH IN NEW ENGLAND 37, 37 (photo. reprint 1968) (David Pulsifer ed., Boston, Press of William White 1861)).

mill or ironworks on the land within a specified time.[106] Statutes required landowners to build dams at their own expense to alleviate flooding of neighboring meadows,[107] restricted the ability of landowners to exclude hunters and fishermen,[108] limited how far from a town meetinghouse a person could erect a dwelling,[109] and permitted cities to regulate the aesthetics of buildings.[110] Such regulations deprived property owners of various sticks in the bundle of rights, for non-injurious uses, without providing just compensation. While some of Professor Hart's examples (such as the upstream-dam requirement) seem to border on the nuisance understanding Justice Scalia presented in *Lucas*, other laws, such as New York's aesthetic restrictions, are examples of colonial-era regulations enacted without reference to the private law of nuisance.[111]

Professor Hart's argument, while helpful for its historical research, does not conclusively answer the question whether the original public meaning of the Takings Clause excluded regulatory takings. First, simply because an affirmative individual right (to receive just compensation for deprivations of use or enjoyment) did not exist does not mean that the original public meaning denied that right. The issue may not have been contested or considered. Second, it is possible that the scarce frequency of such regulations meant they were not a serious mat-

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106. *See id.* at 1267 (citing Act of May 8, 1669, 2 ARCHIVES OF MARYLAND 211, 211–12 (William H. Browne ed., Baltimore, Md. Hist. Soc'y 1884)).

107. *See id.* at 1268 (citing Act of Feb. 10, 1710[–11], 5 LAWS OF THE ROYAL COLONY OF NEW JERSEY 353, 353 (Bernard Bush ed., 1986).

108. *See id.* at 1272 (citing Act of Nov. 15, 1636, 11 RECORDS OF THE COLONY OF NEW PLYMOUTH IN NEW ENGLAND 6, 16 (photo. reprt. 1968) (David Pulsifer ed., Boston, Press of William White,1861)).

109. *See id.* at 1273 (citing Act of Sept. 2, 1635, 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 156, 157 (Nathaniel B. Shurtleff ed., Boston, Press of William White 1853)).

110. *See id.* at 1276 ("The New York Assembly later authorized the city of New York to make 'rules and orders for the better regulation[,] uniformity[,] and gracefulnesse of such new buildings as shall be Erected for habitations.'" (alteration in original) (emphasis omitted) (quoting Act of Oct. 1, 1691, ch. 18, 1 THE COLONIAL LAWS OF NEW YORK 269, 269 (Albany, N.Y., James B. Lyon 1896)).

111. It is also worth noting, as Justice Scalia did in *Lucas v. S.C. Coastal Council*, that at the enactment of the Bill of Rights, states also directly appropriated physical property without compensation. 505 U.S. at 1028 n.15. This is not surprising: only one of the original thirteen colonies had a "just compensation" clause in its state constitution. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 79 (1998).

ter of concern to the public or the legal community. A minor inconvenience may have not been worth fighting; perhaps the colonists had a right, but choose not to exercise the right. Third, judicial review was still evolving during the colonial era. Perhaps the colonists (rightfully) believed that their rights were being violated, but had no judicial remedy against this violation. Fourth, the Takings Clause was incorporated against the states through the Fourteenth Amendment. If one believes that the "Privileges or Immunities" provision of the Fourteenth Amendment was the vehicle by which the Bill of Rights was incorporated, the relevant public meaning of the Takings Clause would not be its meaning in 1791, but in 1868. Those objections notwithstanding, Professor Hart convincingly establishes that at the ratification of the Fifth Amendment, the original public meaning did not affirmatively protect against regulatory takings.

Professor Rappaport pursues the "Privileges or Immunities" objection to "identify the path"[112] for originalists to determine whether the original public meaning of the incorporated Takings Clause protects against regulatory takings. Professor Rappaport, for the most part, accepts that contemporary evidence of the Founding establishes that the Fifth Amendment was limited to physical takings.[113] Nonetheless, he argues that the Takings Clause incorporated through the Fourteenth Amendment may differ, such that regulatory takings could be protected against in the original meaning of that amendment.[114] This approach applies Professor Akhil Amar's interpretation of the Bill

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112. *See* Rappaport, *supra* note 9, at 758. Professor Rappaport notes that he has not done sufficient research to determine whether this argument is the best understanding of the incorporated Takings Clause; he merely "identif[ies] the path." *Id.*

113. *See id.* at 733.

114. *See id.* at 731. Interestingly, Rappaport rejects Professor Richard Epstein's originalist argument that the Takings Clause *did* protect against regulatory takings as a Balkin-esque "Living Constitutionalism." *See id.* at 737–40 (first citing EPSTEIN, *supra* note 11, at ix, 230–31; and then citing Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 101, 298–99 (2007)). Rappaport argues that "[i]t is too politically convenient to assume [the Founders] were confused" in their categories, and claims that the Framers made a conscious choice in tolerating regulatory takings without compensation and enacting a constitution that did not protect against them. *Id.* at 739.

of Rights and Fourteenth Amendment[115] to the Takings Clause. According to Professor Amar, the Bill of Rights was concerned with limiting federal power *vis-à-vis* the states while the Fourteenth Amendment was concerned with protecting individuals from the states.[116] It was "only after the Fourteenth Amendment [that] Madison's vision of strong national protection of minorities against majoritarian oppression [became] the dominant strand of American constitutionalism."[117] Accordingly, while in "1789, Madison cleverly packaged the [just compensation] clause and thus slipped it past a Congress that was considerably less libertarian than he; . . . in 1866 the dominant mood of Congress had become far more sensitive to individual rights."[118]

If one believes the Bill of Rights was incorporated through the Privileges or Immunities Clause, then the relevant original public meaning of the term "takings" is the meaning in 1866. The enactors of the Fourteenth Amendment were concerned with broadly protecting individual property rights from oppressive action by states (which had a long tradition of property regulation).[119] The intent and purpose of the Fourteenth Amendment was likely to provide more expansive protections to property owners.[120] State constitutions and courts in the mid-

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115. *See* AMAR, *supra* note 111. Amar approaches the incorporation of rights through the Fourteenth Amendment's Privileges or Immunities Clause.

116. *See* Rappaport, *supra* note 9, at 745 (citing AMAR, *supra* note 111, at 78).

117. AMAR, *supra* note 111, at 79 n.*. For instance, Professor Amar notes, only one of the original thirteen colonies (Massachusetts) had a just-compensation clause in its state constitution in 1789. *Id.* at 79.

118. *Id.* at 268.

119. *See* Rappaport, *supra* note 9, at 750–53 (discussing the Fourteenth Amendment's structure, purpose, and legislative history).

120. *See id.* at 753–57. Professor Rappaport quotes Professor Amar for the proposition that "[d]octrinally, virtually all mid-nineteenth-century jurists deemed just compensation a fundamental principle of justice." *Id.* at 754 (quoting AMAR, *supra* note 111 at 268–69); *see, e.g.*, Bradshaw v. Rogers, 20 Johns. 103, 106 (N.Y. Sup. Ct. 1822) (finding that the just compensation clause was "declaratory of a great and fundamental principle of government; and any law violating that principle must be a nullity, as it is against natural right and justice"). For a list and discussion of this case and others, see AMAR, *supra* note 111, at 149–50 (collecting cases). *See also* 1 ISAAC F. REDFIELD, A PRACTICAL TREATISE UPON THE LAW OF RAILWAYS § 63, at 231 (3d ed.1869) ("The duty to make compensation for property, taken for public use, is regarded, by the most enlightened jurists, as founded in the fundamental principles of natural right and justice, and as lying at the basis of all wise and just government, independent of all written constitutions or positive law." (footnote omitted)).

nineteenth century were more concerned generally with just compensation for takings than were founding era constitutions and courts. For instance, many state courts imposed a just compensation requirement on state governments even in the absence of explicit statutory or constitutional language to that effect.[121] Some state courts protected against regulatory and consequential takings.[122] Professor Rappaport documents various instances of state courts compensating regulatory and consequential takings, such as interferences with the usage rights of riparian property owners,[123] denials of access to land,[124] and required expenditures by property owners.[125] Since the purposes and structure of the Fourteenth Amendment differed from the Bill of Rights, and the legal landscape at the time of the Fourteenth Amendment's enactment included the idea of regulatory takings in some states, Professor Rappaport concludes that an originalist case for regulatory takings protections may exist under the Fourteenth Amendment.

His argument is only a proposed framework for further investigation, however, since "it is not clear how widespread this expanded view of takings was."[126] One would need to establish whether the state rule protecting against regulatory takings was the more common rule and whether states where the rule was not in effect explicitly rejected it.[127] Further, one must determine whether those ratifying the Fourteenth Amendment understood the incorporated Takings Clause to adopt the mi-

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121. *See, e.g.*, Crenshaw v. Slate River Co., 27 Va. 245, 264–65 (1828) (requiring just compensation in absence of explicit constitutional language because the principle of "fair compensation" is "laid down by the writers on Natural Law, Civil Law, Common Law, and the Law of every civilized country"); Gardner v. Tr. of Newburgh, 2 Johns. Ch. 162, 168 (N.Y. Ch. 1816) (requiring just compensation of a statute in the absence of statutory or constitutional language because "a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property").

122. Professor Rappaport distinguishes regulatory takings, where the government does not take title or possess the land, but regulates the use of it, from consequential takings, which he defines as "takings [that] involve government action that does not actually possess the owner's property, but prevents him from enjoying the use of his property." *Supra* note 9, at 733.

123. *Id.* at 754 (citing *Gardner*, 2 Johns. Ch. at 162).

124. *Id.* at 755 (citing Fletcher v. Auburn & Syracuse R.R. Co., 25 Wend. 462, 462 (N.Y. Sup. Ct. 1841)).

125. *Id.* (citing Commonwealth v. Coombs, 2 Mass. (2 Tyng) 489, 489 (1807)).

126. *Id.* at 756.

127. *See id.* at 756–57.

nority rule, the majority rule, or did not consider the question at all.[128]

While Professor Hart's argument is the more exhaustively researched, Professor Rappaport's reliance on the Fourteenth Amendment's ratification is more persuasive.[129] Both Hart and Rappaport's approaches satisfy the "separation of powers" principle by limiting judicial policy preferences. Both objectively ground the judge's interpretation in a particular time and place. But only Professor Rappaport's approach satisfies the "democratic legitimacy" principle of originalism. First, it is unclear that regulatory takings were contested or relied upon at the ratification of the Fifth Amendment. Second, understanding incorporation through the Privileges or Immunities Clause is a more satisfying approach to discerning the original public meaning of the Takings Clause. The Fourteenth Amendment should be enforced as the ratifiers of the Fourteenth Amendment understood it. This is all the more true for the incorporated Takings Clause, since contemporary takings cases almost always involve state government action being challenged.

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128. *See id*. at 757.

129. I have not, and could not have, included all originalist approaches to regulatory takings. I consider others less persuasive than Professor Hart's and Professor Rappaport's.

Professor Richard Epstein presents a one-step originalist approach to the Takings Clause. His argument in a nutshell runs: since the Founders were Lockean, and Locke would protect against regulatory takings, the original meaning of the Takings Clause protects against regulatory takings. *See* EPSTEIN, *supra* note 11, at ix, 230–31. It is unobjectionable to analyze the Founders' thought through a Lockean lens, but the analysis should not end there. While Locke was an important influence on the Founders' political philosophy, *see, e.g.*, Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 MO. L. REV. 525 (2007), he was not the only influence, and the Fifth Amendment did not enact his *Second Treatise*.

William Treanor puts forth a dictionary based understanding of the Clause. *See* William Michael Treanor, *Take-ings*, 45 SAN DIEGO L. REV. 633 (2008). Dean Treanor analyzes twenty-first century dictionaries and then eighteenth century dictionaries to argue that "take" involves a physical object. But Professor Rappaport's counterexamples, including that I can "take your time," *see supra* note 105, at 741, or that *The Federalist* papers refer to "rights which have been taken away," *see supra* note 105, at 743 (quoting THE FEDERALIST No. 54, at 266 (James Madison) (Terence Ball ed., 2003)), reveal the shortcomings of the dictionary approach. Professor Epstein's and Dean Treanor's approaches lack nuance and smack of the primary danger originalism was meant to avoid: "[T]he main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law." Scalia, *supra* note 37, at 863.

Neither side has conclusively settled the originalist regulatory takings debate. Justice Scalia claimed in his scholarly writings that "for the vast majority of questions the [correct historical] answer is clear."[130] Unfortunately, regulatory takings may be one of the outliers. It is plausible that a Fourteenth Amendment approach to the original public meaning could conclusively establish whether or not the Takings Clause protected against regulatory takings. But it is also possible that the issue was not contested and not relied upon at the framing of that amendment. If that were the case, whence an originalist? In the next section, I will apply a second-best originalism to the doctrine of regulatory takings, based on, but adding to Professor Barnett and Bernick's "good faith" approach.

III. SECOND-BEST ORIGINALISM AND REGULATORY TAKINGS

Let us assume that an Amarian approach does not provide a satisfying one-step originalist answer to the issues before the Court in regulatory takings cases. When a state forbids building a permanent habitable structure on beachfront property,[131] prohibits construction on a campground after its buildings were destroyed in a flood,[132] or conditions approval of a hardware store building permit on the dedication of a greenway space for the public,[133] how are we to understanding the original public meaning of "nor shall private property be taken for public use, without just compensation?" Following Professor Barnett and Bernick, the justification must accord with the text and spirit of the Takings Clause. Per my addendum, it would be better to use the legal background as a proxy for the "spirit" of the provision. Looking to the background of nuisance and eminent domain law against which the Takings Clause was passed, one can see a complex structural back and forth between the legislative and judicial branches. While the legisla-

130. Scalia, *supra* note 37, at 863 (using the death penalty as not cruel and unusual as an example). Given the general consensus that the Founding-era colonies did not protect against regulatory takings, this is likely not the kind of "refined question[] of original intent" with "precise content" that historians struggle to answer. *See id*. The question as applied to the Fourteenth Amendment is murkier.

131. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1008 (1992).

132. *See* First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles, 482 U.S. 304, 308 (1987).

133. *See* Dolan v. City of Tigard, 512 U.S. 374, 412 (1994).

ture had broad discretion in determining the necessity of a taking, its decision could not be arbitrary, and the courts vigorously enforced the procedures for takings.

Eminent domain treatises contemporaneous to the enactment of the Fourteenth Amendment provide a helpful framework for regulatory takings questions. Every property owner was bound by the duty "to use and enjoy his own [property] as not to interfere with the general welfare of the community in which he lives."[134] Where a government limited use and enjoyment of property by enforcing this duty through the police power, the property owner was without remedy.[135] Accordingly, a judge faced with a regulatory takings question should begin by determining if the property owner is committing a nuisance or injurious use. If she is, the police power can be applied to restrain the noxious or injurious use without compensation.[136] These regulations on use can pertain to seemingly innocent activity, such as a property owner denied the ability to remove gravel from his own land because it endangered the public safety of a harbor.[137] Nonetheless, whether "certain property, or the use of it, constitutes a nuisance, *cannot arbitrarily be determined by the legislative branch* of the government, unless the property in fact has that character."[138] Second, the judge must determine whether the government action is for the public use.[139] If the judge determines the action is for the public use, whether the taking is "necessary" is a strictly political determi-

134. LEWIS, *supra* note 91, § 6, at 14 (footnote omitted); *see also* HENRY E. MILLS, A TREATISE UPON THE LAW OF EMINENT DOMAIN § 7, at 7 (1879) ("The owner of property may be restrained from a noxious use of his property, and such a restraint is not a taking of the property.").

135. *See* LEWIS, *supra* note 91, § 6, at 14.

136. *See* LEWIS, *supra* note 91, § 6, at 14 (noting that every property owner is "bound so to use and enjoy his own [property] so as not to interfere with the general welfare of the community in which he lives" and that the enforcement of that duty pertains to "the police power of the State"); MILLS, *supra* note 134, § 7, at 7.

137. MILLS, *supra* note 134, § 7, at 8 (citing Commonwealth v. Tewksbury, 52 Mass. (11 Met.) 55 (1846)).

138. *Id.* § 6, at 6 (emphasis added).

139. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 528 (1868); MILLS, *supra* note 134, § 10, at 12 ("The attempt of the legislature to determine the public character of the use does not settle that it has the right to do so, but the existence of the public use in any class of cases is a question to be determined by the courts." (footnote omitted)).

nation with no judicial input.[140] Third, the judge should determine if the rights at issue are the type for which the State is "not so much the owner as the governing and supervisory trustee."[141] These "rights of a public nature" include public rights such as the right to use navigable waters and the right to fish in public waters.[142] They are an exception to the general rule that when the state appropriates or controls individual property for the public benefit compensation is required.[143]

This framework can serve as the proxy "spirit" of the Takings Clause, with which a judge's decision must accord. This proxy framework recognizes that the "spirit" of the incorporated Takings Clause was not a single statement, but a combination of designs and a compromise of principles. The legal background against which the Fourteenth Amendment was passed structured the relations between the legislative and judicial branches. Whether a nuisance existed[144] or whether the state action was for "public use" was subject to judicial determination, albeit under a deferential standard.[145] Whether the use was "necessary" for the public benefit was strictly determined by the legislature, as was the extent that was necessary to control or appropriate.[146] Yet once that necessity was specified, courts would vigorously ensure that the government action did not exceed its asserted necessity.[147] Similarly, once the state promulgated its procedures, the courts enforced "strict compliance with all the provisions of the law which are made for [the property owner's] protection and benefit."[148] The "spirit" may be better described in structural and procedural terms than substantive ones: the legislature has latitude, but the court enforces limits.

The structural interactions that serve as the proxy "spirit" of the Takings Clause can be described more plainly: the government may not take shortcuts. As Sir Edward Coke quipped,

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140. *See* COOLEY, *supra* note 139, at 538.
141. *Id.* at 523.
142. *Id.* at 524.
143. *See id.*
144. *See* MILLS, *supra* note 134, § 6, at 6.
145. *See id.* § 10, at 12.
146. *See id.* § 11 at 13; COOLEY at 538.
147. *See* COOLEY at 540.
148. *Id.* at 528.

"when something is prohibited, everything that leads to the same result is prohibited."[149] This is often expressed in the maxim, "what may not be done directly may not be done indirectly." This principle was broadly accepted as a principle of common and constitutional law and was ubiquitous at the ratification of the Fourteenth Amendment. Blackstone relied on the principle in his *Commentaries*.[150] State court advocates[151] and judges[152] relied on this principle in almost every state at the time of the ratification of the Fourteenth Amendment. The United States Supreme Court relied on the maxim, as did the advocate before the Court, in a case decided on December 1, 1866.[153] When that decision was handed down, six states had ratified the Fourteenth Amendment. Twenty-eight states would ratify the amendment before Congress passed a resolution declaring it to be part of the Constitution on July 21, 1868.[154]

Analyzing *Mahon*, so far as the majority and dissent disagreed about whether or not the subsidence constituted a nuisance or an endangerment of the public safety, both were true

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149. 3 EDWARD COKE, THE INSTITUTES OF THE LAWES OF ENGLAND 158 (1642) ("[Q]uando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud.").

150. *See* 4 BLACKSTONE, *supra* note 31, at *221 (quoting Coke).

151. *See, e.g.*, Ex parte Greene, 29 Ala. 52, 54 (Ala. 1856) (Attorney General of Alabama arguing that sovereign immunity immunizes officers acting in official capacity from suit because to hold otherwise "would be to allow that to be done indirectly which cannot be done directly").

152. *See, e.g.*, Vinnedge v. Shaffer, 35 Ind. 341, 343 (Ind. 1871) (holding that statute which prohibited married women from alienating real property included mortgages because "what cannot be done directly cannot be done indirectly"); Packard v. City of Lewiston, 55 Me. 456, 459 (Me. 1867) (invalidating portion of state statute at conflict with national statute because it was "clearly an attempt to do indirectly what cannot be done directly"); Washington v. State, 13 Ark. 752, 753 (Ark. 1853) (invalidating portion of statute prohibiting persons from setting up billiards tables without paying for a license since "there is no power to do that indirectly which cannot be done directly").

153. *See* Cummings v. Mo., 71 U.S. 277 (1866) (invalidating state and federal law requiring individuals in certain professions to swear an oath that they never gave aid to the rebellion as an ex post facto law and bill of attainder). The petitioner's advocate relied upon Coke's *Institutes*. *See id.* at 288 (quoting COKE, *supra* note 149). The Court agreed. *Id.* at 325 ("The legal result must be the same, for what cannot be done directly cannot be done indirectly.").

154. CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 108-17, at 31 (Johnny H. Killian et al. eds., Supp. 2004).

to the proxy "spirit" of the Takings Clause. If it were a nuisance, the public use analysis would be superfluous, since as Justice Holmes noted, "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use."[155] Had Justice Brandeis limited his disagreement to the nuisance issue, his opinion would have accorded with the Takings Clause's letter and spirit. Unfortunately, he went further, asserting that "a restriction imposed through exercise of the police power [is not] inappropriate as a means, merely because the same end might be effected through exercise of the power of eminent domain, or otherwise at public expense."[156] This conflation of the police power and eminent domain power is against the "spirit" of the Takings Clause. It is telling that his assertion of this principle relied only on two twentieth-century cases.[157] The meaning of the takings power in 1866 strictly distinguished the police power—directed at injurious use and done without compensation—from the public use eminent domain power, strictly requiring compensation. To ignore that distinction is to deviate from the "spirit" of the Takings Clause.

In *Nollan*, the majority stayed true to the proxy "spirit" of the public use-injurious use distinction, while Justice Brennan's dissent strayed far afield. The regulatory conditions doctrine relied on the fact that "[h]ad California simply required the Nollans to make an easement across their beachfront . . . rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking."[158] Justice Brennan's dissent seemed to invoke the spirit of the clause, stating that the state's "action implicate[d] none of the concerns underlying the Takings Clause."[159] Yet when he analyzed these underlying concerns, he shifted to "concerns that underlie our takings *jurisprudence*" and focused solely on

155. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Justice Holmes anticipated the all-encompassing statist approach taken by Justice Brennan in *Nollan*, warning that "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Id.*

156. *Id.* at 418 (Brandeis, J., dissenting).

157. *See id.* (first citing Laurel Hill Cemetery v. City of San Francisco, 216 U.S. 358 (1910); and then citing Mo. Pac. Ry. Co. v. City of Omaha, 235 U.S. 121 (1914)).

158. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987).

159. *Id.* at 842 (Brennan, J., dissenting).

twentieth-century cases.[160] Justice Brennan did not dispute that the easement was for public use. Under his analysis, if a state disregarded property rights so frequently that any property owner had a real fear of a public easement being laid through their land, no taking would occur if the government *did* create a public easement through their land.[161] This departure neglects the nuisance-public use distinction. Justice Brennan alluded to, but did not rely on, a theory that would have accorded with the clause's spirit. That plausible theory would be that the California Constitution created a right of a public nature to ocean access.[162] A reliance on oceanfront access as a right of a public nature would accord with the spirit of the Takings Clause. An analysis that allows a state to swallow all reasonable expectations to property would not.

The unusual factual background[163] of *Lucas* made a good faith analysis tougher to perform, and neither majority nor dissent hewed to the proxy "spirit." Justice Scalia's reliance on the

160. *See id.* at 853 (emphasis added) (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

161. *See id.* at 853–61 (discussing the Nollans' reasonable investment backed expectations).

162. *See id.* at 855 (quoting CAL. CONST. art. X, § 4). Justice Brennan analyzed the state provision in the context of the reasonable investment backed expectations of the property owners.

163. The South Carolina Court of Common Pleas found that the "beachfront lots [had] been rendered valueless" by the State's regulation. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1020 (1992). Justice Kennedy found this to be a "curious finding." *Id.* at 1034 (Kennedy, J., concurring) ("I share the reservations of some of my colleagues about a finding that a beachfront lot loses all value because of a development restriction." (citations omitted)). Justice Blackmun thought that "[t]his finding [was] almost certainly erroneous." *Id.* at 1044 (Blackmun, J., dissenting) ("Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. Petitioner also retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house." (citations omitted)). Justice Stevens stated that Lucas's land was "far from 'valueless.'" *Id.* at 1065 n.3 (Stevens, J., dissenting) ("Lucas may put his land to 'other uses'—fishing or camping, for example—or may sell his land to his neighbors as a buffer."). Justice Souter expressed the strongest disapproval about the finding of valuelessness. He neither concurred nor dissented from the Court's judgment, but wrote separately because "[a]fter briefing and argument it is abundantly clear that an unreviewable assumption on which this case comes to us is both questionable as a conclusion of Fifth Amendment law and sufficient to frustrate the Court's ability to render certain the legal premises on which its holding rests." *Id.* at 1076 (Souter, J., filing separate statement). Accordingly, he would have dismissed the writ of certiorari "as having been granted improvidently." *Id.*

public use-nuisance distinction[164] was true to the spirit of the takings clause. Yet his analysis strayed from the spirit by failing to recognize the broad discretion governments had to declare nuisances beyond instances of private nuisance.[165] For the reasons expressed in Part II, Justice Blackmun's opinion does not address the meaning of the incorporated Takings Clause. Insofar as one accepts the factual finding that the property was indeed worthless, it seems the approach truest to the spirit is that of Justice Scalia quoting Justice Brennan: "[T]otal deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."[166] A better approach would recognize the legislature's broad power to determine nuisance, while limiting the Court's role to determining whether the legislature acted arbitrarily.

Second-best originalist approaches do not achieve the democratic legitimacy of one-step originalism, but they come close. When performing "good faith" constitutional interpretation, a judge engages in historical investigation to determine if the original public meaning of the Takings Clause protected against regulatory takings. The judge does his best to enforce what the ratifiers voted on. Finding that the question was neither contested nor relied upon, he does his best to look to determine the "spirit" of the Takings Clause, using a proxy method designed to separate the inquiry from the judge's policy preferences. This helps avoid the "'arbitrary discretion in the

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164. *See id.* at 1029–30.

165. The legislature's nuisance declaration cannot be arbitrary. Thus, a burial ground cannot be declared a nuisance if the legislature still permits certain persons to be buried there, since such a law "plainly indicates that the burying-ground is not such a nuisance as requires abating." MILLS, *supra* note 134, § 6, at 6 (citing Austin v. Murray, 33 Mass. (16 Pick.) 121 (1834)). Yet a state can prohibit uses that would not state a claim for a private nuisance. For instance, a state can prohibit hauling gravel from a property owner's lot because such use would "endanger the safety of a harbor." *Id.* § 7, at 8 (citing Commonwealth v. Tewksbury, 52 Mass. (11 Met.) 55 (1846)). Justice Kennedy recognized that the majority opinion deviated from the proxy "spirit" by denying the legislature deference in the injurious use or nuisance determination. *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) ("I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions.").

166. *Lucas*, 505 U.S. at 1017 (citing San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting)).

courts' [that] can cast a pall of illegitimacy on the institution of which judges are a part."[167]

The second-best originalist theory I have outlined in this Note increases judicial constraint. Professor Barnett and Bernick correctly note that "[n]o theory of constitutional interpretation or construction can ensure that judges will not betray the people's trust if they are determined to do so."[168] But a second-best originalist approach that constrains its "spirit" determination is the best alternative for those judges who wish to uphold the people's trust. The historical criterion of original public meaning creates an interpretive principle separate from the policy preferences of the judge. Basing the "spirit" in neighboring doctrines also separates the spirit inquiry from the policy preferences of the judge.

This approach is not without its flaws. The theory requires additional analytic grounding. First, the theory needs an account of how to determine if a neighboring doctrine exists. Second, it must answer how to determine whether neighboring doctrines actually speak to the constitutional question before the court. Finally, like any originalist theory of interpretation, it requires an account of the extent to which *stare decisis* should tie a judge's hands.[169]

Second-best originalism does not eliminate the "discretion zone." But it does reduce it. Where judges engage in "good faith" analysis, they battle over shared disputes—in *Mahon*, whether mining the coal pillars constituted a nuisance, or in *Nollan*, whether oceanfront access was a "right of a public nature" traditionally exempted from the Takings Clause. Reducing the range of contested issues narrows the discretion zone, and reasoned debate leading to a correct historical understanding should too.

One could argue that by looking to something besides the original public meaning, it is not really originalism at all. In-

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167. Barnett & Bernick, *supra* note 10, at 12 (quoting THE FEDERALIST, *supra* note 129, NO. 78, at 383 (Alexander Hamilton)).

168. *Id.* at 29.

169. The work of Judge Amy Coney Barrett is especially insightful on this point. *See* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1922 (2017) (concluding that a survey of Justice Scalia's opinions "suggests new lines of inquiry for originalists grappling with the role of stare decisis in constitutional adjudication").

stead, it is really a smuggled form of living constitutionalism in the vein of Professor Jack Balkin's "Living Originalism" or Professor Lawrence Lessig's "Interpretation as Translation." Second-best originalism differs, however, by hoping the original public meaning investigation ends the process. Only where that does not resolve the question is second-best originalism necessary. More importantly, Professor Balkin's and Professor Lessig's theories allow changes in public values or changes in the legal landscape to justify changing the constitutional meaning.[170] Second-best originalism, by contrast, is "dead" in that the meaning would not change no matter how circumstances changed.[171]

Finally, one might ask why a new theory is needed anyway. Justice Alito presented persuasive and justifiable opinions in *Brown* and *Jones* even after disclaiming the use of an originalist approach. Here, the answer relates to long-term judicial practice. Many contemporary constitutional doctrines that are currently unhinged from the original meaning of the Constitution would have been avoided under second-best originalism. The ouroboros of the "reasonable expectation of privacy" test from *Katz v. United States*,[172] the omnipresent commerce clause jurisprudence,[173] and the economic development "public use" doctrine of *Kelo v. City of New London*[174] would all have reached a more faithful outcome had the Court looked to the original public meaning of the text and the original spirit of the provision at issue. Theories of interpretation relying only on prece-

170. For instance, under Professor Lessig's theory, the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), successfully translates the values of the Founding era into the changed context of today. At the time of the Founding, there was no professional police bureaucracy, so private citizens would carry out warrants. Since under the English common law defendants were forbidden from testifying at trial, interrogation played little role in the criminal justice process. Because the locus of investigation shifted from the judge's courtroom of the eighteenth century to the police officer's interrogation room of the twentieth century, the privilege against self-incrimination needed to shift with it. Accordingly, Professor Lessig argues, *Miranda* is necessary to translate the founding value into the modern context. *See* Lessig, *supra* note 55, 1189–1210. For further discussion of Lessig's approach, see *supra* note 55.

171. I recognize the policy benefits of both approaches, and find many of Professor Lessig's examples seductive. Still, the rule that "two wrongs don't make a right" cautions me away from consequentialist justifications in legal theory.

172. 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

173. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942).

174. 545 U.S. 469 (2005).

dent or pragmatic outcomes snowball bit by bit until the doctrine becomes incompatible with the original meaning. It is thus not surprising that the cases checking these deviations often deploy some form of originalism.[175] While second-best originalism does not provide the strong democratic legitimacy of one-step originalism, it provides a weaker form through setting long-term guardrails on where a doctrine can go.

Second-best originalism forces judges to embrace reasoning grounded in the original public meaning of the constitutional provision, including its broader constitutional and common law background. The background of eminent domain and nuisance law against which the Takings Clause was passed permits legislative discretion, but within rigorously enforced boundaries. The Court's holdings in *Mahon* and *Nollan* can be justified against this original background. The taking at issue in *Lucas* could have been, although not with the reasoning provided. Arguments rejecting regulatory takings too often combine the police power and eminent domain powers into a Frankenstein's monster unmoored from the original background of the Fourteenth Amendment.

IV. CONCLUSION

Justice Thomas's *Murr* dissent is sure to reinvigorate the scholarly debate over the Supreme Court's regulatory takings jurisprudence.[176] This Note is the first post-*Murr* attempt to give that jurisprudence a "fresh look."[177] Yet regulatory takings

175. *See, e.g.*, United States v. Jones, 565 U.S. 400, 404–05 (2012) (citing Entick v. Carrington (1765) 95 Eng. Rep. 807 (KB)) (using a form of second-best originalism similar to that advocated in this Note to find that a physical trespass plus monitoring of the device constituted a search under the Fourth Amendment); NFIB v. Sebelius, 567 U.S. 519, 554 (2012) (Roberts, C.J.) (citing THE FEDERALIST, *supra* note 129, NO. 45 (James Madison)) (using an intentionalist form of second-best originalism to find that the text and spirit of the Commerce Clause permit Congress to regulate, but not compel, commerce since the government's argument was "not the country the Framers of our Constitution envisioned"); Free Enter. Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 501 (2010) (using a loose form of second-best originalism to find that the text and spirit of the Constitution created "a structure in which '[a] dependence on the people' would be the 'primary controul on the government,'" such that two steps of agency for-cause protection violated the Constitution's separation of powers (quoting THE FEDERALIST, *supra* note 129, NO. 51, at 252 (James Madison))).

176. Murr v. Wisconsin, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting).

177. *See id.*

represent a hard case for originalists. There is no regulatory takings protection under the original public meaning of the Fifth Amendment, while the text of the Fourteenth Amendment's Privileges or Immunities Clause is underdetermined with regard to the constitutional question. Accordingly, an originalist must apply an interpretive theory for when the text runs out, an activity I call "second-best originalism." One recent theory of second-best originalism, the "Letter and the Spirit" approach advocated by Professor Barnett and Bernick,[178] presents a promising methodology. Unfortunately, the "spirit" determination Professor Barnett and Bernick put forth can end up being a judge's freewheeling guess. This Note presents an addendum to Professor Barnett and Bernick's approach that will increase judicial constraint within the "spirit" prong. An originalist judge should look to the doctrines in horizontal proximity to the constitutional question. For takings law, that means looking to the doctrines of nuisance and eminent domain.

Treatises and cases contemporaneous with the enactment of the Fourteenth Amendment reveal a structural relationship between the legislative and judicial branches that can serve as a proxy for the "spirit" of the incorporated Takings Clause. A property owner can be deprived, without compensation, of use that constitutes a nuisance or injurious use. Activities that are innocent in one context may be injurious in another, but a court will review the injurious determination to ensure the property in fact has that character. Second, the court must determine whether the government action is for the public use. Finally, the legislature has the authority to appropriate, restrain, or control "rights of a public nature" without compensation. These rights include public rights such as the right to use navigable waters or the right to fish in public waters.

This framework may result in less constitutional protection for property rights and a revision of the Supreme Court's regulatory takings doctrine. For those interested in implementing the Constitution as it was originally understood, those consequences are beside the point. What matters is that this approach to regulatory takings is "grounded in the original public meaning of . . . the Privileges or Immunities Clause of the

178. *See* Barnett & Bernick, *supra* note 10.

Fourteenth Amendment."[179] If the Court desires to bring its doctrine into accord with that meaning, its regulatory takings precedents would be a good place to start.

John Greil

179. Murr, 137 S. Ct. at 1957 (Thomas, J., dissenting).

RETROACTIVITY AND RESTRAINT: AN ANGLO-AMERICAN COMPARISON

INTRODUCTION

In American law, the mandatory retroactivity of common law decisionmaking is an unfashionable idea. Under the traditional understanding, said by Justice Oliver Wendell Holmes to have prevailed "for near a thousand years,"[1] a judicial decision must be treated as stating what the law was, as well as what it is. In the modern era, this concept strikes many judges as absurd mythmaking—or, as California Supreme Court Chief Justice Roger Traynor called it, "moonspinning."[2] Chief Justice Traynor believed that mandatory retroactivity was an artifact of the now-discredited declaratory theory of the common law: "For all too many generations we justified mechanical retroactivity by the prim lore descended to us through Blackstone that judges do no more than discover the law that marvelously has always existed, awaiting only the judicial pen that would find the right words for all to heed."[3]

Chief Justice Traynor was, of course, not wrong to connect the origins of mandatory retroactivity with the Blackstonian theory of law. In the eighteenth century, William Blackstone had famously declared judges to be "the living oracles" of the common law.[4] In his classical formulation, a judge was "sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound an old one."[5] And when former decisions were found wanting? "It is declared, not that such sentence was *bad law*, but that it was *not law* . . . ."[6]

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1. Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting).

2. Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533, 535 (1977).

3. *Id.*

4. 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

5. *Id.*

6. *Id.* at *70. Although the declaratory theory is most often associated with Blackstone, Matthew Hale actually articulated the idea a century earlier:

> [English courts cannot] make a law, properly so called, for that only the king and parliament can do; yet they have a great weight and authority in expounding, declaring and publishing what the law in this kingdom is,

If the declaratory theory of the common law was ever truly believed in, it is no longer.[7] In the exercise of their common law powers, judges are recognized to be making the law, not finding it.[8] After the general dawning of this realization, it was only natural that the mandatory retroactivity of judicial decisionmaking would come into doubt. With the rise of Legal Realism, which questioned the internal coherence of the law more broadly,[9] jurists began to view common law judging as flatly analogous to the work of a legislature.[10] Legislatures could decide whether new rules would operate retroactively or prospectively, based on pragmatic concerns to be weighed by the lawmakers.[11] If judges were going to strip off the old Blackstonian mythology, it followed that they should embrace the set of tools that comported realistically with their position.[12] This tool set came to consist of three techniques: traditional retroactive decisionmaking, purely prospective decisionmaking, and selec-

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> especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times. And though such decisions are less than a law, yet they are greater evidence thereof than the opinion of any private persons, as such, whatsoever.

1 MATTHEW HALE, HISTORY OF THE COMMON LAW 141 (5th ed. 1794).

7. Albert W. Alschuler notes that Blackstone's own account of the declaratory process is delivered with a "wink and a nod." Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 37 (1996). Alschuler also points out that St. George Tucker, author of the classic early American edition of Blackstone's *Commentaries*, saw Blackstone's account of the common law as providing a baseline for America that ought to be modified through time. *See id.* at 12–14. This perspective refutes the idea that pre-Realist legal thought was in thrall to the declaratory myth. Justice Scalia made a similar point about the jurisprudential philosophy of the Founders: "I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law." James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment).

8. *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1759 (1991) ("It would be only a slight exaggeration to say that there are no more Blackstonians.").

9. *See, e.g.*, JEROME FRANK, LAW & THE MODERN MIND 12 (Peter Smith 1970) (1930).

10. *See, e.g.*, Beryl Harold Levy, *Realist Jurisprudence and Prospective Overruling* 109 U. PA. L. REV. 1, 3–4, 16 (1960).

11. *See* Mackey v. United States, 401 U.S. 667, 677 (1969) (Harlan, J., concurring in the judgment).

12. *See* Levy, *supra* note 10, at 16 ("A judge who has fully liberated himself from the outmoded legal *Waltanschauung* of two centuries ago will have no trouble hailing the device as a sensible and simple way to cut a Gordian knot. Contrariwise, the more courts begin to utilize prospective overruling the more it will become obvious that the judge is in fact inescapably a judicial legislator.").

tively prospective decisionmaking. A purely prospective decision would apply the new rule only to cases arising from events after the decision, and not to the case at hand.[13] A selectively prospective decision would apply the new rule to the case before the court and future cases, but not to any other cases arising from events before the decision.[14] Prospectivity would make the judicial craft more flexible by allowing judges to overrule old laws that had generated substantial reliance interests, such as in property, contract, and tax cases, without upsetting those expectations.[15]

In light of the abandonment of the declaratory theory, these innovations were widely viewed as prudent and realistic.[16] Over time, however, prospective decisionmaking fell into disfavor at the federal level. In the 1993 case of *Harper v. Virginia Department of Taxation*,[17] the Supreme Court prohibited the use of selective prospectivity by courts adjudicating federal law as announced and applied by the Court.[18] The Court found that the prospective application of new rules of law was contrary to the judicial function and inherently inequitable.[19] Yet the decision did not extend to state courts' interpretations of state law,[20] and state courts have mostly continued their use of prospective decisionmaking since then.[21] Because state courts, unlike federal courts, are uniquely charged with developing the common law,[22] and because the common law is now universally acknowledged to be judge-made, few state courts in the af-

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13. *See* Eva Steiner, *Judicial Rulings with Prospective Effect—from Comparison to Systematisation*, *in* COMPARING THE PROSPECTIVE EFFECT OF JUDICIAL RULINGS ACROSS JURISDICTIONS 1, 6 (Eva Steiner ed., 2015).

14. *See id.* at 7–8.

15. *See* P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 146 (1987).

16. *See, e.g.*, Levy, *supra* note 10, at 1 (favorably describing prospective overruling as a "technique[] of judicial lawmaking").

17. 509 U.S. 86 (1993).

18. *See id.* at 97. The Court expressly prohibited selective prospectivity in civil cases and suggested, though it did not hold, that pure prospectivity might also be forbidden.

19. *See id.*

20. *See id.* at 100.

21. *See* Richard S. Kay, *Retroactivity and Prospectivity of Judgments in American Law*, *in* COMPARING THE PROSPECTIVE EFFECT OF JUDICIAL RULINGS ACROSS JURISDICTIONS, *supra* note 13, at 209, 223.

22. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

termath of *Harper* seriously questioned their use of prospectivity.[23] How, for a modern common law court, could it be otherwise?

For our closest common law ancestor, it is otherwise. An English court has never decided a case prospectively.[24] This difference is arresting, because the English and American legal systems share deep similarities. English and American courts both decide common law cases. English judges, like their American counterparts, reject the declaratory theory.[25] Like American courts, English courts actively, knowingly, and sometimes drastically change the common law.[26] Yet English legal culture has resisted the idea that judges can both change the law *and* decide when that change will come into effect.[27] In 1999, Lord Goff of the House of Lords stated that prospective overruling "has no place in our legal system," because it necessarily entails the unequal application of the law.[28] In the 2005 case of *In re Spectrum Plus Ltd.*,[29] the House of Lords declared for the first time that a new rule could be applied prospectively, but only in "a wholly exceptional case"—which the matter

23. *See* Kay, *supra* note 21 at, 223.

24. *See* Niamh Connolly, *The Prospective and Retroactive Effect of Judicial Decisions in Ireland*, *in* COMPARING THE PROSPECTIVE EFFECT OF JUDICIAL RULINGS ACROSS JURISDICTIONS, *supra* note 13, at 27, 48.

25. *See, e.g.*, *In re* Spectrum Plus Ltd. [2005] UKHL 41, [34], [2005] 2 AC 680 (HL) 698 (Lord Nicholls of Birkenhead) (appeal taken from Eng.) ("[In cases where an overruling decision represents a response to social changes], on any view, the declaratory theory is inapt. In this context the declaratory theory has long been discarded. It is at odds with reality."); Kleinwort Benson Ltd. v. Lincoln City Council [1999] 2 AC 349 (HL) 378 (Lord Goff of Chieveley) (appeal taken from Eng.) ("The historical theory of judicial decision, though it may in the past have served its purpose, was indeed a fiction."); Lord Mackay of Clashfern, *Can Judges Change the Law?*, 73 PROC. BRIT. ACAD. 285, 287 (1987) ("[F]ew contemporary observers would support the theory that judges merely declare the law that is."); Lord Reid, *The Judge as Law Maker*, 12 J. SOC'Y PUB. TCHRS. L. (N.S.) 22, 22 (1972) ("There was a time when it was thought almost indecent to suggest that judges make law—they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendor and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the pass word and the wrong door opens. But we do not believe in fairy tales any more.").

26. *See* RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 32 (4th ed. 1991).

27. *See* ATIYAH & SUMMERS, *supra* note 15, at 147.

28. *Kleinwort Benson*, [1999] 2 AC at 379 (Lord Goff).

29. [2005] UKHL 41, [2005] 2 AC 680 (HL) (appeal taken from Eng.).

before it was not.[30] Since then, no English court has found it appropriate to decide a case prospectively.[31]

Thus, the English approach to mandatory retroactivity differs sharply from that of American state supreme courts, even though both are similarly situated as expositors of the common law. But the English perspective closely tracks the two rationales offered by the Supreme Court in *Harper* for mandating the retroactive application of federal law—the nature of the judicial function and the need to ensure the equitable treatment of litigants. The practice of English courts demonstrates that state courts can embrace *Harper*'s reasoning and significantly limit their use of prospectivity without abandoning their responsibility for developing the common law or indulging in Blackstonian "moonspinning."

I. PROSPECTIVE DECISIONMAKING IN AMERICA

A. Federal Law

The history of prospective decisionmaking at the federal level traces a distinctive arc: the practice found acceptance in the 1930s, escalated in the 1960s, fell into disfavor in the 1980s, and was strictly curtailed in the 1990s. Although courts very occasionally accepted or used prospective decisionmaking in the nineteenth century,[32] the common use of prospectivity in America only began in the early twentieth century. In the 1932 case of *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*,[33] the Supreme Court held that the federal Constitution does not prohibit prospective decisionmaking by state courts.[34] Earlier that year, the Montana Supreme Court ruled that a previous case regarding railway tariffs was wrongly decided.[35] Nevertheless, the court held that the previous rule was good

30. *Id.* at [74], [2005] 2 AC at 710 (Lord Hope of Craighead).

31. *See* Connolly, *supra* note 24, at 48.

32. *See* Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863) (holding that an Iowa Supreme Court decision retroactively invalidating previously lawful contracts was an unconstitutional impairment); Bingham v. Miller, 17 Ohio 445 (1848) (invalidating a legislative divorce as a violation of the Ohio Constitution but recognizing the divorce to decide the current case).

33. 287 U.S. 358 (1932).

34. *Id.* at 364.

35. Sunburst Oil & Ref. Co. v. Great N. Ry. Co., 7 P.2d 927, 929 (Mont. 1932), *aff'd*, 287 U.S. 358 (1932).

law for all those who had acted on it before the 1932 decision.[36] Going forward, it would no longer be law.[37] In short, the Montana Supreme Court overruled itself purely prospectively.

The U.S. Supreme Court affirmed. The Court, per Justice Cardozo, held that "the federal constitution has no voice" on prospectivity, and that states have the option to decide cases prospectively or retroactively.[38] The Court found that the Due Process Clause of the Fourteenth Amendment does not force a particular "juristic philosophy"[39] of the common law on the states;[40] they may choose for themselves "between the principle of forward operation and that of backward relation."[41] Thus prospective decisionmaking—which came to be known as "sunbursting"[42]—received the imprimatur of the Supreme Court.

Karl Llewellyn, an advocate of prospectivity as a tool of judicial craftsmanship,[43] later stated that "I do not think many opinions gave [Cardozo] greater pleasure" than *Sunburst Oil*.[44] Prospectivity had long been a subject of interest to Justice Cardozo. He has been described as a "pragmatic conceptualist," who, in contrast to the Realists, thought that the law consists of meaningful concepts,[45] yet also believed that judges should adapt those concepts to changing circumstances.[46] In his 1921 lectures compiled as *The Nature of the Judicial Process*, Cardozo had approvingly noted the use of prospectivity in cases where retroactivity would cause great hardship.[47] He suggested that the use of prospective decisionmaking in the future should be governed not by "metaphysical conceptions of the

36. *See id.*

37. *See id.*

38. Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932).

39. *Id.* at 365.

40. *Id.* at 364.

41. *Id.*

42. *See, e.g.*, Heritage Farms, Inc. v. Markel Ins. Co., 810 N.W.2d 465, 479–80 (Wis. 2012).

43. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 301–05 (1960).

44. *Id.* at 302.

45. *See* John C.P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1423–24, 1458–59 (1999) (book review) (citing BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113, 119 (1921)).

46. *See id.* at 1458 (citing CARDOZO, *supra* note 45, at 150).

47. *See* CARDOZO, *supra* note 45, at 142–43.

nature of the judge-made law, nor by the fetich [sic] of some implacable tenet, such as that of the division of governmental powers, but by considerations of convenience, of utility, and of the deepest sentiments of justice."[48] Just before his confirmation to the Supreme Court, then-Judge Cardozo advocated even more strongly for the use of prospectivity. In a 1932 address to the New York State Bar Association, Cardozo stated that he saw prospective decisionmaking as a prudent solution in cases where retroactivity would be "for any reason inexpedient."[49] Prospectivity appealed to Justice Cardozo's pragmatism while not violating his sense of the necessary stability and predictability of the law,[50] and under his opinion in *Sunburst Oil*, its use became widespread in America.

The Supreme Court began developing its own doctrine of prospectivity in the 1965 case of *Linkletter v. Walker*.[51] In 1959, Linkletter was convicted of burglary based on evidence obtained from his home and business by the police.[52] A 1961 Supreme Court case, *Mapp v. Ohio*,[53] found for the first time that the Due Process Clause of the Fourteenth Amendment requires states to exclude evidence seized in violation of the Fourth Amendment.[54] After *Mapp*, Linkletter sought a writ of habeas corpus in federal court to challenge his burglary conviction as based on unconstitutionally-obtained evidence.[55] The Court held that *Mapp* did not operate retroactively on cases finally decided before it came down.[56]

Echoing Justice Cardozo in *Sunburst Oil*, the Court found that the Constitution "neither prohibits nor requires" retrospective effect for the application of new constitutional rules.[57] The Court found that a change in law had to be given retroactive effect for a case on direct review, but that for a judgment being collaterally attacked, whether a change should have retroactive

48. *Id.* at 144–45.

49. Benjamin N. Cardozo, *Jurisprudence* (1932), *reprinted in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 7, 35 (Margaret E. Hall ed., 1947).

50. *Compare id.*, *with id.* at 18.

51. 381 U.S. 618 (1965).

52. *Id.* at 621.

53. 367 U.S. 643 (1961).

54. *Id.* at 655.

55. *Linkletter*, 381 U.S. at 621.

56. *Id.* at 619–20.

57. *Id.* at 629.

effect depended on an individualized consideration.[58] Noting that there was no distinction in terms of retroactivity analysis between civil and criminal cases, the Court stated that "the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective."[59] The Court then sketched a three-factor test for determining whether a new rule should be given retroactive effect on collateral review: (1) the purpose of the new rule; (2) the reliance placed upon the old rule; and (3) the effect on the administration of justice of a retroactive application of the new rule.[60] Weighing the factors, the Court found that the *Mapp* rule should not be given retroactive effect on collateral review.[61]

Justice Black, in a dissent joined by Justice Douglas, called the Court's use of selective prospectivity "arbitrary and discriminatory."[62] Linkletter, who received no relief under *Mapp*, had actually committed his crime after Mapp herself.[63] When Mapp's conviction was vacated by the new rule in her case, Linkletter was left in prison—a clear instance of unequal treatment under law.[64] Justice Black reiterated his earlier assertion that the requirement of retroactivity formed "one of the great inherent restraints upon this Court's departure from the field of interpretation to enter that of lawmaking."[65] Shortly after *Linkletter*, the Court decided that the case's three-factor test could also be used to decide whether new rules should be given retroactive effect on direct review.[66]

In 1971, the Court addressed the prospective application of new rules of civil law in the case of *Chevron Oil Co. v. Huson*.[67] The Supreme Court had previously decided *Rodrigue v. Aetna Casualty & Surety Co.*,[68] which held that state law, not admiralty

58. *Id.* at 627.
59. *Id.* at 627–28.
60. *Id.* at 636.
61. *Id.* at 640.
62. *Id.* at 641 (Black, J., dissenting).
63. *Id.*
64. *See id.*
65. *Id.* at 644 (quoting James v. United States, 366 U.S. 213, 225 (1961)).
66. *See* Stovall v. Denno, 388 U.S. 293, 300 (1967); Johnson v. New Jersey, 384 U.S. 719, 733 (1966).
67. 404 U.S. 97 (1971).
68. 395 U.S. 352 (1969).

law, applies on oil rigs on the Outer Continental Shelf.[69] The question in *Chevron Oil* was whether *Rodrigue*'s new rule should govern a claim that arose before it was decided. The Court identified three factors for determining whether a new rule of civil law should be applied prospectively: (1) whether the decision establishes a new principle of law; (2) whether retroactive application would further the purposes of the rule; and (3) whether retroactive application would produce inequitable results.[70] Applying this test, the Court held that *Rodrigue* should not be applied retroactively.[71]

After a period of embracing prospective overruling, the Supreme Court came to develop grave doubts about the practice. In a series of forceful dissents, Justice Harlan criticized the use of prospective overruling as contrary to the constitutional function of the federal courts. In 1967, *Katz v. United States*[72] stated a new rule that a Fourth Amendment search and seizure does not require a physical intrusion into an enclosure.[73] The next term, in *Desist v. United States*,[74] the Court held that *Katz* did not apply retroactively to any cases involving searches conducted before the new rule was promulgated.[75] In dissent, Justice Harlan declared, "'Retroactivity' must be rethought."[76] Though Justice Harlan had joined in previous opinions limiting the retroactive effect of new constitutional rules, he had done so to limit the impact of decisions that seemed to him "profoundly unsound in principle."[77] He further argued that the discretionary availability of prospective overruling in constitutional criminal law had yielded wide doctrinal confusion. Its use also "depart[ed] from th[e] basic judicial tradition" of treating similarly situated defendants the same[78]—Katz had received the benefit of the new rule, while Desist had not. Justice Harlan would have applied *Katz* retroactively.[79]

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69. *See id.* at 366.
70. *See Chevron Oil*, 404 U.S. at 106–07.
71. *Id.* at 107.
72. 389 U.S. 347 (1967).
73. *Id.* at 353.
74. 394 U.S. 244 (1969).
75. *Id.* at 254.
76. *Id.* at 258 (Harlan, J., dissenting).
77. *Id.*
78. *Id.* at 258–59.
79. *Id.* at 269.

Justice Harlan further developed his critique of non-retroactivity in the 1971 case of *Mackey v. United States*.[80] In 1968, the Court established a new rule in *Marchetti v. United States*[81] that the Fifth Amendment is a valid defense to a prosecution for failure to register as a gambler and pay a gambling tax.[82] In *Mackey*, the Court held that *Marchetti* did not apply retroactively to a conviction that had occurred before that case and that was being heard on collateral review.[83] Justice Harlan, concurring in the judgment, noted that the Court's use of non-retroactivity had been seen by some members of the Court as a way of limiting unsound decisions, and by others as a "technique" for the "implementation of long overdue reforms, which otherwise could not be practicably effected."[84] Justice Harlan pointedly observed that although he did not subscribe to the Blackstonian declaratory theory, he believed that the decision whether to make a new constitutional rule retroactive had to be informed by the nature of the judicial function and its distinction from the legislative role.[85] He contended that the Court is limited by Article III to deciding actual cases or controversies,[86] and cannot apply one constitutional law to one case "fish[ed] . . . from the stream of appellate review . . . as a vehicle for pronouncing new constitutional standards," and not apply the rule to similarly situated cases.[87] He also noted that prospectivity tended to "cut th[e] Court loose from the force of precedent" and freed it to "restructure artificially" the expectations created by current law.[88] Justice Harlan would have required retroactivity for all cases on direct review.[89]

Justice Harlan's reasoning was finally adopted by the Court in the 1982 case of *United States v. Johnson*.[90] *Payton v. New*

80. 401 U.S. 667 (1971).
81. 390 U.S. 39 (1968).
82. *Id.* at 41–42.
83. *Mackey*, 401 U.S. at 669–70, 674.
84. *Id.* at 676 (Harlan, J., concurring in the judgment) (quoting Jenkins v. Delaware, 395 U.S. 213, 218 (1969)).
85. *Id.* at 677.
86. *See id.* at 678.
87. *Id.* at 679.
88. *Id.* at 680.
89. *Id.* at 681.
90. 457 U.S. 537 (1982).

York,[91] an earlier case, held that the Fourth Amendment prohibits police from making a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest.[92] The question in *Johnson* was whether *Payton* should be applied retroactively to a case pending on direct appeal when that case was decided.[93] The Court held that it should, expressly agreeing with Justice Harlan's admonition that "'[r]etroactivity' must be rethought"[94] and partially adopting his views in *Desist* and *Mackey*.[95] But the Court limited its holding on retroactivity to the Fourth Amendment, and stated that it did not apply to civil rules, which would continue to be governed by the flexible test from *Chevron Oil*.[96]

In the 1987 case *Griffith v. Kentucky*,[97] the Court overruled *Linkletter*'s three-factor test, holding that new rules of conduct for criminal prosecutions must be applied retroactively to all cases that are pending on direct review or not yet final.[98] The case involved the application of *Batson v. Kentucky*,[99] which prohibited racially discriminatory peremptory challenges,[100] to a criminal conviction that was on petition for certiorari to the Supreme Court when *Batson* was decided.[101] The Court held that Article III's cases or controversies requirement prohibits the purely prospective application of new constitutional rules in criminal cases, because such decisionmaking is more akin to legislation than adjudication.[102] Furthermore, the Court adopted Justice Harlan's view that "the integrity of judicial review" requires that a new rule be applied not only to the case at hand, but to all similar cases pending on direct review[103]—a rejection of selective prospectivity in the criminal context.

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91. 445 U.S. 573 (1980).
92. *Id.* at 576.
93. *Johnson*, 457 U.S. at 541.
94. *Id.* at 548 (quoting Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting)).
95. *Id.* at 562.
96. *Id.* at 562–63.
97. 479 U.S. 314 (1987).
98. *Id.* at 328.
99. 476 U.S. 79 (1986).
100. *Id.* at 89.
101. *Griffith*, 479 U.S. at 316–18.
102. *Id.* at 322–23 (citing U.S. CONST. art. III, § 2, cl. 1).
103. *Id.* at 323.

Eventually, prospectivity in civil cases also came into question. In the 1991 case of *James B. Beam Distilling Co. v. Georgia*,[104] the Court cast serious doubt on the endurance of *Chevron Oil*. In a 1984 case called *Bacchus Imports, Ltd. v. Dias*,[105] the Court held that a Hawaii excise tax violated the Commerce Clause.[106] After *Bacchus*, Jim Beam brought suit, seeking a refund of taxes it had paid under Georgia's similar law.[107] A state court declared Georgia's law unconstitutional, but refused to apply its ruling retroactively, based on the test from *Chevron Oil*, and the Georgia Supreme Court affirmed.[108] The U.S. Supreme Court reversed, finding that *Bacchus* applied retroactively.[109]

There was no majority opinion in the case. Justice Souter found that retroactivity is a choice of law for the Court to make when promulgating a new rule, and that *Bacchus* had been intended to apply retroactively.[110] He rejected the use of selectively prospective decisionmaking as inherently inequitable, but did not address the propriety of pure prospectivity.[111] Justice White concurred in the judgment, agreeing with Justice Souter on the choice of law question, but also defending *Chevron Oil* and the continued use of pure prospectivity.[112] Justice Blackmun also concurred in the judgment but concluded that both selective and pure prospectivity violate the judicial function.[113] Justice Scalia concurred in the judgment as well. Agreeing with Justice Blackmun, he found that both selectively and purely prospective decisionmaking are unconstitutional actions beyond the meaning of "[t]he judicial Power."[114] Echoing the earlier criticisms of Justices Black and Harlan, Justice Scalia described mandatory retroactivity as "one of the understood

104. 501 U.S. 529 (1991).

105. 468 U.S. 263 (1984).

106. *Id.* at 273.

107. *Beam*, 501 U.S. at 533.

108. *Id.*

109. *Id.* at 532.

110. *Id.* at 534–39 (plurality opinion).

111. *Id.* at 543–44.

112. *Id.* at 544–46 (White, J., concurring in the judgment). Justice White noted that, while he disagreed with *Griffith*'s rejection of the use of selective prospectivity in criminal cases, he would follow that principle in civil cases on the grounds of stare decisis. *See id.* at 545.

113. *Id.* at 548 (Blackmun, J., concurring in the judgment).

114. *Id.* at 549 (Scalia, J., concurring in the judgment) (quoting U.S. CONST. art. III, § 1, cl. 1).

checks upon judicial law-making; to eliminate [it] is to render courts substantially more free to 'make new law,' and thus to alter in a fundamental way the assigned balance of responsibility and power among the three branches."[115] With *Beam*, the Court had taken a large step towards overruling *Chevron Oil*, but had not yet found a clear majority to do so.

In 1993, the Court found that majority, overruling *Chevron Oil* in the case of *Harper v. Virginia Department of Taxation*.[116] In the 1989 case of *Davis v. Michigan Department of Treasury*,[117] the Court declared a state tax on federal retirement benefits unconstitutional.[118] The Supreme Court of Virginia, applying the *Chevron Oil* test, found that *Davis* did not apply retroactively to taxes imposed before it was decided.[119] The U.S. Supreme Court reversed, holding that a rule of federal law, once announced and applied by the Court, must be given retroactive effect in all cases on direct review by all courts, except where the question has been expressly reserved.[120] The Court reiterated the "two basic norms of constitutional adjudication" that opposed prospectivity: first, the nature of judicial review as distinct from legislation, and second, the need to treat similarly situated parties the same.[121] To uphold these norms, the Court expressly extended *Griffith*'s ban on selective prospectivity to the civil context and intimated, without holding, that pure prospectivity might also be impermissible.[122]

In a concurring opinion, Justice Scalia elaborated on the criticism of prospectivity he had advanced in *Beam*. He called prospective decisionmaking "the handmaid of judicial activism, and the born enemy of *stare decisis*," developed in the "heyday of legal realism" for the avowed purpose of making it easier to

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115. *Id.* at 549 (Scalia, J., concurring in the judgment).

116. 509 U.S. 86, 97 (1993).

117. 489 U.S. 803 (1989).

118. *Id.* at 817.

119. Harper v. Va. Dep't of Taxation, 401 S.E.2d 868, 873 (Va. 1991), *rev'd*, 509 U.S. 86 (1993).

120. *Harper*, 509 U.S. at 97.

121. *Id.* at 95.

122. *See id.* at 97 ("Our approach to retroactivity heeds the admonition that '[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.'" (quoting Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 214 (1990) (Stevens, J., dissenting))). Pure prospectivity entails "disregard[ing] current law"—saying what the law is, and at the same time refusing to apply it.

overrule prior precedent.[123] On the other hand, fully retroactive decisionmaking is the tradition of the courts, and forms "a principle distinction between the judicial and the legislative power," as recognized by Blackstone.[124] Justice Scalia drew support from an observation of nineteenth-century Michigan Supreme Court Chief Justice Thomas Cooley:

> It is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases.[125]

Full retroactivity, Justice Scalia argued, is an inherent aspect of the judicial function.[126]

With *Harper*, the Supreme Court came virtually full circle in its approach to prospective decisionmaking. The Court has now decisively rejected selective prospectivity in both the criminal and civil contexts and indicated that pure prospectivity may also be forbidden. The two central reasons the Court has repeatedly cited for rejecting prospectivity are: (1) the nature of the judicial function, and (2) the need for the equitable treatment of litigants. The first reason is that the judicial role is one of deciding cases brought by the parties before the court; the court can say what the law is only in relation to an actual dispute before it. On this understanding, pure prospectivity, by which the court makes a change in the law for the future without applying it to the case at hand, is an illegitimate exercise of legislative power. The second reason is that treating similarly situated parties the same is a central requirement of justice. Selective prospectivity creates two classes of law for two individuals whose cases might have arisen at the same time: the party before the court gets the benefit of the new law, while the party waiting to be heard is shut out. This disparate treatment is in-

123. *Id.* at 105 (Scalia, J., concurring).

124. *Id.* at 107.

125. *Id.* (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 91 (1st ed. 1868)).

126. *See id.*

herently inequitable, and makes selective prospectivity impermissible.[127]

The history of prospectivity at the federal level involves dueling accounts of fairness in adjudication. On the one hand, Justice Cardozo argued for prospectivity by pointing out that retroactive decisionmaking could create great hardship.[128] Unanticipated legal changes that have retroactive effect create unpredictability, leaving individuals unable to conform their conduct to the law. It is chiefly on this account that retroactive criminal legislation has traditionally been seen as a severe abuse of power in Anglo-American legal history.[129] Retroactive decisionmaking, particularly when it upsets reliance interests like those in property, contract, or tax cases, causes a similar kind of unfairness.

On the other hand, Justices Harlan and Scalia emphasized the unfairness inherent in prospectivity: that similarly situated litigants would be treated differently based on nothing more than the accident of whose case arrived in court first. For example, in the case of *Molitor v. Kaneland Community Unit District 302*,[130] the Illinois Supreme Court used selective prospectivity to end school district sovereign immunity.[131] The case involved a school bus that was driven off the road, hit a cul-

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127. Though the Supreme Court has never held so, selective prospectivity also appears to be a clear-cut violation of the Equal Protection Clause of the Fourteenth Amendment. *See* Kermit Roosevelt III, *A Retroactivity Retrospective, with Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What it Might*, 95 CAL. L. REV. 1677, 1690 n.83 ("Giving one person the benefit of a particular rule of law but denying it to another identically situated person: what could be a plainer violation?").

128. *See* CARDOZO, *supra* note 45, at 142–43.

129. *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 391 (1798) (opinion of Chase, J.) ("All [ex post facto criminal laws] are manifestly unjust and oppressive."); 1 BLACKSTONE, *supra* note 4, at *46 ("[A]ll punishment for not abstaining [from an ex post facto criminal law] must of consequence be cruel and unjust."); THE FEDERALIST NO. 84., at 418 (Alexander Hamilton) (Terence Ball ed., 2003) ("[T]he subjecting of men to punishment for things which, when they were done, were breaches of no law . . . ha[s] been in all ages [one of] the favourite and most formidable instruments of tyranny."); Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* 6 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES, 379, 379 (J. Jefferson Looney et al. eds., 2009) ("[E]x post facto laws are against natural right . . . .").

130. 163 N.E.2d 89 (Ill. 1959), *superseded by statute*, Local Governmental and Governmental Employees Tort Immunity Act, 1965 Ill. Laws 2983, *as recognized in* Murray v. Chi. Youth Ctr. 864 N.E.2d. 176 (Ill. 2007).

131. *Id.* at 96–97.

vert, exploded, and burned, injuring the eighteen young students inside.[132] The court's use of selective prospectivity granted relief to the student who brought the suit while protecting the reliance interests of the state's school districts, many of which had chosen not to take out insurance based on the protection afforded them by the immunity rule.[133] Yet the court's decision meant that the seventeen other youths in the very same bus crash would be barred from relief, simply because their cases would reach the court after their fellow student's.[134] This type of arbitrary distinction in the law is also deeply unfair.

The choice between prospectivity and retroactivity, then, appears to involve a choice between two kinds of unfairness. Of the two—(1) unforeseeability of what the law is at any given time, and (2) arbitrary treatment of similarly situated litigants[135]—the first initially seems more troubling. After all, there are few concepts more central to the rule of law than that the law should be known in advance so that citizens can conform their actions to it. Justice Scalia made this point himself when referring to Caligula's practice of posting his pronouncements high on columns so that the people would be unable to read them and therefore easier to condemn for disobedience.[136] Unforeseeability implicates the great mass of people, while selective prospectivity singles out only one individual for special—typically beneficial—treatment. Thus if a given change

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132. *Id.* at 104 (Davis, J., dissenting).

133. *See id.* at 97–98 (majority opinion).

134. *See id.* at 104 (Davis, J., dissenting).

135. Pure prospectivity does not present the problem of arbitrary treatment of similarly situated parties because it draws a distinction in the law based on when the facts of the case occurred rather than when they came before the court. But courts have rarely decided cases purely prospectively, primarily because it denies a litigant the benefit of his own success, results in an advisory opinion, and acts in a frankly legislative fashion (as it does not even connect the change in law it announces to the decision of a particular case). *See* Kay, *supra* note 21, at 217.

136. *See* Flores-Figueroa v. United States, 556 U.S. 646, 658 (2009) (Scalia, J., concurring in part and concurring in the judgment) (comparing the Court's use of legislative history to expand a criminal statute beyond its text to Caligula's practice of putting his laws on high pillars to ensnare the people); *cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (incorrectly relating the same story about Nero). This story about Caligula can be found in 4 CASSIUS DIO, ROMAN HISTORY 384–85 (Herbert Baldwin Foster trans., 1905) and SUETONIUS, THE TWELVE CAESARS 174 (Michael Grant ed., Robert Graves trans., Penguin Books rev. ed. 1979).

is to be implemented, prospective application appears to be the fairer path.

But this comparison presumes what is at issue: the inevitability of a given legal change. This was the point made by Justice Harlan in *Mackey*. While he had previously seen prospectivity as a way of limiting the harmful effects of changes in the law, others had seen it as a way of enacting changes that could never have been imposed retroactively, precisely because it would have been too harmful to do so.[137] Though prospectivity may be a fairer way to implement a given legal change than retroactivity, a rule of mandatory retroactivity *for that very reason* prevents courts from undertaking disruptive legal changes. Like his fellow Realists, Chief Justice Traynor embraced prospectivity on just this account:

> A court usually will not overrule a precedent even if it is convinced that the precedent is unsound, when the hardship caused by a retroactive change would not be offset by its benefits. The technique of prospective overruling enables courts to solve this dilemma by changing bad law without upsetting the reasonable expectations of those who relied on it.[138]

As Traynor's point makes clear, comparing the fairness of retroactive and prospective decisionmaking is largely missing the point of prospectivity. Under the traditional rule of retroactivity, the very unfairness of unforeseeable change acts as a restraint on judicial lawmaking and a prevention of the unfair consequences that would result from it.[139] Meanwhile the unfair arbitrariness of prospectivity is a regular part of its operation. On this understanding, the Court has ultimately come to

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137. *See* Mackey v. United States, 401 U.S. 667, 676 (1971) (Harlan, J., concurring in the judgment).

138. Traynor, *supra* note 2, at 541–42; *see also* Levy, *supra* note 10, at 28 (describing prospective overruling as a way of facilitating "more effective and defensible judicial lawmaking").

139. *See* Thomas S. Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 226 (1965) ("Forcing courts to overrule retroactively or not at all tends to minimize objectionable judicial legislation—that is, judicial legislation that is in some way disruptive of the harmonious functioning of a multipartite government—by rendering it difficult for a court to overrule a prior decision because of the injury that will result from retroactive application of the newly announced rule to interests that have been created in reliance upon the old rule.").

the right conclusion in describing prospectivity as the more unfair regime of the two.

In *Harper*, the Court rejected prospectivity because it violates the nature of the judicial function and treats similarly situated litigants differently. While these two reasons for rejecting prospectivity are equally applicable to both federal and state courts, *Harper*'s holding applies only to rules of federal law—*Sunburst Oil* still recognizes the freedom of state courts to prospectively apply their own interpretations of state law.[140] In the exercise of this freedom, state supreme courts have largely continued their use of prospectivity during the decades since *Harper* was decided.

B. State Law

Prospective decisionmaking became common at the state level after *Sunburst Oil*.[141] Following *Erie Railroad Co. v. Tompkins*[142] in 1938, the federal government ceased to create general common law[143]—leaving to the state courts the development of the bulk of common law doctrine. This responsibility underlies state courts' attachment to prospectivity, because the arguments in favor of nonretroactivity apply with their greatest force to common law decisionmaking. Since time immemorial, common law judges have been accustomed to adapting the law to fit new circumstances.[144] Llewellyn once memorably described the common law as a "quest [that] consists in a constant re-examination and reworking of a heritage, that the heritage may yield not only solidity but comfort for the new day and for the morrow."[145] In such a system, where judges are positively expected, perhaps even duty-bound, to keep the law in line with policy, the appeal of prospective decisionmaking is intuitive. The retroactivity or prospectivity of a decision is only significant when a court is implementing a change in the law. Pro-

140. *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 100 (1993).

141. *See* Kay, *supra* note 21, at 212–13.

142. 304 U.S. 64 (1938).

143. *See id.* at 78.

144. *See, e.g.*, Oliver Wendell Holmes, Jr., THE COMMON LAW 1 (1881) ("The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.").

145. LLEWELLYN, *supra* note 43, at 36.

spective decisionmaking allows judges to change the law for the future without upsetting reliance interests created by precedent.

Reliance interests weigh particularly heavily in the private law context, especially in the areas of property and contract. In the pre-New Deal era, vested private rights were at times considered to be inviolable by both courts and legislatures.[146] By contrast, public rights, as creatures of government power, were broadly subject to retrospective alteration.[147] The protected status of private rights in this era was the impetus for some of the Supreme Court's earliest endorsements of prospectivity. In *Gelpcke v. City of Dubuque*,[148] the Court held that a vested private right could not be upset by a retroactive overruling.[149] The 1846 Iowa Constitution prohibited the state from creating any debts greater than $100,000.[150] In 1857, the city of Dubuque issued bonds exceeding that amount to fund the construction of a railroad.[151] A series of Iowa Supreme Court cases held that the constitutional debt limit did not apply to municipalities.[152] Then an 1862 Iowa Supreme Court case reversed course and interpreted the constitution to limit municipal debt.[153] The question before the U.S. Supreme Court was whether the 1862 decision was to be given retrospective effect, thereby invalidating the bonds issued by Dubuque. The Court found that the bonds had created a vested private right, and as such, could not be altered by a retroactive overruling:

> However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. "The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any

146. *See* THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTION TO U.S. LAW: PROPERTY 237 (2010).

147. *See* Ann Woolhander, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1027–36 (2006).

148. 68 U.S. (1 Wall.) 175 (1863).

149. *Id.* at 206.

150. *Id.* at 204.

151. *Id.* at 178.

152. *See id.* at 205.

153. *See* State ex rel. Burlington & Mo. River R.R. Co. v. Wapello Cty., 13 Iowa 388, 423 (1862).

> subsequent action of legislation, or decision of its courts altering the construction of the law."[154]

Thus, to avoid upsetting a vested private contract right, the Court required that the Iowa Supreme Court's decision be applied prospectively only.

As the Court's approach in *Gelpcke* indicates, prospectivity is a tool particularly well-suited for dealing with change in the private law. For example, property law generates strong reliance interests, as individuals consciously rely on existing law to order their affairs.[155] At the same time, property law is a field in which ancient common law rules draw little attention from the legislature.[156] This makes prospectivity both useful and necessary if the law is to be kept up to date with the changing conditions of society. The same arguments apply to contract law.[157] Tort law, by contrast, does not typically create such reliance interests, because few people plan to be involved in a tort.[158] As a result, tort cases do not call as regularly for prospectivity as a means of softening the blow of a dramatic change in the law.[159] Nevertheless, as discussed above in *Molitor*,[160] tort cases can also at times benefit from the flexibility made possible by prospectivity.

The argument for prospectivity in common law cases is also stronger on grounds of authority. In the field of statutory law, at least on some accounts, the task of the judiciary is to interpret the preexisting work of the legislature.[161] With the ac-

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154. *Gelpcke*, 68 U.S. (1 Wall.) at 206 (quoting Ohio Life Ins. & Tr. Co. v. Debolt, 57 U.S. (16 How.) 416, 432 (1853)).

155. *See* Currier, *supra* note 139, at 242.

156. *See* Cody Blake Bartlett, *Prospective Overruling and Property Law*, 18 CASE W. RES. L. REV. 1205, 1205–06 (1967).

157. *See* ATIYAH & SUMMERS, *supra* note 15, at 146; Paul J. Mishkin, *The Supreme Court 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 70 n.47 (1965).

158. Currier, *supra* note 139, at 244.

159. *See id.*

160. *See supra* text accompanying notes 130–34.

161. *See, e.g.*, *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 267 (2010) (statement of Elena Kagan) ("I think [a statement by an Israeli judge] means [he thinks] that the Court can change a statute and I think that that's wrong."). *But see* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 357 (7th Cir. 2017) (en banc) (Posner, J., concurring) ("I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are im-

ceptance of this secondary role would seem to come a limitation on saying that the law once meant one thing, but now means another. This is at least true for those who argue that judges must give texts the meaning they had when originally adopted.[162] By contrast, even the most conservative jurists accept that judges make the common law.[163] Within the zone of that well-established responsibility, the assumption of the power to say both what the law is, and when it will be effective, seems much more reasonable.

Even so, advocates for prospectivity have rarely limited their arguments to the domain of private law. Justice Cardozo in *Sunburst Oil* noted that prospective decisionmaking by state courts is constitutional "whether the subject of the new decision is common law or statute."[164] Chief Justice Traynor made the same point, arguing that "[w]hen a judge does overrule a precedent, it matters little whether it related only to the common law or to the interpretation of a constitution or statute."[165] And on an empirical basis, prospective decisionmaking may be more common for new statutory interpretations than for new common law rules.[166] Nevertheless, while prospective decisionmaking has never been limited to the private law domain, the common law tradition has been a critical tool in framing the use of prospectivity.[167] Because of the historical concern for vested private rights, the strength of reliance interests in private law domains, and the traditional authority of judges over the development of the common law, the popularity of prospectivity among the common law judges of state courts is unsurprising.

Against this backdrop, the U.S. Supreme Court's rejection of prospectivity in *Harper* was met with strong disagreement in

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posing on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted.").

162. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 78 (2012).

163. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 10 (1997).

164. Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 365 (1932) (citations omitted).

165. Traynor, *supra* note 2, at 541.

166. *See* Kay, *supra* note 21, at 241.

167. *See, e.g.*, Bartlett, *supra* note 156, at 1206 ("[P]rospective overruling is . . . the highest form of the common law tradition.")

the state courts—what the Montana Supreme Court has called the "Revolt in the Provinces."[168] *Harper* itself only mandated that courts apply federal rules of law retroactively; it said nothing about applications of state law. At the same time, the case's reasons for abandoning prospectivity applied with equal force to applications of state law by state courts. This led many state courts to consider whether they should continue their use of prospectivity and the *Chevron Oil* test, or adopt a rule of virtually mandatory retroactivity as *Harper* had for federal law. Almost every state that has considered the question has declined to follow the Supreme Court's reasoning in *Harper* and retained *Chevron Oil* or a variation thereof.[169]

In the 1994 case of *Beavers v. Johnson Controls World Services, Inc.*,[170] the New Mexico Supreme Court offered an extended analysis of *Harper* and its justifications for adhering to the test in *Chevron Oil*. The case involved a classic instance of common law development: the recognition of a new cause of action for prima facie tort.[171] The question facing the court was whether the new cause of action, first recognized by the court in 1990,[172] should be retroactively applied to conduct occurring before that time.[173] The court had to decide whether to follow the approach recently advanced by the U.S. Supreme Court in *Harper* or stick with the *Chevron Oil* analysis it had adopted in 1982.[174] It chose the latter.[175]

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168. Dempsey v. Allstate Ins. Co., 104 P.3d 483, 488 (Mont. 2004).

169. *See, e.g.*, *Ex parte* Capstone Bldg. Corp., 96 So.3d 77, 90–95 (Ala. 2012); Citicorp v. Franchise Tax Bd., 100 Cal. Rptr. 2d 509, 525 (Ct. App. 2000); Findley v. Findley, 629 S.E.2d 222, 228 (Ga. 2006); Aleckson v. Vill. of Round Lake Park, 679 N.E.2d 1224, 1227 (Ill. 1997); Commonwealth v. Dagley, 816 N.E.2d 527, 533 n.10 (Mass. 2004); Bezeau v. Palace Sports & Entm't, Inc., 795 N.W.2d 797, 800–01 (Mich. 2010); *Dempsey*, 104 P.3d at 488–89; Beavers v. Johnson Controls World Servs., Inc., 881 P.2d 1376, 1380–81 (N.M. 1994); City of New Bern v. New Bern-Craven Cty. Bd. of Ed., 450 S.E.2d 735, 742–43 (N.C. 1994); DiCenzo v. A-Best Prods. Co., 897 N.E.2d 132, 137–39 (Ohio 2008); Caperton v. A.T. Massey Coal Co., 690 S.E.2d 322, 351–52 (W. Va. 2009); Wenke v. Gehl Co., 682 N.W.2d 405, 428–30, 430 n.43 (Wis. 2004). *But see* State v. Styles, 693 A.2d 734, 735 (Vt. 1997) (acknowledging *Harper* as congruous with the court's own rule of retroactivity).

170. 881 P.2d 1376 (N.M. 1994).

171. *Id.* at 1377.

172. *See* Schmitz v. Smentowski, 785 P.2d 726, 735 (N.M. 1990).

173. *Beavers*, 881 P.2d at 1377.

174. *Id.* at 1377–78. The New Mexico Supreme Court adopted *Chevron Oil* in *Whenry v. Whenry*, 652 P.2d 1188 (1982).

175. *Beavers*, 881 P.2d at 1378.

The New Mexico Supreme Court framed the issue of mandatory retroactivity versus optional prospectivity as "one of the great jurisprudential debates of the twentieth century."[176] It noted at the outset that *Sunburst Oil* established the question as one that was for state courts to resolve for themselves.[177] The court then made clear that its "juristic philosophy" diverged sharply from that of the *Harper* majority, and particularly from that of Justice Scalia.[178] Accusing Justice Scalia of "hold[ing] (or pretend[ing] to hold) a conception of the nature of law as something fixed and nearly immutable,"[179] the court took issue with his support for retroactivity as a means of restraining judges:

> Justice Scalia apparently does not *really* believe that the law is something courts search for, and discover, as if it were so much buried treasure. Rather, he seems to urge that courts should behave in this way so as to maximize restraint on what some might call judicial legislation and minimize temptation to stray from what he conceives to be the proper judicial role—applying settled law to conduct that has already occurred by the time of a lawsuit.[180]

The New Mexico high court preferred Justice O'Connor's *Harper* dissent,[181] which endorsed *Chevron Oil* and stated that "when the Court changes its mind, the law changes with it."[182]

Moving past the debate over the declaratory theory, the court then directly addressed the *Harper* majority's two stated reasons for mandating retroactivity: (1) the nature of judicial review, and (2) the need to treat similarly situated parties the same.[183] The court found that the first *Harper* objection was limited to the nature of the federal Constitution and had no relevance to New Mexico courts.[184] Article VI of the New Mexico Constitution vests the "judicial power of the state" in various

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176. *Id.* at 1377.

177. *Id.* at 1380.

178. *Id.* at 1380–81.

179. *Id.*

180. *Id.* at 1380 n.5.

181. *Id.* at 1381.

182. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 115 (1993) (O'Connor, J., dissenting) (quoting James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 550 (1991) (O'Connor, J., dissenting)).

183. *Beavers*, 881 P.2d at 1381.

184. *Id.*

courts, including the state supreme court.[185] Without elaboration, the New Mexico court found that "our conception of the judicial power under Article VI of our constitution does not lead us to conclude" that prospective judgments are prohibited.[186] A more recent decision by the same court has noted that the New Mexico Constitution does not expressly impose a "cases or controversies" requirement like that under Article III of the federal Constitution,[187] but that the exercise of "the judicial power" should still be "guided by prudential considerations,"[188] including concern about "the proper—and properly limited—role of courts in a democratic society."[189] Nevertheless, in *Beavers* the New Mexico Supreme Court did not consider that prospectivity was inherently foreign to the meaning of "judicial power."[190]

The New Mexico Supreme Court gave greater credence to *Harper*'s second rationale: the inequitable nature of selective prospectivity. Although the need to treat similarly situated parties the same was "quite compelling," the court found that it was not so powerful as to justify mandatory retroactivity.[191] At most, it created a presumption of retroactivity that was rebuttable by an express declaration of prospective effect or "a sufficiently weighty combination of one or more of the *Chevron Oil* factors."[192] Thus, while formally acknowledging the equity problem identified in *Harper*, *Beavers* ultimately maintained an approach quite similar to the status quo under *Chevron Oil*.

As a representative of the thought process of state courts in the aftermath of *Harper*, *Beavers* is a revealing case. The New Mexico Supreme Court's choice to address Justice Scalia's concurrence before it analyzed the majority opinion's grounds for overruling *Chevron Oil* is telling. The court saw the alternatives of *Harper* and *Chevron Oil* as reflecting "the great jurisprudential debate[]" about the nature of the law.[193] Fastening on Jus-

185. N.M. CONST. art. VI, § 1, cl. 1.

186. *Beavers*, 881 P.2d at 1382.

187. New Energy Econ., Inc. v. Shoobridge, 243 P.3d 746, 752 (N.M. 2010).

188. *Id.* (quoting N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 847 (N.M. 1998)).

189. *Id.* (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

190. *Beavers*, 881 P.2d at 1382.

191. *Id.*

192. *Id.* at 1383.

193. *Id.* at 1377.

tice Scalia's quotation of Blackstone, the court attempted to reduce *Harper* to a stealth reassertion of the declaratory theory, and pronounced that New Mexico would have none of it. This move allowed the court to evade the long line of criticism developed by Justices Black, Harlan, and Scalia about the separation of powers problems raised by prospectivity. Rather than engage with these arguments, which apply equally to state courts as to federal, the New Mexico Supreme Court pointed to the different standards prevailing under the state constitution and the court's long history of endorsing prospectivity.

That this discussion took place in a case concerning the application of a new common law cause of action is unsurprising. In common law decisionmaking, where, as discussed above, judges are universally acknowledged to play an important and active role in changing the law, rhetorical cautions about the dangers of judicial legislation carry the least sway. The general reluctance of state courts to reconsider *Chevron Oil* in the aftermath of *Harper* must be seen as linked partially to their desire to maintain the flexibility felt to properly attend the exercise of common law decisionmaking. It is at this point that the comparative tradition of English common law courts becomes instructive.

II. PROSPECTIVE DECISIONMAKING IN ENGLAND

When, in 1960, Llewellyn described the "Grand Style of the Common Law" as one in which judges were responsible as craftsmen for the "on-going renovation of doctrine,"[194] there must have been few left who would have contended otherwise. In the 1960s and 1970s, common law innovation reached a peak in America, with state high courts spearheading radical reforms like strict products liability, the replacement of contributory negligence with comparative fault, and the abrogation of governmental, charitable, and parental immunity.[195] In 1968, Professor Fleming James captured the prevailing academic opinion when he stated, "The proposition that changing the

194. LLEWELLYN, *supra* note 43, at 36.

195. *See* ATIYAH & SUMMERS, *supra* note 15, at 136.

law is properly and exclusively the function of the legislature runs counter to Anglo-American tradition."[196]

As P.S. Atiyah and Robert S. Summers noted in their landmark comparative study, *Form and Substance in Anglo-American Law*, "Insofar as James included the English tradition in his comments, and insofar as he may have implied that the change in question was the kind of change made by courts in modern times, he was certainly wrong."[197] While not rejecting the power of courts to modify the common law, English practice has long placed greater restrictions on their ability to do so. Given the common origins of the English and American legal systems and the mutually acknowledged importance of stare decisis to both systems, this difference is remarkable. Atiyah and Summers' general thesis is that the English legal system is more formal and the American more substantive, reflecting deep differences in legal style, legal culture, and visions of law between the two countries.[198] These differences are manifested in the divergent approaches of American state courts and English courts to prospective decisionmaking.[199]

From 1861 to 1966, the House of Lords, then the highest English court, entirely disclaimed an ability to overrule its own decisions.[200] In the 1861 case of *Beamish v. Beamish*,[201] the Lord Chancellor had dissented from a previous case that had addressed the same question—whether a marriage not presided

196. Fleming James, Jr., *Comment on* Maki v. Frelk, 21 VAND. L. REV. 891, 892 (1968).

197. ATIYAH & SUMMERS, *supra* note 15, at 137 n.93.

198. *See id*. at 1.

199. Atiyah and Summers' comparative analysis was published in 1987, before the U.S. Supreme Court strictly limited the use of prospectivity in the civil context in *Beam* (1991) and *Harper* (1993). Thus their work does not address the current congruity between the federal approach to prospective decisionmaking and longstanding English practice.

200. *See* Beamish v. Beamish (1861) 11 Eng. Rep. 735 (HL) 761 (appeal taken from Ir.) (the rule was affirmed in *London Tramways v. London County Council* [1898] AC 375 (HL) 381 (appeal taken from Eng.)); Practice Statement (Judicial Precedent) [1966] 1 WLR 1234 (HL) 1234. Following the Constitutional Reform Act of 2005, the Supreme Court of the United Kingdom replaced the House of Lords as the United Kingdom's court of last resort in 2009. *See* Constitutional Reform Act 2005, c. 4 (Gr. Brit.); The Supreme Court Rules 2009, SI 2009/1603, art. 1, ¶ 1 (Gr. Brit.).

201. (1861) 11 Eng. Rep. 735 (HL) 761 (appeal taken from Ir.).

over by a priest is valid.[202] Nevertheless, he found that the House was powerless to overrule its own decision:

> The law laid down as your *ratio decidendi*, being clearly binding on all inferior tribunals, and on all the rest of the Queen's subjects, if it were not considered as equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law, and legislating by its own separate authority.[203]

This strict standard illustrates the heightened importance with which precedent has traditionally been treated in English law.

In 1966 the House of Lords issued a Practice Statement asserting its power to depart from its own previous decisions.[204] The Statement briefly noted that a rigid adherence to precedent could lead to injustice and impede the proper development of the law.[205] Even while declaring the House's power to overrule its prior decisions, the Statement also cautioned that creating retrospective changes to the law of contracts, property, and fiscal arrangements would be particularly dangerous.[206] Since 1966, the House of Lords has exercised its power to overrule itself sparingly.[207] Its most significant use of the power to overrule was in *Miliangos v. George Frank (Textiles) Ltd.*,[208] in which the court overruled a 300-year-old precedent that judgments could be given only in pounds sterling.[209] Even today, lower courts remain tightly bound to their own precedent: the English Court of Appeal does not have the power to overrule its own decisions, with strictly limited exceptions.[210]

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202. *Id.* at 760 (citing R v. Millis (1844) 8 Eng. Rep. 844 (HL) (appeal taken from Ir.)).

203. *Id.* at 761.

204. Practice Statement (Judicial Precedent) [1966] 1 WLR 1234 (HL) 1234.

205. *Id.*

206. *Id.*

207. ATIYAH & SUMMERS, *supra* note 15, at 139.

208. [1976] AC 443 (HL) (appeal taken from Eng.).

209. *See id.* at 470 (Lord Wilberforce); ATIYAH & SUMMERS, *supra* note 15, at 139–40.

210. *See* Davis v. Johnson [1979] AC 264 (HL) 328 (Lord Diplock) (appeal taken from Eng.) (reaffirming "expressly, unequivocably and unanimously" that the Court of Appeal is bound by its own prior decisions); Young v. Bristol Aeroplane Co. [1944] KB 718 (C.A.) 729–30 (Eng.) (identifying narrow grounds on which the Court of Appeal would not be bound by its past decisions); *see also* CROSS & HARRIS, *supra* note 26, at 108–16.

English courts do, of course, change the law. The strict practices regarding overruling by the House of Lords noted above apply only to express overruling, not implicit overruling, the creation of exceptions, and the gradual extension of doctrine. To give only one famous example, the House of Lords' decision in *Donoghue v. Stevenson*[211] radically altered English tort law by establishing a duty of care owed by the manufacturer of a product to the product's end user.[212] The House of Lords was free to do so, despite its self-imposed ban on overruling, because, as Lord Macmillan noted, there was no prior decision by the House on the precise point at issue.[213] Lord Macmillan argued that there was no "unbroken and consistent current of decisions" holding that a manufacturer owed no duty of care to a consumer in the absence of a contract.[214] He saw the extension of a duty of care to the manufacturer as dictated by "justice and common sense."[215] Thus the House of Lords was free to fashion a rule of law that was, as Lord Devlin later called it, "revolutionary in the legal world."[216] The story could be repeated in any area of law—English judges recognize their role as lawmakers and exercise their power to make the law, despite the greater customary restrictions on their ability to do so.[217]

Nevertheless, despite agreeing with American judges and scholars like Cardozo, Llewellyn, and Traynor that the common law judge is a lawmaker, English judges and judicial practice have rejected prospectivity in all but the most extreme circumstances. Lord Reid, while dismissing the declaratory theory as a "fairy tale," at the same time denounced prospective decisionmaking as an abuse of the judicial power:

> We cannot say that the law until yesterday was one thing, from tomorrow it will be something different. That would indeed be legislating. I believe that in America some exper-

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211. [1932] AC 562 (HL) (appeal taken from Scot.).

212. *See id.* at 599 (Lord Atkin).

213. *Id.* at 609 (Lord Macmillan). The case was a Scottish appeal, which had to be decided according to Scots law, but it proceeded on the assumption that the applicable law was the same in England and Scotland. *See id.* at 618. *Winterbottom v. Wright* (1842) 152 Eng. Rep. 402 (Exch.), was decided in the Exchequer of Pleas.

214. *Donoghue* [1932] AC at 608.

215. *Id.* at 621.

216. PATRICK DEVLIN, THE JUDGE 11 (1979).

217. *See supra* note 25 quoting English courts and judges rejecting the declaratory theory and acknowledging the proper role of judges as lawmakers.

> iments of this kind have been made and I should like to know more about them. I have some doubt whether we could follow.[218]

Lord Devlin held a similar position: recognizing the essential role of judge as common law maker, while rejecting the propriety of prospectivity as a judicial tool. He stated that "in the common law there is a general warrant for judicial lawmaking,"[219] and "[i]n the common law development is permitted, if not expected."[220] But he nevertheless recognized the value in retaining mandatory retroactivity as a check on the scope of judicial change to the law: "If it does become necessary to choose between a change in the law and a real injustice caused by retroactivity in the case at bar, surely the choice must be against change in the law; that puts a limit on judicial activism."[221] On the American adoption of prospective decisionmaking, Lord Devlin stated, "I do not like it. It crosses the Rubicon that divides the judicial and the legislative powers. It turns judges into undisguised legislators."[222] Lord Devlin recognized that although retroactivity was a fiction necessitated by the now-rejected declaratory theory, that fiction played a valuable role:

> It is facile to think that it is always better to throw off disguises. The need for disguise hampers activity and so restricts the power. Paddling across the Rubicon by individuals in disguise who will be sent back if they proclaim themselves is very different from the bridging of the river by an army in uniform and with bands playing.[223]

Thus, in Lord Devlin's view, mandatory retroactivity was essential to preserving the nature of the judicial function, even after the demise of the declaratory theory.

These judicial doubts about non-retroactivity are borne out in practice: no English court has ever prospectively overruled a

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218. Reid, *supra* note 25, at 23; *see also* W. Midland Baptist (Trust) Assoc. (Inc.) v. Birmingham Corp. [1970] AC 874 (HL) 898–99 (Lord Reid) (appeal taken from Eng.) ("We cannot say that the law was one thing yesterday but is to be something different tomorrow.").

219. DEVLIN, *supra* note 216, at 10.

220. *Id.*

221. *Id.* at 11.

222. *Id.* at 12.

223. *Id.*

case.[224] In a 2005 case called *In re Spectrum Plus Ltd.*,[225] the House of Lords recognized in dicta for the first time its power to decide cases prospectively, but emphasized that the power should only be used in an altogether exceptional situation.[226] The case involved the question of whether a charge over book debts was fixed or floating.[227] This affected their priority of payment under an insolvency statute that gave priority to preferential creditors for payment out of assets subject to a floating charge.[228] A previous case in the Chancery Division of the High Court, *Siebe Gorman & Co. Ltd. v. Barclays Bank Ltd.*,[229] had defined a fixed charge in such a way that the Spectrum charge qualified as fixed.[230] With this understanding, a large number of banks not involved in the litigation had used similar charging arrangements, believing that under the law they would take priority over other debts.[231]

Because the case involved these strong reliance interests, the House of Lords examined whether it had the power to overrule *Siebe Gorman* prospectively. All seven Lords on the panel found that it did, but that the present case was not sufficiently exceptional to justify such an action. Lord Nicholls noted what he distinguished as the "practical" and "principled" arguments against prospective decisionmaking.[232] Practically, prospectivity creates problems of discrimination.[233] A purely prospective decision means that a successful litigant will not receive the benefit of the new law.[234] A selectively prospective decision treats similarly situated individuals differently.[235] Selective prospectivity also makes the law arbitrary: the law applied in a particular litigant's case depends on the time that person brought suit.[236] The principled argument against prospectivity

224. *See* Connolly, *supra* note 24, at 48.
225. [2005] UKHL 41, [2005] 2 AC 680 (HL) (appeal taken from Eng.).
226. *See id.* at [41], [2005] 2 AC at 699 (Lord Nicholls).
227. *See id.* at [76], [2005] 2 AC at 710–11 (Lord Scott of Foscote).
228. *See id.* at [76], [2005] 2 AC at 711.
229. [1979] 2 Lloyd's Rep. 142 (Ch).
230. *See In re Spectrum* [2005] UKHL 41, [86], [2005] 2 AC at 713 (Lord Scott).
231. *See id.* at [43], [2005] 2 AC at 700 (Lord Nicholls).
232. *Id.* at [26], [2005] 2 AC at 695.
233. *See id.* at [26], [2005] 2 AC at 696.
234. *See id.* at [27], [2005] 2 AC at 696.
235. *See id.*
236. *See id.*

is that it is "outside the constitutional limits of the judicial function," "usurp[s] . . . the legislative function," and "robs a ruling of its essential authenticity as a judicial act."[237] A purely prospective judgment does not decide an actual dispute between parties based on the court's statement of what the law is—the hallmark of the judicial function.

Lord Nicholls saw the principled argument as needing the qualification that judges have a legitimate role to play as makers of the common law within their appropriate bounds. He noted that prospective decisionmaking might in some cases be a "proper exercise of judicial power."[238] Lord Nicholls adopted the approach of "[n]ever say never," admitting the possibility of using prospectivity in a future case under "altogether exceptional[]" circumstances.[239] He then ended by noting that the present case was "miles away from the exceptional category in which alone prospective overruling would be legitimate."[240]

Lord Hope agreed with Lord Nicholls that prospectivity might be appropriate in some future case, but was not in the present one. He stated that "in almost every case that can be imagined the exercise of the judicial power will require the House simply to declare what the law is, with the inevitable result that it will apply to other comparable cases whenever the events occurred."[241] He would not rule out prospective application of a decision, but only "in a wholly exceptional case."[242] Lord Scott agreed with Lord Nicholls's "never say never" approach, while remarking that an instance where prospective application of a new interpretation of a statute would be appropriate was inconceivable to him.[243] The remaining Lords agreed that prospective decisionmaking might be appropriate, but was certainly not in the present case.[244]

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237. *Id.* at [28], [2005] 2 AC at 696.

238. *Id.* at [39], [2005] 2 AC at 699.

239. *Id.* at [41], [2005] 2 AC at 699.

240. *Id.* at [43], [2005] 2 AC at 700.

241. *Id.* at [71], [2005] 2 AC at 709 (Lord Hope).

242. *Id.* at [74], [2005] 2 AC at 710.

243. *See id.* at [126], [2005] 2 AC at 726 (Lord Scott).

244. *See id.* at [45], [2005] 2 AC at 700 (Lord Steyn); *id.* at [161], [2005] 2 AC at 736 (Lord Walker of Gestingthorpe); *id.* at [162], [2005] 2 AC at 736–37 (Baroness Hale of Richmond); *id.* at [165], [2005] 2 AC at 737 (Lord Brown of Eaton-under-Heywood).

Following *Spectrum*, the Supreme Court of the United Kingdom has reiterated in dicta its belief in that court's inherent power to limit the retrospective effect of its decisions,[245] but has never found occasion to do so. Thus, England's "very cautious approach" to prospectivity remains in place.[246]

Spectrum's analysis of the perils of prospectivity tracks closely with that given by the Supreme Court in *Harper*. Both courts focused on the problem of treating similarly situated litigants differently, a violation of one of the most fundamental principles of justice. And both courts identified that prospectivity takes the court out of the judicial role and into the legislative. They both identified prospectivity as contrary to the judicial function, apart from the particular doctrinal confines of Article III. Though the House of Lords asserted its authority to use prospectivity in the future, neither it nor the U.K. Supreme Court has ever actually employed the technique—demonstrating English courts' hesitancy to use a measure that cuts so sharply against the grain of the judicial office. This posture, which combines a very cautious acceptance of the power to decide cases prospectively with a great reluctance to actually do so, aligns closely with the Supreme Court's holding in *Harper*. There, the Court created an exception for itself that allowed it to make an express reservation of the question of retroactivity when adopting a new rule,[247] though with the practical effect that virtually no new rules in federal law are now applied prospectively.[248]

On the other hand, *Spectrum*'s treatment of prospectivity forms a sharp contrast with that of the New Mexico Supreme Court in *Beavers*. *Beavers* noted the two rationales provided in *Harper*, but summarily dismissed the idea that the judicial function created any impediment to the use of prospectivity. The New Mexico court asserted that *Harper*'s rationale on that count applied only to Article III of the federal Constitution, not to the nature of the judicial function more generally. But *Spectrum*, and the broader English tradition, is strong evidence that this is not the case. As Lord Nicholls noted, it is America, not

245. *See* Cadder v. Her Majesty's Advocate [2010] UKSC 43, [58] (Lord Hope DP) (appeal taken from Scot.).

246. Connolly, *supra* note 24, at 47.

247. *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97–98 (1993).

248. *See* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 312 (2016).

England, that is the outlier among common law jurisdictions in its casual embrace of prospectivity.[249] English courts are not limited by a written "cases or controversies" requirement, yet the tradition of stating the law only in conjunction with deciding actual cases is so deeply rooted in English legal culture as to make prospectivity conceivable only in a "wholly exceptional case."[250] The English experience proves that a common law court, fully recognizing and embracing its responsibility for developing the common law,[251] can also identify the dangers posed by prospectivity and deliberately limit its use to truly exceptional circumstances. In this way, *Spectrum* demonstrates the viability of the *Harper* approach to retroactivity for American state courts.

III. CONCLUSION

American support for prospective decisionmaking has waxed and waned since the demise of the declaratory theory in the early twentieth century. The treatment of prospectivity at the Supreme Court tells the tale: acceptance, embrace, doubt, and ultimately, denial. A doctrine that at first seemed intuitively compatible with the demands of the judicial craft in the end proved both illegitimate and inequitable—a violation of the inherent nature of the judicial function and the need to apply the laws equally. Yet in many state courts, prospective decisionmaking remains as popular as ever, and mandatory retroactivity is still regarded as an outmoded Blackstonian holdover.

Insofar as state courts have declined to rein in their use of prospectivity after *Harper*, they are wrong to do so. The very problems that animated *Harper* apply with equal force to the state courts. Nor does the unique position of the state courts as developers of the common law diminish the force of *Harper*'s arguments. English courts recognize their role as developers of the common law yet, largely for the same reasons that motivated *Harper*, sharply limit prospectivity. The practice of English

249. *In re Spectrum* [2005] UKHL 41, [18], [2005] 2 AC at 693 (Lord Nicholls) ("In other common law countries prospective overruling has taken root as such only in the United States of America and India.").

250. *Id.* at [74], [2005] 2 AC at 710 (Lord Hope).

251. *See id.* at [32], [2005] 2 AC at 697 (Lord Nicholls).

courts demonstrates that state courts can follow *Harper*'s lead without falling back under the sway of Blackstone's beguiling "fairy tale."

Stephen J. Hammer