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NOTE

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Founded by E. Spencer Abraham & Steven J. Eberhard

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PREFACE

Over the past two years, the federal judiciary has increasingly come into public view. From the travel ban to the 2020 census to DACA, warring political factions have turned to the courts to settle their disagreements on fundamental national questions. The nominations of both *Journal* alumnus Neil Gorsuch and Brett Kavanaugh to the Supreme Court turned into highly publicized partisan political struggles, with both Justices being confirmed by narrow, nearly party-line votes. In such times, a proper understanding of the Constitution, the principles motivating it, and the role of judges in interpreting it is especially worthy of study. Scholars and judges from around the country addressed these issues and more in the Thirty-Seventh Annual Federalist Society Student Symposium in March 2018.

This Issue of the *Harvard Journal of Law & Public Policy* includes eight Essays from the Symposium. Justice Clint Bolick of the Arizona Supreme Court and Mr. Edward Whelan debate the merits of the presumption of constitutionality in statutory interpretation. Professors Randy Barnett, John Mikhail, and Lee Strang discuss what role, if any, the Declaration of Independence should have in interpreting the Constitution. Professor John Yoo examines the President's power to reverse the actions of his predecessors. Professor Kurt Lash makes the case that the Fourteenth Amendment did not, as is commonly argued, disrupt the basic principles of federalism originally enshrined in the Constitution. Lastly, Professor John McGinnis reflects on the amendment process established by Article V.

The first Article of this Issue, by Professor Craig Lerner, continues the Symposium's theme of examining the first principles of the Constitution and judges' role in interpreting it. He considers Justice Scalia's Eighth Amendment jurisprudence, arguing that the late Justice's "sake-of-argument" originalism failed to reconcile original meaning with nonoriginalist precedents. In the next Article, Professor Michael McGinniss discusses the importance of freedom of conscience within the legal profession and outlines the threats that the ABA's recently adopted Rule 8.4(g) of the Model Rules of Professional

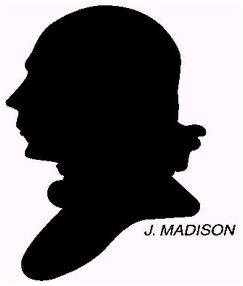
Conduct poses for socially conservative lawyers. Finally, Dr. Kevin Dayaratna, Mr. Paul Larkin, and Dr. John O'Shea argue that occupational licensing requirements needlessly contribute to the shortage of qualified medical professionals in America.

This Issue also includes an Essay by Professor Michael Greve examining the effect of states sorting themselves into "red" and "blue" blocs on our system of federalism. The Issue closes with a Note by myself on whether, in light of Pope Francis's recent revision of the *Catechism of the Catholic Church*, American Catholic judges have a moral obligation to recuse themselves from capital cases.

I would like to thank the *Journal* and Symposium editors for all the effort they put into making this Issue a reality. This *Journal* could not exist without them. In particular, Deputy Editor-in-Chief Chad Harper played an instrumental role in Article selection and was always available to provide counsel or do anything I asked of him. Will Courtney admirably performed the roles of both National Symposium Editor and Managing Editor, each a daunting task in its own right. Brad Barber ably discharged the many duties of Managing Editor as well. David Richter frequently volunteered to take on additional work that was not required of him. The labors of all these editors testify to the value of the *Journal*'s contribution to legal scholarship.

Ryan M. Proctor
Editor-in-Chief

THE FEDERALIST SOCIETY



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THE PROPER ROLE OF "JUDICIAL ACTIVISM"

THE HONORABLE CLINT BOLICK*

The last time I was invited to speak at the Federalist Society National Student Symposium,[1] never in my wildest dreams did I imagine that the next time I spoke at the Symposium would be as a Justice of the Arizona Supreme Court. Yet, here I am, as a judge. And once again, I am going to extol the virtues of an activist judiciary—here at the Federalist Society, of all places. How on earth could I make such a provocative, if not downright shocking, argument? "Judicial activism" is the universal pejorative. It is one thing on which both the right and left, red and blue, agree—that judicial activism is horrible.[2] But think about this for a moment: Every single person in this room is an activist. We are here because we are activists. After all, the opposite of activism is passivity, and perish the day that any of us are accused of passivity.

The devil, of course, is in the definition. I define judicial activism as any instance in which the courts strike down a law that violates individual rights or transgresses the constitutional boundaries of the other branches of government. In that regard, the problem with judicial activism is not that there is far too much, but that there has been far too little. This is due to the explosive growth of government power at every level.[3]

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* Associate Justice, Arizona Supreme Court.

1. Clint C. Bolick, *Jump-Starting K–12 Education Reform*, 40 HARV. J.L. & PUB. POL'Y 17 (2017).

2. *See* Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1401 (2002) ("Everyone scorns judicial 'activism' . . . . [I]f 'restraint' is good, then 'activism' must be bad. When liberals are ascendant on the Supreme Court, conservatives praise restraint and denounce activism. . . . When conservatives are ascendant on the Court, liberals praise restraint—by which they mean following all those activist liberal decisions from the previous cycle!—and denounce 'conservative judicial activism.'").

3. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233–50 (1994) (tracking the growth of the administrative state); Stephen Moore, *The Growth of Government in America*, FOUND. FOR ECON. EDUC. (Apr. 1, 1993), https://fee.org/articles/the-growth-of-government-in-america/

From our nation's founding, it took 169 years—until 1958, two decades after the New Deal had been enshrined in federal law—for the U.S. Code to reach 11,000 pages.[4] It took only 42 years—to the year 2000—for the number of those pages to quadruple.[5] One quarter of the time, yet four times the amount of federal laws. And of course, those laws have grown substantially since then.[6]

So it stands to reason that if we have four, or five, or six times as many laws as we did in 1958, we ought to see four, or five, or six times as many judicial decisions striking laws down as unconstitutional, unless we have fewer unconstitutional laws today than we had in 1958. That is quite unlikely. To the contrary, every student of the Constitution and of the various branches of government knows that, once upon a time, the President and the Congress debated endlessly over whether they had the constitutional authority to do what it was that they wanted to do.[7] In fact, that is why we have a Fourteenth Amendment—because Congress was persuaded that the civil rights laws that it wanted to pass were beyond the scope of its constitutional authority.[8]

When was the last time you saw an elected political official agonize over whether he or she possessed the power to enact a law? It was only a few years ago that President Bush signed into law the McCain-Feingold Act, recognizing that "the bill does have flaws" and expressing "reservations about the constitutionality" but stating that he "expect[ed] that the courts

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[http://perma.cc/JS44-4784] ("The United States has been gradually transformed from a nation with almost no government presence in the marketplace to one in which the government is now the predominant actor in the domestic economy.").

4. *Compare* 1–50 U.S.C. (1934), *with* 1–50 U.S.C. (1958).

5. *Compare* 1–50 U.S.C. (1958), *with* 1–50 U.S.C. (2000).

6. *Compare* 1–50 U.S.C. (2000), *with* 1–50 U.S.C. (2012).

7. *See* Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1103–09 (2013) (explaining that historical practice has framed the discussion of presidential powers vis-à-vis Congress); Samuel Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation*, 68 VA. L. REV. 333, 394–96 (1982) (providing a terse summary of congressional authorization vis-à-vis presidential powers).

8. *See generally* John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950) (providing a rich history of the Fourteenth Amendment that sheds light on its original meaning).

[would] resolve these legitimate legal questions as appropriate under the law."[9]

Today, much of our law is made not by officials who are democratically accountable to the people, but by unelected bureaucrats who are not.[10] The growth of the U.S. Code pales in comparison to the growth of the Federal Register, the compilation of agency-made law.[11] And what has been the judiciary's response? The *Chevron*[12] Doctrine—which, if we had an Academy Awards for judicial abdication, would be strolling down the red carpet right now.[13]

From what source does the judicial power and duty to strike down unconstitutional laws derive? It derives from the genius of our constitutional republic.[14] As Hamilton argued in Federalist No. 78, "[n]o legislative act . . . contrary to the Constitution, can be valid," and "the courts were designed to . . . keep the [legislature] within the limits assigned to their authority."[15] To

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9. Press Release, President George W. Bush, President Signs Campaign Finance Reform Act (Mar. 27, 2002), http://georgewbush-whitehouse.archives.gov/news/releases/2002/03/20020327.html [http://perma.cc/AE6L-M6ZV].

10. *See* Ronald D. Rotunda, *King v. Burwell and the Rise of the Administrative State*, 23 U. MIAMI BUS. L. REV. 267, 281–82 (2015) ("Unelected administrators, hidden from public view, decide significant and controversial issues such as 'net neutrality,' or the future of the Internet. Regulators (and the President who appoints them) can use complex regulations that are written in jargon to reward political friends and burden political enemies.").

11. *See* SUSAN E. DUDLEY & JERRY BRITO, REGULATION: A PRIMER 5–6 (2d ed. 2012) (discussing the growth of agency-made law). This is illustrated through the sheer number of pages that have been added to the Federal Register, which "has grown from under 25,000 pages to over 165,000 pages over the last 50 years." *Id.* at 5.

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

13. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151–52 (10th Cir. 2016) (Gorsuch, J., concurring) (Rather "than completing the task expressly assigned to us, rather than 'interpret[ing] . . . statutory provisions,' declaring what the law is, and overturning inconsistent agency action, *Chevron* step two tells us we must allow an executive agency to resolve the meaning of any ambiguous statutory provision. In this way, *Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty" (alteration in original) (quoting 5 U.S.C. § 706 (2012)).).

14. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–78 (1803) (holding that the Constitution was designed to assign "to different departments, their respective powers," and that it granted the judiciary the power to strike down laws that violate the Constitution of the United States).

15. THE FEDERALIST NO. 78, at 379 (Alexander Hamilton) (Terence Ball ed., 2003).

be sure, Hamilton also presciently warned that the judiciary itself could become dangerous if it ever exercised executive or legislative powers.[16]

It ought not be an option for a court to "fix" a seemingly unconstitutional statute. Justice Scalia was famous for saying that, if the legislature produces garbage and the Court is asked to interpret it, the Justices' constitutional obligation is to return garbage.[17] "Garbage in, garbage out."[18] Of course, if there are two competing ways to interpret a statute, the judge should interpret the statute in the way that makes the statute constitutional rather than the way that would make it unconstitutional. That proposition is not only compelled by the separation of powers, but is a core rule of statutory interpretation.[19] However, the problem arises when a judge is inclined to rewrite a statute that, as written, cannot be interpreted in such a way as to make it constitutional.

The Arizona Supreme Court recently adjudicated a case involving a question of statutory interpretation related to a parental-rights provision.[20] Arizona has a statute that says that, if a parent fails to appear at the hearing for termination of parental rights, that person waives his parental rights.[21] The issue before the court was whether the parent's absence is determined at the beginning or the end of the hearing.[22] In addressing this question, my colleagues on the Arizona Supreme Court

16. *Id.* at 378, 381 (internal citation omitted) ("[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers. . . . [I]f [judges] should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.").

17. *See Q&A with Justice Antonin Scalia*, C-SPAN (July 19, 2012), https://www.c-span.org/video/?307035-1/justice-antonin-scalia-1936-2016 [http://perma.cc/DHY2-UMZZ].

18. *Id.* at 00:16:54 to 00:16:57.

19. Derek P. Langhauser, *Executive Regulations and Agency Interpretations: Binding Law or Mere Guidance? Developments in Federal Judicial Review*, 29 I.C. & U.L. 1, 13 (2002) ("The basis of *Chevron* was a constitutional presumption central to the separation of powers.").

20. *See* Marianne N. v. Dep't of Child Safety, 401 P.3d 1002 (Ariz. 2017).

21. ARIZ. R.P. JUV. CT. 64(C).

22. *Marianne N.*, 401 P.3d at 1006–07.

used a variety of statutory construction tools.[23] But frankly, I am sure the legislature did not even think about this question when it wrote the statute. Unsurprisingly, the justices' statutory construction tools resulted in interpretive conflicts.[24] For instance, two other justices and I read the statute's language and determined that there was only one constitutional way to interpret the statute: A parent only waives his rights if he is absent for a severance or termination hearing.[25] For if a parent could waive his parental rights by missing the beginning of the hearing, such as by arriving only two seconds late, that would unquestionably constitute a violation of due process.[26] And I do not think that is a controversial way to interpret a statute. That said, four of our colleagues chose Option C, which was to effectively rewrite the statute to make it constitutional.[27] The other two justices and I were very critical of this approach, so we found ourselves in dissent.[28]

Whereas I view the above legal debate as relating to a doctrine of statutory interpretation, Mr. Whelan sees a presumption of constitutionality in favor of the statutory language. Such a presumption enables a situation in which an individual who possesses a right under the Constitution walks into the courtroom, and the government walks into the courtroom, and the scales of justice tilt in favor of the government.[29] Instead of simply interpreting the individual's right against the government power on equal terms, a presumption of the statute's con-

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23. *See generally id.* (approaching the question by analyzing, for example, the Arizona Constitution, legislative intent, and the statute's plain language).

24. *See generally id.*

25. *See id.* at 1010 (Eckerstrom, J., dissenting) ("Based on its plain language, § 8-863(C) expressly allows default only if the parent fails to attend the severance hearing.").

26. *See id.* at 1008–09.

27. *See generally id.* at 1004–08.

28. *Id.* at 1008–13 (Eckerstom, J., joined by Bolick, J., and Gould, J., dissenting).

29. *See* Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 898, 913 (2005) ("[T]he rational basis test permits—perhaps encourages—government lawyers and witnesses to misrepresent facts and distort reality; it destroys the principal of judicial neutrality by conscripting judges to act as advocates for the government; it turns a blind eye to corruption; it saddles plaintiffs with a logically impossible burden of proof; and it is often deliberately misapplied in order to achieve a preferred result.").

stitutionality forces the individual to prove what is, in some instances, a metaphysical impossibility.[30]

Another reason judges should never rewrite statutes is for the sake of individual inquiry. If a person wants find and obey the law, she ought to be able to look at a statute and know what it means; she should not have to turn to a judicial decision to see how judges have rewritten words that in fact do not appear in the statute. That is certainly true also when judges invalidate a provision. They do not really remove laws from the books, but declare laws void and hold that they cannot be enforced.[31]

No matter how activist a judge is in policing constitutional boundaries, that judge should never yield to the temptation to exercise legislative or executive powers, lest that judge violate those very same boundaries. But judicial abdication is just as grave as judicial lawlessness, for it eviscerates individual liberties and allows government to grow far beyond its intended powers.[32]

With respect to the other branches of government, how is the judicial power properly bound? It is bound by the constitutional oath that all judges take, and hence, by the words and to the meaning of the Constitution.[33] That means that judges should enforce every provision of the Constitution—the Fourth and Fifth Amendments, just as the First and Second Amendments. There are no ink blots in the Constitution, whether the Ninth

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30. *Id.*

31. *See* THE FEDERALIST NO. 78, at 379 (Alexander Hamilton) (Terence Ball, ed. , 2003) ("Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.").

32. Professor Randy Barnett has written, very persuasively, that proper interpretation introduces not a presumption of constitutionality, but a presumption of liberty into the Constitution. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 253 (2004) (contrasting the presumption of constitutionality with the presumption of liberty and then offering an in-depth explanation of the presumption of liberty).

33. 28 U.S.C. § 453 (2012) ("I, _____ _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.").

Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment.

An example of unbridled judicial abdication is the judiciary's flawed interpretation of the Fourteenth Amendment. The Fourteenth Amendment marked a radical restructuring of part of our system. In fact, one of the dissenting justices in the *Slaughter-House Cases*[34] aptly referred to it as a "new Magna Carta"; it was an understanding that the states, despite the assumption that they would be the more reliable guardians of liberty, in many instances were not.[35] And so the intent of the Fourteenth Amendment was to place a floor beneath the rights that are guaranteed by the federal Constitution.[36]

A judicial abomination like the *Slaughter-House Cases* is not an act of judicial moderation, but a virtual repeal of one of the most important and meaningful provisions of our Constitution.[37] By reading the Privileges or Immunities Clause out of the Constitution, the Supreme Court removed the principal basis for the protection of economic liberties in our Constitution.[38]

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34. 83 U.S. (16 Wall.) 36.

35. *Id.* at 56 (Swayne, J., dissenting).

36. *See id.* at 37 (Field, J., dissenting) ("The amendment was adopted to obviate objections which had been raised and pressed with great force to the validity of the Civil Rights Act, and to place the common rights of American citizens under the protection of the National government."); *id.* at 54 (Bradley, J., dissenting) ("[F]ormerly the States were not prohibited from infringing any of the fundamental privileges and immunities of citizens of the United States . . . since the adoption of the fourteenth amendment. In my judgment, it was the intention of the people of this country in adopting that amendment to provide National security against violation by the States of the fundamental rights of the citizen."); *id.* at 59 (Swayne, J., dissenting) ("By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against the wrong and oppression by the States. That want was intended to be supplied by this amendment.").

37. *Id.* at 24 (holding that the Privileges or Immunities Clause of the Fourteenth Amendment protects only the privileges and immunities of citizens of the United States, not those of the citizens of the several states); *see also* McDonald v. City of Chicago, 561 U.S. 742, 754 (2010) ("[T]he Privileges or Immunities Clause protects only those rights 'which owe their existence to the Federal government, its National character, its Constitution, or its laws.' . . . [O]ther fundamental rights—rights that predated the creation of the Federal Government and that 'the State governments were created to establish and secure'—were not protected by the Clause" (quoting *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 76–79).).

38. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 78–79 ("Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for

That gave rise to the somewhat oxymoronic notion of substantive due process, and created a hopelessly muddled jurisprudential regime.[39]

In some sense, the *Slaughter-House Cases* did restore to the states a much greater measure of sovereignty or autonomy than would have been the case if the court had struck down the challenged laws and given a more robust interpretation to the Privileges or Immunities Clause.[40] But at the same time, it opened up a regime of tyranny that was precisely what the Fourteenth Amendment was designed to prevent.[41] So unless one is an advocate of state power as an end in itself, the decision is not one to cheer.

However, one thing that the *Slaughter-House Cases* also did not do is require the states to adopt its interpretation of "privileges or immunities."[42] Quite the contrary, the Court said if the citizens wanted to protect their privileges or immunities that are not expressly protected under federal law, they had to go to the states.[43] So how did the state courts respond? "Our Privi-

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security and protection, and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.").

39. *See* United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., concurring) (referring to substantive due process as an "oxymoron").

40. *See* Brief for the Goldwater Institute et al. as Amici Curiae Supporting Petitioners at 26, 28–29, McDonald v. City of Chicago, 561 U.S. 742 (2010) (No. 08-1521) (opining that, given its proper interpretation, "[t]he undeniable truth is that the Fourteenth Amendment significantly altered the original constitutional balance of power between the federal and state governments, at least as it pertains to protecting rightful liberty from state action").

41. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 548 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954) ("[W]e think the enforced separation of the races, as applied to the internal commerce of the state [does not] abridge[] the privileges or immunities of the colored man . . . .").

42. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) at 77 ("Nor did it profess to control the power of the State governments over the rights of its own citizens. Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.").

43. *See id*. ("But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government.").

leges and Immunities Clause does not mean anything either," they replied.[44]

Principled judicial activism means enforcing rather than amending constitutional language. "Public Use" does not mean "Public Benefit."[45] "Cruel and Unusual Punishment" does not mean "Cruel or Unusual Punishment."[46] Principled judicial activism means avoiding the muddle of hopelessly subjective, value-laden, judicially created tests, like the three-part system of assigning different protections to different types of rights under the Equal Protection Clause.[47] Just think of how much easier a law school constitutional law exam would be if students could just apply one standard.

Instead, we have multiple standards, including the particularly problematic "Rational Basis" test for economic liberties under the Constitution—a test that calls itself Rational Basis, but requires neither a rationale nor a basis.[48] Constitutional

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44. *See, e.g.*, Cory v. Carter, 48 Ind. 327, 341 (1874) (upholding segregation in schools by following the rationale of the *Slaughter-House Cases* vis-à-vis its Privileges or Immunities Clause); Bd. of Educ. v. Tinnon, 26 Kan. 1, 16–17 (1881) (finding no statutory basis from the Kansas legislature for school segregation, but noting that "[f]or the purposes of this case we shall assume that the legislature has the power to authorize the board of education of any city or the officers of any school district to establish separate schools for the education of white and colored children, and to exclude the colored children from the white schools, notwithstanding the fourteenth amendment to the constitution of the United States; and there are decisions in some of the states which sustain such authority"); State *ex rel.* Russell v. Beattie, 16 Mo. App. 131, 134–38 (1884), *overruled in part by* City of St. Louis v. Russell, 22 S.W. 470 (Mo. 1893) (following the *Slaughter-House Cases* precedent to grant wide latitude to the Missouri legislature to regulate livery stables).

45. Kelo v. City of New London, 545 U.S. 469, 508 (2005) (Thomas, J., dissenting) ("The most natural reading of the [Public Use] Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever.").

46. *See generally* Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119 (2004) (discussing the trouble with the often-indiscriminate uses of "cruel *and* unusual" and "cruel *or* unusual").

47. *See* High Tech Gays v. Def. Indus. Sec. Clearance Off., 895 F.2d 563, 571 (9th Cir. 1990) ("It is well established that there are three standards we may apply in reviewing the plaintiffs' equal protection challenge to the DoD Security Clearance Regulations: strict scrutiny, heightened scrutiny, and rational basis review" (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–41 (1985)).

48. *See* Neily, *supra* note 31, at 913 ("[T]he rational basis test permits—perhaps encourages—government lawyers and witnesses to misrepresent facts and distort reality; it destroys the principal of judicial neutrality by conscripting judges to act

challenges subject to Rational Basis Review are almost impossible to win.[49] The Rational Basis test creates a presumption of constitutionality, where the judge puts his weight on the scale.[50] Where does this come from? It does not come from the language of the Constitution.[51] In fact, it is contrary to the spirit of the Constitution, which is by and large a delegation of specifically enumerated powers to the national government, not a declaration of rights.[52] Here, I adhere to thoughts that have

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as advocates for the government; it turns a blind eye to corruption; it saddles plaintiffs with a logically impossible burden of proof; and it is often deliberately misapplied in order to achieve a preferred result.").

49. *See* Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 79–81 (1997) ("[J]udicial scrutiny under rational basis review is typically so deferential as to amount to a virtual rubber stamp.").

50. *See* Neily, *supra* note 31, at 907–08 ("It is a bedrock principle of common law that parties to court proceedings are entitled to a neutral adjudicator who is free from bias and even the appearance of bias. . . . But like so many of our most cherished legal traditions, that one goes right out the window in rational basis cases, where judges are not only permitted but *required* to assist the government in defending challenged regulations by dreaming up possible justifications of their own. In any other setting, the idea that judges may actually align themselves with one party and actively work to help that side prevail in litigation would be intolerable.").

51. *See* U.S. CONST. amends. V, XIV; *see also* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2326–27 (2016) (Thomas, J., dissenting) ("The majority's furtive reconfiguration of the standard of scrutiny applicable to abortion restrictions also points to a deeper problem. The undue-burden standard is just one variant of the Court's tiers-of-scrutiny approach to constitutional adjudication. And the label the Court affixes to its level of scrutiny in assessing whether the government can restrict a given right—be it 'rational basis,' intermediate, strict, or something else—is increasingly a meaningless formalism. As the Court applies whatever standard it likes to any given case, nothing but empty words separates our constitutional decisions from judicial fiat. Though the tiers of scrutiny have become a ubiquitous feature of constitutional law, they are of recent vintage."); United States v. Virginia, 518 U.S. 515, 570 (1996) (Scalia, J., dissenting) ("To reject the Court's disposition today, however, it is not necessary to accept my view that the Court's made-up tests cannot displace longstanding national traditions as the primary determinant of what the Constitution means.").

52. *See* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted.").

been well developed by Georgetown's esteemed Professor Randy Barnett.[53]

The current rational basis test came from *FCC v. Beach Communications*,[54] in which the Court held that any conceivable rational basis will suffice—even one not presented by the government in defense and even one that was not the actual factor motivating the legislature.[55] In essence, the Court said, "If you don't come up with a rational basis, Solicitor General, we will come up with it. And if we can conceive of a rational basis, then the statute is constitutional."[56] That is a far cry from a more robust Rational Basis test, which would ask two questions: "Is indeed there a legitimate government power?" And in this case, "Are the means rationally related to accomplish the legitimate objective?"

A quick example will illustrate the issue with the Rational Basis test. The Tenth Circuit has held that economic protectionism is a legitimate government purpose.[57] But if one goes to the common law, he will find that it is not.[58] Is an economic regulation rationally connected in a genuine way to a legitimate gov-

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53. *See generally* Randy E. Barnett, *Are Enumerated Constitutional Rights the Only Rights We Have?: The Case of Associational Freedom*, 10 HARV. J.L. & PUB. POL'Y 101 (1987); Randy E. Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI. KENT L. REV. 37 (1988); Randy E. Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y (1991); Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1989).

54. 508 U.S. 307 (1993).

55. *Id.* at 315 ("Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of legislative facts explaining the distinction [o]n the record, has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data" (internal citations omitted).).

56. *See supra* note 31 and accompanying text.

57. Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004) ("[F]avoring one intrastate industry over another is a legitimate state interest. . . . [W]e hold that, absent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest.").

58. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 101–02 (1872) (Field, J., dissenting) ("All monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness, and were held void at common law in the great *Case of Monopolies*, decided during the reign of Queen Elizabeth.").

ernment purpose? This was the rule of law that was articulated by the dissenters in the *Slaughter-House Cases*.[59] Yet, under the current regime, most courts would likely uphold nearly any economic regulation.

A possible exception is a challenge under a state constitution, in which case state courts are at liberty to give greater meaning to the protections of economic liberty—just as the Texas Supreme Court did in *Patel*.[60] That case illustrates that state courts may enforce constitutional rights even if their federal counterparts do not.

For instance, the Arizona Supreme Court had a case involving the warrantless use of GPS devices on vehicles, which the court struck down under the Fourth Amendment by a four to three vote.[61] One of the federal precedents that we had to apply was a case from 1967 called *Katz v. United States*,[62] defining what a "reasonable expectation of privacy" is under the Fourth Amendment.[63] The justices were admonished, among other things, to ask and answer whether a particular privacy was one that society was prepared to recognize as reasonable.[64] How on earth does a judge know what society is prepared to recognize as reasonable? If asked to do that again, perhaps I should call

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59. *See generally id.* at 83–130 (illustrating Justices Field's, Justice Bradley's, and Justice Swain's dissenting views).

60. Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69 (Tex. 2015); *see also id.* at 95 (Willett, J., concurring) ("Like the Court, I favor a less hard-hearted and more liberty-minded view for Texas, one that sees the judiciary as James Madison did when he introduced the Bill of Rights, as an 'impenetrable bulwark' against imperious government. The Texas Constitution enshrines structural principles meant to advance individual freedom; they are not there for mere show. Our Framers opted for constitutional—that is, *limited*—government, meaning majorities don't possess an untrammeled right to trammel. The State would have us wield a rubber stamp rather than a gavel, but a written constitution is mere meringue if courts rotely exalt majoritarianism over constitutionalism, and thus forsake what Chief Justice Marshall called their 'painful duty'—'to say, that such an act was not the law of the land'" ((internal citations omitted)).

61. State v. Jean, 407 P.3d 524, 527 (Ariz. 2018).

62. 389 U.S. 347 (1967).

63. *Id.* at 360–61 (Harlan, J., concurring).

64. *Jean*, 407 P.3d at 547 n.5 (Bolick, J., concurring in part and dissenting in part) ("[W]e are admonished to determine whether a particular expectation of privacy is 'one that society is prepared to recognize as "reasonable"'" (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).).

for a show of hands at the next Federalist Society event I attend; that will be my litmus test.

Principled judicial activism means a perspective on stare decisis not as an end in itself, but as a means to perpetuate the rule of law. Our job as judges is not to align the Constitution to our precedents; it is to align our precedents to the Constitution. Principled judicial activism means avoiding artificial, court-made obstacles to the vindication of individual rights, such as taxpayer standing and a presumption of constitutionality.[65] Furthermore, principled judicial activism means recognizing state constitutions as the primary safeguards for freedom in our federalist system, not as an afterthought.[66]

We have seen the incredible power of ideas over the last few decades in American jurisprudence, compared to the era in which people like Richard Epstein and Mike McConnell and

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65. *See* Randy E. Barnett, *Foreword: Judicial Conservatism v. A Principled Judicial Activism*, 10 HARV. J.L. & PUB. POL'Y 273, 276, 290 (1987) ("Others have urged a more activist judicial role, a view that I have previously called judicial pragmactivism and that has recently been referred to as a principled judicial activism.").

66. Justice Brennan, in his dissenting opinion in *Michigan v. Mosley*, urged state courts to look to state constitutions for protections of individual liberties. 423 U.S. 96, 120 (1975) (Brennan, J., dissenting) ("In light of today's erosion of *Miranda* standards as a matter of federal constitutional law, it is appropriate to observe that no State is precluded by the decision from adhering to higher standards under state law. Each State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution."). Justice Stevens echoed Justice Brennan's sentiments in cases subsequent to *Mosley*. *See, e.g.*, Massachusetts v. Upton, 466 U.S. 727, 738–39 (1984) (Stevens, J., concurring) ("It must be remembered that for the first century of this Nation's history, the Bill of Rights of the Constitution of the United States was solely a protection for the individual in relation to federal authorities. State Constitutions protected the liberties of the people of the several States from abuse by state authorities. The Bill of Rights is now largely applicable to state authorities and is the ultimate guardian of individual rights. The States in our federal system, however, remain the primary guardian of the liberty of the people."). States courts have at an increasing rate accepted Justice Brennan and Justice Stevens' invitation to focus on state constitutions to protect individual liberties. *See, e.g.*, Baker v. State, 744 A.2d 864, 870 (Vt. 1999) ("While the federal [Fourteenth] [A]mendment may thus supplement the protections afforded by the Common Benefits Clause, it does not supplant it as the first and primary safeguard of the rights and liberties of all Vermonters" (citations omitted)); State v. Badger, 450 A.2d 336, 347 (Vt. 1982) (stating that the state court was free to "provide more generous protection to rights under the Vermont Constitution than afforded by the federal charter").

Randy Barnett were just beginning to work.[67] So many of their ideas, considered radical at the time, have become mainstream.[68] Over the past 30 years, the United States Supreme Court has revitalized many freedoms and enhanced forgotten parts of the Constitution. This revitalization has included a renewed focus on federalism,[69] constraints on Congress's ability to use the commerce power to restrict political speech,[70] the protection of private property rights,[71] and an increased clarity and greater rights related to the individual's right to keep and bear arms.[72] These are the types of beneficial, principled judi-

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67. *Michael W. McConnell*, STAN. L. SCH., https://law.stanford.edu/directory/michael-w-mcconnell/ [http://perma.cc/Z8QV-KE2K] (last visited Sept. 22, 2018) (linking to a list of Michael McConnell's publications); *Randy E. Barnett*, GEO. L., https://www.law.georgetown.edu/faculty/randy-e-barnett/ [http://perma.cc/2B3H-GLP6] (last visited Sept. 22, 2018) (including a list of Randy Barnett's publications); *Richard Epstein*, N.Y.U. L., https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.publications&personid=26355 [http://perma.cc/ME77-HDP7] (last visited Sept. 22, 2018) (including a list of Richard Epstein's publications).

68. *See, e.g.*, Sheryl Gay Stolberg & Charlie Savage, *Vindication for Challenger of Health Care Law*, N.Y. TIMES (March 26, 2012), https://www.nytimes.com/2012/03/27/us/randy-barnetts-pet-cause-end-of-health-law-hits-supreme-court.html [https://nyti.ms/2MQLMlv]; Sam Williamson, *The Miscasting of Michael McConnell: The Curse of Excellence*, FINDLAW (July 3, 2001), https://supreme.findlaw.com/legal-commentary/the-miscasting-of-michael-mcconnell.html [http://perma.cc/N7TR-AN3C].

69. *See* Richard C. Reuben, *Court Bolsters 10th Amendment*, A.B.A. J., Apr. 1995, at 78, 78 (1995) ("While today's renewed focus on federalism is being driven by political events, much of the legal groundwork already has been plowed by the U.S. Supreme Court.").

70. *See* Citizens United v. FEC., 558 U.S. 310, 365 (2010) ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

71. *See* Ilya Somin, *It's Time To End the Poor Relation Status Of Constitutional Property Rights*, WASH. TIMES (July 29, 2015), https://www.washingtontimes.com/news/2015/jul/29/celebrate-liberty-month-its-time-to-end-the-poor-r/ [http://perma.cc/8WPV-UDWN] ("In recent years, the Court's record on property rights has improved. In several decisions, it has gradually strengthened protection against uncompensated takings. It has also cracked down on practices under which landowners are sometimes forced to go through costly, byzantine administrative procedures before they can even raise a takings claim. Most recently, in its June decision in Horne v. Department of Agriculture, an 8-1 majority held that a taking has occurred when the government seizes large quantities of raisins from producers, in order to artificially inflate the market price of that commodity.").

72. *See* District of Columbia v. Heller, 554 U.S. 570, 636 (2008) (holding that a ban on registering handguns and keeping guns in the home disassembled or non-

cial activism to which I alluded. They demonstrate that it always possible to return the Constitution to its text.

If I may just impart one imperative to each of you—in your future scholarship, in your civic engagement, in your philanthropy, in your litigation, and for the many of you who are unidentified as yet as future judges, in your opinions—please keep this momentum going. The threats to our freedoms are omnipresent and omnivorous. For better or worse, our judges are often the thin black-robed line between freedom and tyranny. As homage to the patron saint of my precious adopted state of Arizona, and of the modern conservative movement, I will close by adapting the famous words of Barry Goldwater: "Activism in defense of liberty is no vice. Abdication in pursuit of justice is no virtue."[73]

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functional with a trigger-lock requirement, violates the Second Amendment and therefore is unconstitutional).

73. Senator Barry Goldwater, 1964 Acceptance Speech (July 16, 1964), https://www.washingtonpost.com/wp-srv/politics/daily/may98/goldwaterspeech.htm [http://perma.cc/GD8P-MVW3].

THE PRESUMPTION OF CONSTITUTIONALITY

EDWARD WHELAN*

Justice Bolick and I have agreed to disagree as much as possible, so I'm going to do my best to live up to our agreement. Let me jump right into my core thesis.

A Justice may deem a statute to be unconstitutional only when, after careful analysis, the Justice determines that the statute clearly conflicts with the Constitution. A Justice may not deem a statute to be unconstitutional if the relevant constitutional provision, at the end of the analysis, has two or more plausible meanings and the statute is consistent with one of those plausible meanings. It's not enough, in other words, that the statute is inconsistent with what the Justice regards as the best reading of the constitutional provision. If there remains a plausible alternative reading that can be reconciled with the statute, the Justice must apply the statute.

This concept might fairly be labeled a "presumption of constitutionality." A statute, that is, is presumptively constitutional. That presumption may be rebutted, but only by showing that the statute clearly conflicts with the Constitution.

This principle has deep roots. Indeed, it inheres in the very foundation of what we call judicial review: the power or, perhaps better, the duty of federal courts to decline to apply statutes that violate the Constitution. In his justification of judicial review in Federalist 78, Alexander Hamilton explains that the Constitution is a "fundamental law" that, like any other law, judges must interpret in order to "ascertain its meaning."[1] In the event of what Hamilton calls an "irreconcilable variance" between the Constitution and an ordinary statute, judges need to apply the Constitution, the law of, as he puts it, "superior

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* President, Ethics and Public Policy Center. The following is adapted from remarks given on March 9, 2018, at the Federalist Society's National Student Symposium as part of a debate with Justice Clint Bolick of the Arizona Supreme Court titled "The Judicial Power: The Judicial Duty to Follow the Law or a Discretionary Power of Judicial Review?"

1. *See* THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (Jacob E. E. Cooke, ed. 2010).

obligation and validity," in preference to the statute.[2] Chief Justice Marshall's exposition of judicial review in *Marbury v. Madison*[3] closely tracks Hamilton's reasoning.

Hamilton explains that the exercise of determining whether a statute clashes with the Constitution is akin to the ordinary judicial function of deciding which of two competing statutes trumps the other. As he puts it, "[s]o far as [those statutes] can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done."[4] Likewise, it is the obligation of judges to attempt, by any fair construction, to reconcile the Constitution with a statute that is alleged to violate it, and to decline to enforce the statute only when such reconciliation is not possible.

In perhaps his most famous passage, Hamilton again emphasizes that the exercise of judicial review to decline to apply a statute must involve a genuine repugnancy between the Constitution and the statute. "It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. . . . [I]f they should be disposed to exercise WILL instead of JUDGMENT," by, for example, positing repugnancies that can in fact be reconciled, "the consequence would equally be the substitution of their pleasure to that of the legislative body."[5] "The observation," he continues, "if it proved any thing, would prove that there ought to be no judges distinct from that body."[6]

So, again, the presumption of constitutionality is built into the very justification for judicial review. As Chief Justice Marshall writes in *Fletcher v. Peck*,[7] in order for a judge to deem a statute void, "[t]he opposition between the constitution and the

2. *Id.*

3. 5 U.S. (1 Cranch) 137 (1803).

4. THE FEDERALIST NO. 78, at 525–26 (Alexander Hamilton) (Jacob E. E. Cooke, ed. 2010).

5. *Id.* at 526.

6. *Id.*

7. 10 U.S. (6 Cranch) 87 (1810).

law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."[8]

Let me emphasize that under a proper understanding of the exercise of judicial review, judges do not *invalidate* or *strike down* laws; they merely *decline to apply* them. Judges do not have the authority to remove laws from the statute books. There is, as law professor Jonathan Mitchell points out, no "writ of erasure" that judges can issue to erase a law.[9] If you look at various laws that were "struck down," you will find that most of them are still on the books. Very rarely has the legislature actually repealed them. When the Supreme Court first ruled that paper money was unconstitutional and then reversed itself a couple years later, there was no new statute enacted in the meantime. But if the first statute was erased (in material part) after the court's first ruling, how could the court have resuscitated it later?

The whole notion of judges striking down laws is part of the myth of judicial supremacy—a myth that goes well beyond the sound understanding of judicial review and holds that we are all obligated to accept as binding in all respects whatever the Supreme Court rules on the constitutionality of statutes. This is a myth that was never voiced by the Supreme Court until *Cooper v. Aaron*[10] in 1958. When the Court voiced it then, it made up a constitutional history that was entirely unsound, claiming that this myth had always been accepted. Never mind that Andrew Jackson, Abraham Lincoln, and Thomas Jefferson had clearly rejected it.[11] If we can avoid saying that the Court strikes down statutes, it will lead to an improved understanding of the role of the Court.

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8. *Id.* at 128. This standard of clear conflict is less deferential than the standard that James Bradley Thayer advocated and, unlike Thayerian deference, it applies to federal laws as well as state laws. *See* Ed Whelan, *John McGinnis on the Originalist Case for Judicial Restraint*, NAT'L REV.: BENCH MEMOS (March 27, 2015, 3:51 PM), https://www.nationalreview.com/bench-memos/john-mcginnis-originalist-case-judicial-restraint-ed-whelan/ [https://perma.cc/85MM-7W4X].

9. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018).

10. 358 U.S. 1 (1958).

11. *See* Ed Whelan, *A New Book Revitalizes Our Understanding of the Constitution*, NAT'L REV. (May 20, 2015, 8:00 AM), https://www.nationalreview.com/2015/05/new-book-takes-myth-judicial-supremacy-ed-whelan/ [https://perma.cc/5VWJ-926W].

Having laid this foundation, I would now like to defend "judicial activism"—the term and epithet, that is, not the practice. There is a cottage industry of academics who alternate between maligning the term judicial activism and trying to co-opt it.

I will first address the common claim that the term judicial activism should simply be avoided. The relevant question is not whether the term is often used poorly. That is surely the case. But that is also the case with many terms that no one seeks to banish from public discourse. Terms like "conservative," "liberal," and "moderate" are highly contested and are often used poorly. The relevant question is whether the term is capable of being used well. The answer to that question is, plainly, "yes." Indeed, the term judicial activism best captures succinctly the wrongful judicial invasion of the realm of representative government. The core of judicial activism, as I use the term, consists of the wrongful overriding by judges of democratic enactments, typically through the invention of new constitutional rights. *Roe v. Wade*[12] is a classic example. The central concern that the term signals is over the proper limits on the role of the courts in our system of separation of powers and representative government. The term also usefully triggers the deeper question of what interpretive method or methods are legitimate.

I emphasize that judicial activism is just one category of judicial error. I use the term "judicial passivism" to identify another category of error: a court's wrongful failure to enforce constitutional rights and limits on governmental power. Judicial restraint is the sound mean between the two extremes of judicial activism and judicial passivism. Judicial restraint means that judges do not wrongly decline to apply democratic enactments. At the same time, it is entirely consistent with judicial restraint, and it is part of the judicial duty, for judges to deem unconstitutional those statutes that do clearly conflict with the Constitution.

Some critics aim to destigmatize the term judicial activism. Judicial activism actually began as a non-pejorative term, advanced in its first public use by Arthur Schlesinger back in the

12. 410 U.S. 113 (1973).

late 1940s.[13] But over time, especially as liberal judicial activism prevailed in many ways, the term fully earned its stigma. Now, we see a legal system rife with liberal judicial activism on questions like abortion, marriage, the death penalty, criminal procedure, obscenity and pornography, gender issues, the place of religion in the public square, and so much more, along with the resort to foreign law to justify some of these results.

One effort to destigmatize judicial activism is to redefine it to mean any exercise of judicial review, whether right or wrong, that declines to apply a statute. I am reminded of William F. Buckley's response to the leftist charge during the Cold War that the CIA and the KGB were engaged in morally equivalent acts of spycraft. As Buckley put it, that's like saying "that the man who pushes an old lady into the path of a hurtling bus is not to be distinguished from the man who pushes an old lady out of the path of a hurtling bus: on the grounds that, after all, in both cases someone is pushing old ladies around."[14] To lump sound exercises of judicial review with unsound ones is likewise obtuse.

Another effort is to equate judicial activism with the overturning of precedent. Under this verbal wordplay, overturning an activist precedent would itself somehow be activist. That is another unsound use of the term. Of course, reasonable minds can differ regarding the proper way to address precedent. For example, there was a significant division between Justice Scalia and Justice Thomas on their willingness to revisit precedent.[15] Justice Scalia was certainly willing to do it. But in some instances, he would say, "look, that's settled." There is reasonable ground for criticism about the notion that a ruling that gets

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13. Keenan D. Kmiec, *The Origin and Current Meanings of Judicial Activism*, 92 CAL. L. REV. 1441, 1445–46 (2004).

14. *See* LINDA BRIDGES & JOHN R. COYNE JR., STRICTLY RIGHT: WILLIAM F. BUCKLEY JR. AND THE AMERICAN CONSERVATIVE MOVEMENT 182 (2007).

15. *See* Randy Barnett, *Celebrating Justice Thomas's 25 Years on the Supreme Court*, NAT'L REV. (July 1, 2016, 8:00 AM), https://www.nationalreview.com/2016/07/clarence-thomas-supreme-court-celebrating-25-years/ [https://perma.cc/W5U3-PRLK] ("Justice Thomas is far more willing than any other justice on the Court to reverse . . . precedents that have expanded the powers of Congress beyond the original meaning of the text. This judicial stance has distinguished Justice Thomas from originalism's most vocal defender on the Court, the late Justice Antonin Scalia.").

the Constitution wrong could ever be deemed settled. If the Court were inclined to be a little bit creative—not one millionth as creative as it is in inventing rights, but just in using its equitable power—it might come up with a way to overturn precedents on which there has been great reliance, but in a way that is not disruptive. Say that the Court were to decide that paper money is unconstitutional. It surely would seem pretty disruptive to have a ruling like that come down tomorrow. But what if the Court said, "We believe this is the best reading of the Constitution. We recognize that it will be disruptive, and we're going to give the political branches X years to work through an amendment to address this if they see fit"? Such an amendment would likely go through quickly; and if it needed a little more time, the Court could give it more time. In other words, there is plenty of ability to overturn precedents while respecting reliance interests.

I suspect that many of those who want to destigmatize or redefine judicial activism do so for the same reason that arsonists would be happy to have the word "arson" disappear or be redefined. If "arson" were simply referred to as "fire-building," or if all legitimate fire-building would henceforth be called "arson," the term "arson" would lose the stigma that it has earned, and life would be much easier for arsonists. I do not think that is something we should encourage.

THE DECLARATION OF INDEPENDENCE AND THE AMERICAN THEORY OF GOVERNMENT: "FIRST COME RIGHTS, AND THEN COMES GOVERNMENT"

RANDY E. BARNETT*

The topic of this panel is the Declaration of Independence, to which I devoted a chapter of my recent book, *Our Republican Constitution*.[1] I want to draw on that book to make five points.

First, the Constitution is not our founding document—the Declaration is. In its words, it was "[t]he unanimous Declaration of the thirteen United States of America,"[2] in Congress. After the founding, the Framers took two cracks at forming a national government. We began with the Articles of Confederation in 1776, before changing to the Constitution in 1789. And one might consider the Reconstruction Amendments in 1868 to be a third try at forming a government. But the Declaration remained the political fountainhead of them all.

Second, the Declaration served as a bill of indictment, "submitted to a candid world."[3] To legally justify armed resistance to the crown as something other than treason, it presented a "long train of abuses" that the British Crown in Parliament had committed against the rights of the people of the United States. By this declaration, the colonists "dissolve[d] the political bands which have connected them with another," and "assume[d], among the powers of the earth, the separate and equal station to which the Laws of Nature and Nature's God entitle them."[4] In sum, the Declaration was viewed as abolish-

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* Carmack Waterhouse Professor of Legal Theory, Georgetown University Law Center; Director, Georgetown Center for the Constitution.

1. RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016).

2. THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

3. *Id.* para. 2.

4. *Id*. para. 1.

ing the social contract with Great Britain and establishing a state of nature between two independent polities.

Third, the Declaration then *officially* identified the political theory on which the United States was founded. I stressed "officially" because this theory was drafted by a committee, edited by the Congress as a whole, and unanimously adopted by representatives of the thirteen states. And it was only after this official act that what the Declaration refers to as the "Form of Government" was established, first by the Articles and later by the Constitution.[5] These constitutional structures were simply the means to the ends that were announced in the Declaration.

Fourth, the end for which these different governments were established is described in the Declaration's two most famous sentences, which everyone knows:

> We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable Rights; that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.[6]

While this passage is familiar, its component parts must be separated out.

(a) "[A]ll men are created equal . . . ."[7] This is an affirmation of the fundamental equality of each individual person. It speaks not of groups, but of individuals. Indeed, as the original draft read before it was edited, "all men are created equal *and independent*; that from that equal creation they derive rights inherent and inalienable."[8]

(b) The Declaration refers to "certain unalienable Rights."[9] What does it mean to say a right is inalienable or unalienable? It means it cannot be surrendered up to the general government.[10] In the canonical words of George Mason's draft of the

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5. *Id.* para. 2.

6. *Id.*

7. *Id.*

8. THOMAS JEFFERSON, DRAFT OF THE DECLARATION OF INDEPENDENCE (1776), *reprinted in* THE LIFE OF THOMAS JEFFERSON 172–73 (Henry S. Randall ed., 1858) (emphasis added).

9. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

10. BARNETT, *supra* note 1, at 38–41.

Virginia Declaration of Rights, which he wrote just weeks before the Declaration and which Jefferson had before him when he wrote the Declaration[11]: "[a]ll men are born equally free and independent and have certain inherent natural rights of which *they cannot by any compact deprive or divest their posterity*."[12] This means that such rights are not and cannot be alienated by the adoption of a compact or a constitution.[13]

(c) Next, "among these are the unalienable rights of Life, Liberty, and the pursuit of Happiness."[14] Once again, this succinctly echoes Mason's draft Declaration of Rights, which referred to "the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursuing and obtaining Happiness and Safety."[15] Notice that each of these rights belongs to the people as individuals. They are not group rights. They are not collective rights. They are the individual rights of We the People, each and every one.

(d) We now arrive at what may be the most important sentence identifying the American theory of Government, "[t]hat *to secure these rights*, Governments are instituted among Men, deriving their just powers from the consent of the governed."[16] The expressly stated end of government is to "secure" the *individual* natural "rights" named in the preceding sentence. In short, governments are instituted among men as a means of securing the individual rights of each and every person, and the effective protection of these rights is the end against which such governments are to be judged.[17] Because of the failure of the British government to fulfill the political function of securing the individual rights of each one of us, the Declaration concludes that "these united Colonies are, and of Right ought to be, Free and Independent States . . . and that all political con-

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11. *See* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 125–26 (1998).

12. VA. DECLARATION OF RIGHTS § 1 (1776) (emphasis added).

13. BARNETT, *supra* note 1, at 38–41.

14. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

15. VA. DECLARATION OF RIGHTS § 1 (1776).

16. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

17. BARNETT, *supra* note 1, at 41, 44.

nection between them and the State of Great Britain, is and ought to be totally dissolved."[18]

The political theory announced in the Declaration of Independence can be summed up in a single sentence: *First come rights, and then comes government*.[19] This proposition is not, as some would say, a *libertarian* theory of government.[20] The Declaration of Independence shows it to be the officially adopted *American* Theory of Government.

- According to the American Theory of Government, the rights of individuals do not originate with any government but pre-exist its formation;
- According to the American Theory of Government, the protection of these rights is both the purpose and first duty of government;
- According to the American Theory of Government, at least some of these rights are so fundamental that they are inalienable, meaning that they are so intimately connected to one's nature as a human being that they cannot be transferred to another even if one consents to do so;
- According to the American Theory of Government, because these rights are inalienable, even after a government is formed, they provide a standard by which its performance is measured; in extreme cases, a government's systemic violation of these rights or failure to protect them can justify its alteration and abolition. In the words of the Declaration, "whenever any Form of Government becomes destructive of these ends," that is the securing of these rights, "it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."[21]

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18. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

19. *See* BARNETT, *supra* note 1, at 41. For an extended explanation and defense of these natural rights, *see* RANDY E. BARNETT, STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 171, 354 (2d ed. 2014). For a summary of the argument presented there, *see* BARNETT, *supra* note 1, at 44–51 (explaining "why the Declaration was right").

20. *See, e.g.* Ed Whelan, *Randy Barnett's Our Republican Constitution—Part 2*, NAT'L REV. (Aug. 12, 2016, 7:58 PM), https://www.nationalreview.com/bench-memos/barnett-republican-constitution-2/ [https://perma.cc/N7FH-FPG7].

21. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

My fifth and final point concerns the passage "deriving their just powers from the consent of the governed."[22] Does this entail that the inalienable rights of We the People, as individuals, can be altered or abolished by popularly elected legislators representing the consent of the governed? Hardly.

Representative government is merely one means among several to the ends of protecting what the Ninth Amendment refers to as the "rights . . . retained by the people."[23] Neither by acts of legislation nor by the Constitution itself may the people "divest their posterity"[24] of these inalienable rights to "life, liberty, and the pursuit of happiness."[25]

According to this passage, governments may exercise not *all* powers, not *unlimited* powers, but only their "*just* powers."[26] A just power is one that is within the competence of a legitimate government, which the Declaration defines as one that secures the inalienable natural rights of We the People, each and every one.[27]

So, the "consent of the governed" is not about popular governance by a representative assembly superseding (rather than securing) pre-existing individual rights. This passage is about *which* government is to govern the polity that the declaration is establishing: the American people.[28] Will the American people be governed by Crown and Parliament of Great Britain or by the governments of the United States? Will it be governed by separate state governments, a consolidated national government, or some combination of state and national governments? It is the matter of "who governs" that the Declaration says is to be decided by "the consent of the governed."[29]

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22. *Id.*

23. U.S. CONST. amend. IX.

24. VA. DECLARATION OF RIGHTS § 1 (1776) (emphasis added).

25. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

26. *Id.* (emphasis added).

27. *See* Randy E. Barnett & Evan D. Bernick, No Arbitrary Power: An Originalist Theory of the Due Process of Law 49 (March 26, 2018) (unpublished manuscript), https://ssrn.com/abstract=3149590 [https://perma.cc/73JP-NYBQ] (explaining the concept of legislative "competence").

28. *See* BARNETT, *supra* note 1, at 41–43, 73–78.

29. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed").

The original public meaning of the text of the Declaration of Independence is distinct from the original public meaning of the U.S. Constitution.[30] The Constitution, however it is properly interpreted, does not justify itself. To be legitimate, it must be consistent with political principles that are capable of justifying it.[31] Moreover, these same publicly identified original principles are needed inform how the original public meaning of the Constitution is to be faithfully to be applied when the text of the Constitution is not alone specific enough to decide a case or controversy.[32]

The original principles that the Founders thought underlie and justify the Constitution were neither shrouded in mystery nor to be found by parsing the writings of Locke, Montesquieu, or Machiavelli.

The American Theory of Government was officially articulated and adopted in the Declaration of Independence.

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30. *See* Lee J. Strang, *The Declaration of Independence: No Special Role in Constitutional Interpretation*, 42 HARV. J.L. & PUB. POL'Y 43, 46–47 (2019); *see also* Lee J. Strang, *Originalism's Subject Matter: Why the Declaration of Independence Is Not Part of the Constitution*, 89 S. CAL. L. REV. 637, 670 (2016) ("Therefore, the natural law tradition's conception of law supports my earlier claim that the written Constitution is the sole subject of constitutional interpretation, and the Declaration is not part of the Constitution").

31. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 7–86 (2d. ed. 2014) (discussing the concept of "constitutional legitimacy").

32. *See* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: An Unified Theory of Originalism*, 107 GEO. L.J. 1, 32 (2018) ("The Constitution's provisions, like the Constitution as a whole, are calculated to perform particular functions, and they would be without value if they did not do so. Truly understanding and applying the text may require an understanding of those functions.").

A TALE OF TWO SWEEPING CLAUSES

JOHN MIKHAIL*

Whenever there is a discussion about the relationship between the Declaration of Independence and the Constitution, most of the attention naturally gravitates toward the principle of equality and natural rights background of the Declaration, which have played such important roles in American history. The question then becomes whether, or to what extent, the Constitution embodies these background principles. In this Essay, I wish to focus attention on a different and less familiar connection between these two foundational documents—a connection that bears on the issue of government powers rather than of individual rights. I will make three main points, which may be surprising for some readers. I will first state these claims without much elaboration or qualification. Then I will circle back and say a few words of clarification about each of them.

Here are the three points: First, some of the most influential founders considered the Declaration of Independence to be, in effect, the "first constitution" of the United States, which not only declared the existence of a new nation, but also vested the United States with all of the express and implied authority of any other nation, including the "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do."[1]

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* Associate Dean for Research and Academic Programs and Agnes N. Williams Research Professor, Georgetown University Law Center. This Essay is a revised version of invited remarks I gave on "The Relationship between the Declaration of Independence and the Constitution" at the 37th Federalist Society National Student Symposium at Georgetown University Law Center on March 10, 2018. I wish to thank Ethan Womble and the other organizers for inviting me to participate in this event, along with my fellow panelists—Judge Thomas Hardiman and Professors Randy Barnett, Lee Strang, and Michael Zuckert—for their stimulating conversation and constructive feedback.

1. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

Second, many of these same individuals celebrated the Constitution precisely because it marked a return to the broad conception of implied national powers vested in the United States by the Declaration, which the Articles of Confederation had sought to deny the national government.

Third, when it came time to draft the Constitution, the principal framers of that document turned back toward the Declaration for inspiration. The specific language on which they relied was its reference to "all other Acts and Things which Independent States may of right do."[2] This language had directly inspired the "all other powers" provisions, or "sweeping clauses," one finds in several early state constitutions, such as the Delaware, Pennsylvania, and Vermont constitutions.[3] It also served as a template for the "all other powers" provision of the Necessary and Proper Clause,[4] which James Wilson drafted for the Committee of Detail.[5]

My three points can be compressed into a single sentence: The Declaration was effectively the first constitution of the United States, which vested the United States with implied national powers and which later inspired one of the key provisions of the Necessary and Proper Clause. That is the main takeaway of my remarks. Let me now try to unpack the various parts of this argument and say a bit more about each of them.

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2. *Id.*

3. *See* DEL. CONST. of 1776, art. I, § 5 (vesting the state legislature with enumerated powers "and all other powers necessary for the Legislature of a free and independent state"); PA. CONST. of 1776, ch. 2, § 9 (vesting the state legislature with enumerated powers "and . . . all other powers necessary for the Legislature of a free State or Common-Wealth"); VT. CONST. of 1777, ch. 2, § 8 (vesting the state legislature with enumerated powers "and all other powers necessary for the legislature of a free State").

4. U.S. CONST. art. I, § 8, cl. 18 (authorizing Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

5. *See* James Wilson, Documents of the Committee of Detail (1787), 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 129, 151, 168, 182 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS]. *See generally* John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1096–1103, 1121–28 (2014).

I. THE DECLARATION WAS THE "FIRST CONSTITUTION" OF THE UNITED STATES

Consider first the idea that the Declaration of Independence was, in effect, the first constitution of the United States, which vested the United States with all of the power of any other nation, including the right to do all "Acts and Things" which any other nation might do. What should we make of this language in the final paragraph of the Declaration?

A conventional reading of this passage assumes that the enumerated powers to which it refers—that is, the power "to levy War, conclude Peace, contract Alliances," and so forth—were declared to belong to each state *individually*. On this familiar reading, the Declaration produced thirteen independent nations, *each* of which was a free and independent state, and *each* of which possessed these powers. At the Constitutional Convention, Maryland's Luther Martin endorsed this conventional view when he claimed that "the people of America preferred the establishment of themselves into thirteen separate sovereignties instead of incorporating themselves into one."[6] Martin added that "the separation from [Great Britain] placed the 13 states in a state of nature towards each other . . . [and] they would have remained in that state . . . but for the [Articles of C]onfederation."[7]

Martin's interpretation of the Declaration has a certain appeal and plausibility.[8] It is important to recognize, however, that many of the most influential Framers roundly rejected this interpretation. James Wilson, for example, stood at the convention and responded to Martin by reading aloud the final paragraph of the Declaration, arguing that its precise language implied that the states had declared their independence and

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6. James Madison, Notes on the Constitutional Convention (June 20, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 5, at 335, 340.

7. James Madison, Notes on the Constitutional Convention (June 19, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 5, at 313, 324.

8. In a recent opinion, the Supreme Court seemed to endorse a similar conception. *See* Murphy v. Nat'l Collegiate Athletic Assoc., 138 S. Ct. 1461, 1475 (2018) ("When the original States declared their independence, they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority 'to do all . . . Acts and Things which Independent States may of right do.'").

possessed these enumerated powers "not Individually, but Unitedly"[9]—that is, in their collective, corporate capacity. Alexander Hamilton agreed with Wilson and likewise disputed Martin's claim that the Declaration had placed the states in "a State of nature."[10] And Rufus King reached similar conclusions by arguing that the individual states had never been "'sovereigns' in the sense contended for"[11] by Martin and some of the other delegates. King pointed out that the states lacked many of the sovereign powers to which the Declaration refers—for example, "[t]hey could not make war, nor peace, nor alliances, nor treaties."[12] As "political Beings," he said, the states were "dumb, for they could not speak to any for[e]ign Sovereign whatever."[13] They were also "deaf, for they could not hear any propositions"[14] from these foreign governments.

Who was right in this debate? It's a longstanding debate, which is still with us in some respects.[15] My own view is that, on balance, the nationalists had the stronger argument. Without trying to settle the matter here, let me simply highlight several key propositions in their favor, drawing on arguments that have been made at various stages in American history by influential figures such as Wilson, Hamilton, Joseph Story, and Abraham Lincoln, along with historians such as John Norton Pomeroy, Curtis Nettles, Richard Morris, and Richard Beeman, among others.[16]

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9. Madison, *supra* note 7, at 324.

10. *Id.*

11. *Id.* at 323.

12. *Id.*

13. *Id.*

14. *Id.*

15. *See, e.g.*, Murphy v. Nat'l Collegiate Athletic Assoc., 138 S.Ct. 1461 (2018); U.S. Term Limits v. Thornton, 514 U.S. 779 (1995); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).

16. *See, e.g.*, RICHARD R. BEEMAN, OUR LIVES, OUR FORTUNES AND OUR SACRED HONOR: THE FORGING OF AMERICAN INDEPENDENCE, 1774–1776 (2013); Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* LINCOLN: POLITICAL WRITINGS AND SPEECHES 115 (Terence Ball ed., 2013); Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* LINCOLN: POLITICAL WRITINGS AND SPEECHES, *supra*, at 124; Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), *in* 2 THE PAPERS OF ALEXANDER HAMILTON 400–18 (Harold C. Syrett & Jacob E. Cooke eds., 1961); JOHN NORTON POMEROY, INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES (9th ed. 1886); JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION §§ 198–217 (5th ed. 1891); James Wilson,

First, the national government of the United States existed and became operative before the formation of the individual states. The nation preceded the states, in other words.[17] Furthermore, the delegates to the First and Second Continental Congresses were generally selected by the *people* of the colonies, not by the colonial legislatures.[18] It was these Congresses which directed the people of the colonies to organize new state governments in 1775 and 1776, beginning with New Hampshire and South Carolina in November of 1775, and then followed by the other states.[19]

During this period, Congress exercised implied national powers of a sweeping sort, as Hamilton and other observers frequently emphasized.[20] So, for example, Congress commissioned a continental army and placed George Washington at its

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Considerations on the Bank of North America (1785), *in* 1 COLLECTED WORKS OF JAMES WILSON 60 (Kermit L. Hall & Mark David Hall eds., 2007); Richard B. Morris, *The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty over Seabeds*, 74 COLUM. L. REV. 1056 (1974); Curtiss Putnam Nettels, *The Origins of the Union and the States*, 72 PROC. MASS. HIST. SOC'Y 68 (1957–60). For a sharply different interpretation of the origins of national sovereignty, see, for example, Claude H. Van Tyne, *Sovereignty in the American Revolution: An Historical Study*, 12 AM. HIST. REV. 529 (1907).

17. *See generally* Lincoln, Message to Congress, *supra* note 16; POMEROY, *supra* note 16; STORY, *supra* note 16; Nettels, *supra* note 16.

18. *See, e.g.*, STORY, *supra* note 16, § 203; Morris, *supra* note 16, at 1068. Compare President Ronald Reagan's remark at his First Inaugural Address: "All of us need to be reminded that the Federal Government did not create the States; the States created the Federal Government." Quoted in PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGAL, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 659 (7th Edition, 2018).

19. *See* 3 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 319 (W.C. Ford et al. eds., 1904–1937) [hereinafter J.C.C.] (Nov. 3, 1775: New Hampshire); *id.* at 326–27 (Nov. 4, 1775: South Carolina); *see also, e.g.*, BEEMAN, *supra* note 16, at 282–87; Morris, *supra* note 16, at 1069–71; Nettles, *supra* note 16, at 73–74.

20. *See, e.g.*, Letter from Hamilton to Duane, *supra* note 16, at 401 ("The manner in which Congress was appointed would warrant, and the public good required, that they should have considered themselves as vested with full power *to preserve the republic from harm*. They have done many of the highest acts of sovereignty, which were always cheerfully submitted to—the declaration of independence, the declaration of war, the levying an army, creating a navy, emitting money, making alliances with foreign powers, appointing a dictator &c. &c.—all these implications of a complete sovereignty were never disputed, and ought to have been a standard for the whole conduct of Administration."); STORY, *supra* note 16, §§ 214–17; Nettels, *supra* note 16, at 69–70.

head.[21] It borrowed money on behalf of the United States.[22] It defined treason against the United States.[23] It issued national passports in the name of the United States.[24]

Throughout the Revolutionary War, Congress's right to conduct foreign affairs—including defense, diplomacy, and the negotiation of treaties—went unchallenged by the states.[25] The Treaty of Peace with Great Britain was ratified solely by Congress on behalf of the United States.[26] Despite the fact that Article IX of the Articles of Confederation mandated that "no State shall be deprived of territory for the benefit of the United States,"[27] the Treaty of Peace adjusted the boundaries of eight states without their affirmative consent.[28] And there are many other similar examples of implied national powers on which the United States relied upon during this period.

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21. 2 J.C.C., *supra* note 19, at 89–91 (June 14–15, 1775); Nettels, *supra* note 16, at 69–70; *see also, e.g.*, BEEMAN, *supra* note 16, at 221–38; Morris, *supra* note 16, at 1072, 1075–76.

22. *See, e.g.*, 2 J.C.C., *supra* note 19, at 103 (June 22, 1775) (resolving that "a sum not exceeding two millions of Spanish milled dollars be emitted by the Congress in bills of Credit, for the defence of America"); 3 *id.* at 390 (Nov. 29, 1775) (resolving that "a quantity of Bills of Credit be emitted by Congress amounting to 3,000,000 of Dollars"). *See generally* E. JAMES FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776–1790, at 25–47 (1961) (documenting various sums borrowed by Congress on behalf of the United Colonies, and later the United States, to fund the war).

23. *See, e.g.*, 2 J.C.C., *supra* note 19, at 111, 116 (Article XXVIII of the Articles of War, which Congress adopted on June 30, 1775, affirming that "[w]hosoever belonging to the continental army, shall be convicted of holding correspondence with, or of giving intelligence to, the enemy, either directly or indirectly, shall suffer such punishment as by a general court-martial shall be ordered"); 3 *id.* at 330–34 (revised Articles of War, including several articles pertaining to treason, adopted on November 7, 1775); 5 *id.* at 475 (June 24, 1776 resolution affirming that "all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws" and declaring that anyone who levies war against any of the colonies or gives aid and comfort to the King of Great Britain will be deemed "guilty of treason"). *See generally* Morris, *supra* note 16, at 1083–85.

24. *See, e.g.*, Morris, *supra* note 16, at 1087 n.207 (citing the passport issued by John Jay, President of Congress, to Captain Joseph Deane, June, 1779); *id.* at 1087 n.208 (citing numerous examples of United States passports issued by Benjamin Franklin while serving as American commissioner to France).

25. *See, e.g.*, Morris, *supra* note 16, at 1074–75; Nettels, *supra* note 16, at 69–77.

26. *See* 24 J.C.C., *supra* note 19, at 348; 25 *id.* at 631–32, 821–28; 27 *id.* at 615–25, 627–30. *See also, e.g.*, Morris, *supra* note 16, at 1075.

27. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 2.

28. *See, e.g.*, Morris, *supra* note 16, at 1075; Nettles, *supra* note 16, at 78–79.

II. THE DECLARATION VESTED THE UNITED STATES WITH IMPLIED NATIONAL POWERS

What justified the exercise of these implied powers? The classical argument was given by James Wilson in his defense of congressional authority to charter the Bank of North America. Before turning to that argument, let me say a few words of introduction about Wilson, because he is not as well-known as he should be. By any measure, he is one of the most remarkable figures in the history of American law. One of eight immigrants to sign the Constitution,[29] Wilson is the only founder to sign both the Constitution and the Declaration of Independence and to serve as a Justice on the United States Supreme Court.[30] He wrote the first complete draft of the Constitution, and in that capacity he was primarily responsible for the precise language of many of its most significant clauses and phrases, including the Vesting Clauses, the Necessary and Proper Clause, the Supremacy Clause, and the majestic opening words of the Preamble: "We the People."[31] One of the best lawyers and legal minds of his generation, Wilson has also been called the "most democratic" founder because of his unwavering support for popular sovereignty and the principle of one person, one vote.[32]

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29. Seven of the thirty-nine delegates to the constitutional convention whose names are affixed to the Constitution were "foreign-born," that is, born outside of the territories that became the United States. In addition, because the English-born secretary of the convention, William Jackson, also put his name to the original document, exactly twenty percent (eight out of forty) of the individuals who signed the Constitution were foreign-born. *See* John Mikhail, *Foreign-Born Framers*, BALKINIZATION (Sept. 17, 2017, 2:34 PM), https://balkin.blogspot.com/2017/09/foreign-born-framers.html [https://perma.cc/V39K-EN2E].

30. *See, e.g.*, GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 38–39 (1918); John Mikhail, *Law, Science, and Morality: A Review of Richard Posner's* The Problematics of Moral and Legal Theory, 54 STAN. L. REV. 1057, 1059 n.10 (2002).

31. *See* Wilson, *supra* note 5, at 150, 151, 171, 172 (Vesting Clauses); *id.* at 151, 168 (Necessary and Proper Clause); *id.* at 169 (Supremacy Clause); *id.* at 150, 152, 163 (Preamble).

32. For further discussion of Wilson's commitment to popular sovereignty and its roots in Scottish Common Sense philosophy, see, for example, MARK DAVID HALL, THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON, 1742–1798, at 90–126 (1997); William Ewald, *James Wilson and the Scottish Enlightenment*, 12 U. PA. J. CONST. L. 1053 (2010); John Mikhail, *Scottish Common Sense and Nineteenth-Century American Law: A Critical Appraisal*, 26 L. & HIST. REV. 167, 168, 171 (2008).

Now when Wilson put his mind to defending the constitutionality of a national bank under the Articles of Confederation, he faced long odds. The argument that Congress lacked the authority to charter such a bank was simple and straightforward. First, no such power was expressly given by the Articles of Confederation. Second, an implied power to charter a bank was apparently foreclosed by Article II, which limited Congress to "expressly delegated" powers and reserved all other powers to the states.[33]

Despite these obstacles, Wilson forcefully denied the conclusion that Congress lacked the requisite power, offering an ingenious argument on behalf of the bank that sharply narrowed the reach of Article II. The power to charter a national bank, he argued, was not a power possessed by any individual state.[34] Thus, it was not a power that the states could delegate in the first place.[35] Rather, the power to charter a national bank was an implied power that derived from the *union* of the individual states.[36] A national power for national purposes, it was one of those "other Acts and Things" to which the Declaration referred in 1776.[37]

Because the logic of Wilson's argument is so important and has been so influential in the further development of American constitutional law, it is worth examining at length:

> Though the United States in congress assembled *derive from the particular states* no power, jurisdiction, or right, which is not expressly delegated by the confederation, it does not thence follow, that the United States in congress have *no other* powers, jurisdiction, or rights, than those delegated by the particular states.
>
> The United States have general rights, general powers, and general obligations, not derived from any particular states,

33. *See* ARTICLES OF CONFEDERATION OF 1781, art. II ("Each state retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.").

34. Wilson, *supra* note 16, at 65.

35. *Id.*

36. *Id.* at 65–66.

37. *Id.* at 66.

> nor from all the particular states, taken separately; but resulting from the union of the whole . . . .
>
> To many purposes, the United States are to be considered as one undivided, independent nation; and as possessed of all the rights, and powers, and properties, by the law of nations incident to such.
>
> Whenever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in congress assembled. There are many objects of this extended nature. The purchase, the sale, the defence, and the government of lands and countries, not within any state, are all included under this description. An institution for circulating paper, and establishing its credit over the whole United States, is naturally ranged in the same class.
>
> The act of independence was made before the articles of confederation. This act declares, that "*these United Colonies*," (not enumerating them separately) "are free and independent states; and that, as free and independent states, *they* have the full power to do *all* acts and things which independent states may, of right, do."
>
> The confederation was not intended to weaken or abridge the powers and rights, to which the United States were previously entitled. It was not intended to transfer any of those powers or rights to the particular states, or any of them. If, therefore, the power now in question was vested in the United States before the confederation; it continues to vest in them still. The confederation clothed the United States with many, though, perhaps, not with sufficient powers: but of none did it disrobe them.[38]

As many commentators have noted, this is a remarkable argument.[39] Among other things, it anticipates many important doctrines in American constitutional law, including those articulated by the Supreme Court in cases such as *Chisholm v. Georgia*,[40] *Fletcher v. Peck*,[41] *McCulloch v. Maryland*,[42] *Dartmouth*

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38. *Id.* at 65–66.

39. *See, e.g.*, Robert Green McCloskey, *Introduction* to 1 THE WORKS OF JAMES WILSON 1, 3–4 (Robert Green McCloskey ed., 1967); SUTHERLAND, *supra* note 30, at 38–39.

40. 2 U.S. (2 Dall.) 419 (1793).

41. 10 U.S. (6 Cranch) 87 (1810).

College v. Woodward,[43] *Cohens v. Virginia*,[44] *Missouri v. Holland*,[45] and *United States v. Curtiss-Wright*.[46] [47] For our purposes, two points Wilson makes in these passages deserve primary emphasis.

First, it is notable that Wilson decides whether the Government of the United States is authorized to charter a national bank by asking whether it could do so *before* the Articles of Confederation were adopted. He then argues that if the power existed then, it remains vested in the United States still, because the Articles did not deprive the United States of any of its powers. Consider the implications of that type of argument for our understanding of the Tenth Amendment, for example.[48] Second, Wilson argues that the power to incorporate a bank is an implied power vested in the Government of the United States *by the Declaration*. The implications of this argument for how we might understand the "powers vested by this Constitution in the Government of the United States"[49] to which the Necessary and Proper Clause refers, are likewise profound.

Finally, Wilson emphasizes that implied national powers are vested in the United States in their *collective* capacity—in other words, in the *Union*, rather than in its individual members. To clarify this point, Wilson adapts an instructive metaphor from the Swiss jurist, Jean-Jacques Burlamaqui. That metaphor is *harmony*. Harmony, Wilson explains, is a musical property that no individual voice can produce on its own.[50] Instead, it requires the combination of two or more voices. Accordingly, harmony is an emergent property that resides at the group level, not at the level of one or more individuals. In a similar fash-

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42. 17 U.S. (4 Wheat.) 316 (1819).

43. 17 U.S. (4 Wheat.) 518 (1819).

44. 19 U.S. (6 Wheat.) 264 (1821).

45. 252 U.S. 416 (1920).

46. 299 U.S. 304 (1936).

47. McCloskey, *supra* note 39, at 1, 3–4.

48. *Cf.* United States v. Darby, 312 U.S. 100, 124 (1941) ("The [Tenth A]mendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment . . . .").

49. U.S. CONST. art. I, § 8, cl. 18.

50. *See* Wilson, *supra* note 16, at 66–67.

ion, Wilson suggests, certain national powers lie beyond the competence of individual states. They are vested—and can only vest—in the Government of the United States, conceived as a composite whole.[51]

III. THE DECLARATION'S "ALL OTHER ACTS AND THINGS" PROVISION SERVED AS A TEMPLATE FOR THE "ALL OTHER POWERS" PROVISION OF THE NECESSARY AND PROPER CLAUSE

Let me turn now to the last part of these remarks and briefly explain how all of the foregoing ideas about implied powers and the Declaration of Independence influenced the drafting of the Constitution.

The key point here is to recognize that when Wilson drafted the Necessary and Proper Clause for the Committee of Detail, he sought to declare and incorporate into the Constitution the doctrine of implied and inherent national powers that he and other leading nationalists of the period, such as Hamilton, Robert Morris, and Gouverneur Morris, had located in the Declaration and had repeatedly relied upon during the previous decade to justify the authority of the United States over the war effort, public finance, foreign affairs, and western lands.[52]

Here it is crucial to play close attention to the constitutional text and what Hamilton called the "peculiar comprehensiveness" of the Necessary and Proper Clause.[53] In addition to granting Congress the instrumental power to carry into effect its own enumerated powers, that clause also gives Congress

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51. *Id.* ("It is no new position, that rights may be vested in a political body, which did not previously reside in any or in all of the members of that body. They may be derived solely from the union of those members. 'The case,' says the celebrated Burlamaqui, 'is here very near the same as in that of several voices collected together, which, by their union, produce a harmony, that was not to be found separately in each.'").

52. Mikhail, *supra* note 5, at 1047–49.

53. Alexander Hamilton, *Opinion as to the Constitutionality of the Bank of the United States* (Feb. 23, 1791), *in* 4 THE WORKS OF ALEXANDER HAMILTON: COMPRISING HIS CORRESPONDENCE, AND HIS POLITICAL AND OFFICIAL WRITINGS, EXCLUSIVE OF THE FEDERALIST, CIVIL AND MILITARY 104, 110 (John C. Hamilton ed., 1850) ("The expressions have peculiar comprehensiveness. They are—'to make *all laws*, necessary and proper for carrying into execution the foregoing powers & *all other* powers vested by the constitution in the *government* of the United States, or in any *department* or *officer* thereof.'").

the express power to make "all laws which shall be necessary and proper for carrying into Execution . . . *all other* powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[54]

Unless one of the latter provisions is treated as surplusage, this carefully crafted language implies that the Constitution vests powers in the Government of the United States that are not merely identical or coextensive with the powers it vests in the Departments or Officers of the United States. Because these additional government powers are not specified in the Constitution, they must be implied or unenumerated powers.[55] Much like the existence of unenumerated rights affirmed by the Ninth Amendment, then, the existence of implied or unenumerated powers is thus presupposed by the precise text of the Constitution. And Wilson, of course, was instrumental in the origin of both the Ninth Amendment and Necessary and Proper Clause, both of which reflect deep features of his jurisprudence. He firmly believed that the limits of enumeration applied to both rights and powers.[56] Many people are familiar with the argument with respect to the Ninth Amendment: it's impossible to enumerate all of the natural rights individuals possess, so it's dangerous to attempt to enumerate them, and necessary to indicate that there are other rights retained by the people, which should not be disparaged. That's true. Wilson believed the same thing about government powers, and he said so explicitly at the constitutional convention. "[I]t would be impossible to enumerate the powers which the federal Legislature ought to have,"[57] Wilson explained at the outset of the proceedings. And he subsequently drafted the Necessary and Proper Clause to recognize and accommodate that fundamental fact.

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54. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

55. Mikhail, *supra* note 5, at 1047.

56. *Id.* at 1099; *see also, e.g.*, James Wilson, *Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States* (1787), *in* 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 16, at 178, 195 (explaining that "[i]n all societies, there are many powers and rights which cannot be particularly enumerated"); *id.* at 212 ("Enumerate all the rights of Men! I am sure, sir, that no gentleman in the late convention would have attempted such a thing.").

57. William Pierce, Notes on the Constitutional Convention (May 31, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 5, at 57, 60.

Wilson's reference to "all other powers" in the Necessary and Proper Clause was inspired by the Declaration's "all other Acts and Things" provision, and by the similar "all other powers" provisions in the several state constitutions to which I have referred.[58] There was a term that the founding generation used for this type of clause: a "Sweeping Clause."[59] The essential function of a sweeping clause is to cancel the implication that a given list of items is exhaustive, and the "and all other" language is the most common formula for doing so, both then and now.[60]

Unlike the Articles of Confederation, then, both the Declaration of Independence and the Constitution contain a list of enumerated powers, followed by a sweeping clause of the "and all other" variety. The fact that both of these foundational documents contain a Sweeping Clause is one of the clearest textual and conceptual links between them. The connection goes to the heart of how the Framers understood American nationalism and the implied national powers vested by the Constitution in the Government of the United States. It also may reflect the wisdom of John Adams' famous observation that the American

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58. *Cf.* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 308 (D. Lemmings, ed., Oxford Univ. Press, 2016) (explaining that among those powers which "are necessarily and inseparably incident to every corporation" are the power to "sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may"). *See generally* Mikhail, *supra* note 5.

59. *See, e.g.*, *Convention of Virginia* (1788), *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 1, 418 (Jonathan Elliot ed., 1836) (statement of John Lawrence explaining that by virtue of "the sweeping clause" Congress was "vested with the powers to carry the ends [of the Preamble] into execution"); THE FEDERALIST No. 33, at 205 (Alexander Hamilton) (Jacob Ernest Cooke ed., 1961) (using the term "sweeping clause" to refer to a paraphrase of the last half of the Necessary and Proper Clause); Pierce Butler, Objections to the Constitution (Aug. 30, 1787), *in* SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787 249, 249 n.1 (James H. Hutson ed., 1987) (documenting that George Mason objected to the Constitution because "[t]he sweeping Clause absorbs everything almost by Construction"); James Madison, Notes for Speech in Congress (c. June 8, 1789), *in* 12 PAPERS OF JAMES MADISON 193, 194 (Charles F. Hobson & Robert A. Rutland eds., 1979) (using the term "sweeping clause" to refer to a paraphrase of the last half of the Necessary and Proper Clause); James Madison, Amendments to the Constitution (June 8, 1789), *in* 12 PAPERS OF JAMES MADISON, *supra*, at 196, 205 (same).

60. Mikhail, *supra* note 5, at 1121–24.

experiment in constitutional government was a game of "Leap-frog."[61] The first leap, however, was not the Articles of Confederation, but rather the Declaration of Independence itself.

61. *See, e.g.*, *From John Adams to Benjamin Rush, 20 June 1808*, NAT'L ARCHIVES: FOUNDERS ONLINE (June 13, 2018), http://founders.archives.gov/documents/Adams/99-02-02-5242 [https://perma.cc/7PM5-CTNM] ("Our Constitution operates as I always foresaw and predicted it would. It is a Game at Leap-Frog."). As with much else, I am indebted to Merrill Jensen for bringing Adams' use of this phrase to my attention. *See, e.g.*, MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 245 (1940).

THE DECLARATION OF INDEPENDENCE: NO SPECIAL ROLE IN CONSTITUTIONAL INTERPRETATION

LEE J. STRANG*

INTRODUCTION

The Declaration of Independence is a beautifully written document; it is a potent symbol of our nation's birth and founding principles; but it does not and should not play a unique role in constitutional interpretation.[1] Instead, the Declaration is one source, among many, of the Constitution's original meaning. (Indeed, you heard many of my fellow panelists giving evidence of this claim regarding what they perceived as the impact of the Declaration either on a particular clause—the Necessary and Proper Clause for example[2]—or the Constitution's overall structure or its overall goals.[3])

Frankly, this is not what I expected when I began my research into the Declaration of Independence over a decade ago. Instead, like most Americans today, I assumed that the Framers and Ratifiers either viewed the Declaration as of-a-piece with the Constitution, or at least as the interpretive key to the Constitution. I think I learned this from going to political and pro-life events with my parents, where speakers would make arguments like this: "The Declaration requires us to interpret the

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* John W. Stoepler Professor of Law & Values, The University of Toledo College of Law.

1. My arguments in this Essay are based upon two articles I published and some other unpublished scholarship on which I am currently working. Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN. ST. L. REV. 413 (2006) [hereinafter *Originalism, the Declaration of Independence, and the Constitution*]; Lee J. Strang, *Originalism's Subject Matter: Why the Declaration of Independence is not Part of the Constitution*, 89 S. CAL. L. REV. 637 (2016).

2 John Mikhail, *A Tale of Two Sweeping Clauses*, 42 HARV. J.L. & PUB. POL'Y 29, 39–42 (2019).

3 Randy E. Barnett, *The Declaration of Independence and the American Theory of Government*, 42 HARV. J.L. & PUB. POL'Y 23 (2019).

Fourteenth Amendment's 'person' to include unborn human beings." I assumed that that view was consistent with what went on in the Framing and Ratification of the original Constitution and the Reconstruction Amendments. Today, I'm sharing with you a sketch of some of the reasons why I changed my mind.

My thesis is that the Declaration is not the unique interpretive key to the Constitution. Instead, it is one source of the Constitution's original meaning. I will make three arguments to support that thesis. The first is a claim internal to originalist theory. The second is an historical claim. And the third is a jurisprudential claim.

First and theoretically, I argue that mainline originalist theory has no analytical space within it for the Declaration to play a special role in constitutional interpretation. To illustrate this, I describe the most prominent conception of originalism—public meaning originalism. Then, I show that public meaning originalism's process to ascertain the Constitution's original meaning treats the Declaration as one source of original meaning, and that its importance *as a source* therefore depends on the empirical-historical question of whether the original meaning in fact did privilege it.

This leads me to my second main argument, based on history. I make three moves to show that the Declaration did not play a unique interpretive role. First, I describe how the Framers and Ratifiers did not use the Declaration as the unique interpretive key to constitutional interpretation. Second, I show that, because the Declaration was inconsistent with the Constitution's text, it cannot be the interpretive key to the Constitution. Third, I explain that it was only after the Founding, during times of moral crisis, that Americans in various social movements turned to the Declaration to support their out-of-the-mainstream constitutional interpretations. This phenomenon shows that appeals to the Declaration are motived by a desire for political and social change extrinsic to the Constitution.

Third and jurisprudentially, I show that our current constitutional practice does not recognize the Declaration as playing a unique role in constitutional interpretation. I focus on the Constitution's text, current legal practice, and Supreme Court practice (because of time constraints).

One final note before proceeding: my arguments today presume that originalism is the correct interpretive theory. I make that assumption because I think that it is the correct interpretive theory and also because many Declarationists—that is, scholars who argue in favor of the Declaration playing a unique role—adhere to this premise.[4]

I. THERE IS NO ANALYTICAL SPACE WITHIN MAINLINE ORIGINALIST THEORY FOR THE DECLARATION OF INDEPENDENCE TO PLAY A UNIQUE ROLE IN CONSTITUTIONAL INTERPRETATION

Public meaning originalism identifies the Constitution's text's public meaning when it was ratified as its authoritative meaning.[5] Originalists have described three analytically distinct steps to identify the original meaning,[6] none of which privileges the Declaration of Independence.

The first step that an originalist will perform is to look for the *conventional* meaning of the text in the period of ratification.[7] This is the standard usage of that text at the time of ratification. For example, if we are looking for the conventional meaning of

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4. *See, e.g.*, SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION (1995) (providing the best originalist justification for the Declarationist position); I. Kersch, *Beyond Originalism: Conservative Declarationism and Constitutional Redemption*, 71 MD. L. REV. 229 (2012) (making originalist-type arguments to support the Declarationist position); Alexander Tsesis, *Self-Government and the Declaration of Independence*, 97 CORNELL L. REV. 693 (2014) (same).

5. Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 269–70 (2017). For the most recent and thorough descriptions of originalism's internal architecture see Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015); Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (Apr. 11, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215 [https://perma.cc/NLN2-EQCW]; *see also* Lawrence B. Solum, *Communicative and Legal Content*, 89 NOTRE DAME L. REV. 479 (2013) [hereinafter Solum, *Communicative Content*] (providing a summary of originalism).

6. Solum, *Communicative Content*, *supra* note 5, at 479–93; *see also* Lee J. Strang, *How Big Data Can Increase Originalism's Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181, 1195–98 (2016) (summarizing this process).

7. Solum, *Communicative Content*, *supra* note 5, at 487–88, 491, 497.

the word "religion" in the First Amendment, we look to how Americans utilized that word in 1791.[8]

The second step is an interpreter identifies the text's *semantic* meaning by placing that conventional meaning in the context of the Constitution and applying the rules of grammar and syntax.[9] This involves identifying how the words are put together in clauses and sentences, along with their punctuation, which may modify the text's conventional meaning. For example, the word "religion" does not appear by itself in the Constitution or the First Amendment. It is part of a(t least one) clause that includes the phrase the "free exercise []of [religion]."[10] In this phrase, the "free exercise []of" could impact the conventional meaning of "religion."[11]

Third, an interpreter takes into account *contextual enrichment*: the contemporary publicly available context in which the Constitution's text was drafted and ratified. For example, when the "free exercise []of [religion]" language was adopted in 1791, most states conditioned religious exercise on, for instance, not being "inconsistent with the peace or safety of this State," as New York's 1777 constitution provided.[12] This context may suggest that the constitutional text's phrase carried that connotation—and that limitation—into its meaning.[13]

The Declaration of Independence is not a privileged element in any of these three steps of originalist interpretation. For ex-

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8. *See* Lee J. Strang, *The Meaning of "Religion" in the First Amendment*, 40 DUQ. L. REV. 181 (2002) (performing this inquiry).

9. Solum, *Communicative Content*, *supra* note 5, at 487–88, 491, 497.

10. U.S. CONST. amend. I.

11. *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1114 (1990) ("The conclusion that the clause protects conduct as well as speech or belief would seem to follow from its very words: 'exercise' means conduct.").

12. N.Y. CONST. of 1777, art. XXXVIII.

13. For example, Professor Philip Hamburger argued that the historical context of the time showed that "the free exercise" of religion included within that concept implicit limits. *See* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 932 (1992) (arguing that the historical context showed that "the free exercise of religion tended not to be considered a particularly extensive or radical claim of religious liberty—indeed, it was a freedom espoused not only by dissenters but also by establishments."); *see also, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1456 (1990).

ample, one would not prioritize the Declaration to ascertain the conventional meaning of a word. Instead, under current originalist theory, the Declaration is simply one potential piece of evidence at steps one and three, what I described as the conventional meaning and the Framing and Ratification context. This theoretical point then makes it a contingent historical question of the extent to which the Declaration of Independence actually influenced the meaning of the Constitution in these two steps. And it is to this, my second move, I now turn.

II. THREE IMPORTANT PIECES OF HISTORICAL EVIDENCE SHOW THAT THE DECLARATION OF INDEPENDENCE DID NOT PLAY A SPECIAL ROLE IN THE CREATION OR INTERPRETATION OF THE CONSTITUTION

Here, I describe how three important pieces of historical evidence show that the Declaration of Independence did not play a unique role in the creation or interpretation of the Constitution. This evidence shows that the Declaration is one source among many of the Constitution's original meaning.

A. The Declaration Did Not Play a Unique Role in Constitutional Creation or Interpretation During the Framing and Ratification

First, the Framers and Ratifiers did not use the Declaration as a special key to the creation or interpretation of the Constitution. In my research on the period of the Framing and Ratification, I uncovered very few statements regarding the Declaration, and none arguing or assuming that it would play a unique role in constitutional interpretation.[14] Instead, the Framers and Ratifiers typically employed the Declaration for three purposes.

First, the Declaration was identified for its practical impact as the creator and point of independence from the United Kingdom. We heard this from Professor Mikhail earlier.[15] For example, during the Constitutional Convention, Rufus King and Lu-

14. Strang, *Originalism, the Declaration of Independence, and the Constitution*, *supra* note 1, at 439–57.

15. Mikhail, *supra* note 2, at 31–34.

ther Martin debated the Declaration's impact.[16] King contended that the states became one collective entity, whereas Martin argued that each of the thirteen colonies became independent states.[17]

Second, the Declaration was used to bolster an argument for or against the Constitution's merits, when the meaning of the provision was agreed upon by the debate participants.[18] For example, in the Pennsylvania Ratification Convention, ratification opponent John Smilie argued that a Bill of Rights was indispensable because it established the parameters for those in power.[19] And to support his position, he quoted the Declaration for the proposition that America should secure its rights through a Bill of Rights lest the right to abolish government identified in the Declaration become "mere sound without substance."[20] Both sides of the debate utilized the Declaration as a tool to argue for or against an inclusion of a Bill of Rights, but not as the Constitution's interpretive key.[21]

Third, the Framers and Ratifiers used the Declaration for rhetorical impact. Take, for example, *The Federalist Papers*, the most comprehensive argument, from that period, in favor of ratification. It cited the Declaration . . . twice, and both times for the unexceptional proposition that it is legitimate to change one's form of government.[22] This is also the consensus of most historians. Pauline Maier, for example, concluded: "Participants in the extensive debates over the creation and ratification of the Constitution mentioned the Declaration very infrequently and then generally cited to its assertion of the people's right to abol-

16. JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787, HELD AT PHILADELPHIA (June 19, 1787), *reprinted in* 5 ELLIOT'S DEBATES 212–13 (2d ed. 1907).

17. *Id.* at 212 (remarks of Rufus King); *id.* at 213 (remarks of Luther Martin).

18. Strang, *Originalism, the Declaration of Independence, and the Constitution*, *supra* note 1, at 440.

19. John Smilie, *Address at the State Constitutional Ratification Convention for the Commonwealth of Pennsylvania* (Nov. 28, 1787), *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: PENNSYLVANIA, 385–86 (Merrill Jensen ed., 1976).

20. *Id.* at 385.

21. Strang, *Originalism, the Declaration of Independence, and the Constitution*, *supra* note 1, at 442–43.

22. THE FEDERALIST NO. 40 (James Madison); THE FEDERALIST NO. 45 (James Madison).

ish or alter their governments and to found new ones."[23] In sum, the historical evidence shows that the Declaration of Independence was one source, among many, of the Constitution's original meaning.

B. The Declaration of Independence is Inconsistent with the Constitution's Text

Beyond the historical evidence that the Declaration did not play a unique role in constitutional creation or interpretation, are the often dramatic inconsistencies between the Declaration's provisions and the Constitution's text. These contradictions make it difficult to attribute to the Declaration a special interpretive role.

This argument was previewed by my fellow panelist Dr. Zuckert in his prior scholarship, and he identified slavery as being the most prominent example of this conflict.[24] The Declaration has the inspiring phrase "all men are created equal."[25] The original Constitution, by contrast, accommodated slavery in multiple ways. The Constitution accommodated slavery by helping slave masters recover escaped slaves through the Fugitive Slave Clause.[26] The Constitution prohibited Congress, until at least 1808, from eliminating the supply of new slaves by ending the slave trade.[27] Moreover the Constitution provided that slave states' congressional representation would be augmented by counting, for population purposes, "three fifths of all other Persons."[28] The Constitution's accommodation of slavery and the denial of equality it entailed make it very difficult, if not impossible, to interpret the Constitution using the Declaration.

Relatedly, if the Constitution is to be read in light of the Declaration, how did the institution of slavery—contrary to the Declaration's claim of human equality—survive until the Civil

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23. PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 169 (1998).

24. *See* Michael P. Zuckert, *Legality and Legitimacy in* Dred Scott*: The Crisis of the Incomplete Constitution*, 82 CHI.-KENT L. REV. 291, 308 (2007) (citing *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 620 (Curtis, J., dissenting)).

25. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

26. U.S. CONST. art. IV, § 2, cl. 3.

27. *Id.* art. I, § 9, cl. 1.

28. *Id.* art. I, § 2, cl. 3.

War when even its most prominent opponents, including President Lincoln, did not argue that slavery was unconstitutional?[29] This long-standing inconsistency shows that the Declaration cannot be the Constitution's interpretive key.

Third, if the Constitution is to be read in light of the Declaration, why was it necessary to adopt the Thirteenth, Fourteenth, and Fifteenth Amendments to eliminate slavery and promote equality?[30] Should not "all men are created equal" have been enough?[31]

Fourth, given the Southern states' economic interest in slavery, they would not have ratified the Constitution if it completely embodied the Declaration of Independence's principles. Abolition of slavery was a deal-breaker and to make the deal—to create the union—the Framers conceded on the point of equality.[32]

Fifth, only relatively few, relatively radical abolitionists argued that the Constitution, without necessity of amendment, outlawed slavery. For example, during and following the Civil War, few abolitionists argued that the Constitution, properly interpreted in light of the Declaration, abolished slavery without amendment.[33] And, even those who believed the Constitution did not need to be amended to abolish slavery recognized that their views were unconventional. For instance, Senator Charles Sumner from Massachusetts, who was a Declarationist, recognized that his views were the minority position and, therefore, worked to pass statutes and constitutional amend-

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29. *See* Abraham Lincoln, *First Inaugural Address* (Mar. 4, 1861) ("I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so.").

30. U.S. CONST. amends. XIII, XIV, XV.

31. *Cf.* DAVID ARMITAGE, THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY 76–77 (2007).

32. LAWRENCE GOLDSTONE, DARK BARGAIN: SLAVERY, PROFITS, AND THE STRUGGLE FOR THE CONSTITUTION 1–7 (2005); *see also* Abraham Lincoln, *Speech at Chicago, Illinois* (July 10, 1858), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 484, 501 (R. Basler ed., 1953) ("[W]e could not get our constitution unless we permitted them to remain in slavery, we could not secure the good we did secure if we grasped for more, and having by necessity submitted to that much, does not destroy the principle that is the charter of our liberties.").

33. *E.g.*, LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 42 (Boston, Bela Marsh 1845).

ments to secure them.[34] In sum, the Declaration's inconsistency with the Constitution's text shows that it cannot be the interpretive key to the Constitution.

C. The Declaration of Independence Was Most Commonly Invoked to Defend Out-of-the-Mainstream Constitutional Interpretations

The third piece of historical evidence, which shows that the Declaration does not possess a unique role in constitutional interpretation, is that, in times of subsequent national moral crisis, Americans turned to the Declaration to support their out-of-the-mainstream constitutional interpretations.[35] Though surprising to most Americans today, in the immediate aftermath of the Revolution, the Declaration fell out of the public's consciousness only to be subsequently resurrected by reform movements that have used it for a variety of purposes.[36]

Thereafter and throughout American history, social movements have utilized the Declaration to support their unconventional constitutional visions.[37] This began with the abolitionists in the 1820s and continued with the suffragettes in the mid-to-late 19th century, the modern Civil Rights Movement and, more recently, the Pro-Life Movement.[38]

What this phenomenon shows is that appeals to the Declaration were motivated by the movements' goals of political, social, and legal change, which were themselves stimulated by contemporary social and legal environments.[39] These appeals were not the product of historical claims about what the Constitution, properly interpreted, actually meant.[40] In other words, this shows that appeals to the Declaration originate ex-

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34. DAVID HERBERT DONALD, CHARLES SUMNER 132–59 (De Capo Press 1996) (1960).

35. *See* ALEXANDER TSESIS, FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE (2012) (providing an analysis of how social movements incorporated the rhetoric of the Declaration of Independence into their rights-based agendas).

36. *See* MAIER, *supra* note 23, at 168 (describing how the Declaration was "all but forgotten" after the Revolution).

37. TSESIS, *supra* note 35.

38. Strang, *Originalism, the Declaration of Independence, and the Constitution*, *supra* note 1, at 415–31.

39. *Id.*

40. *Id.*

trinsically to the Constitution and are not intrinsic to the Constitution or to its history.

III. THREE FACETS OF CURRENT LEGAL PRACTICE EXCLUDE A SPECIAL INTERPRETIVE ROLE FOR THE DECLARATION OF INDEPENDENCE

My third set of arguments is jurisprudential in nature, and my claim here is that our current legal practice does not recognize the Declaration as playing a unique role in constitutional interpretation. The Declaration does not fit three important facets of our constitutional practice. This claim relies on a "thin" Hartian conception of law: law is those norms recognized as law by the practice of relevant legal officials, such as judges.[41] I am utilizing this conception of law because it is widely held and, in this context, accurate.[42] I make three moves to support this claim: first, the Constitution's text identifies the Declaration as not playing a unique role; second, our current legal practice does not include a unique role for the Declaration; and third, the Supreme Court's practice does not have room for a unique interpretive role for the Declaration.

A. The Constitution's Text Identifies the Declaration as Not Playing a Unique Role

The Constitution's text is at the center of our legal practice.[43] The Constitution's text identifies only the written Constitution as the subject matter of constitutional interpretation. In particular, constitutional "indexicals" show that only the written Con-

41. H.L.A. HART, THE CONCEPT OF LAW 55–56, 100, 110 (3d ed. 2012).

42. *Id.*; Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719 (2006); Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1348 (2018) ("The main contending camps in contemporary Anglophone legal philosophy are, broadly speaking, Hartian and Dworkinian.").

43. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY, at x-xi (2012); Richard H. Fallon, Jr., *Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 47, 55 (Matthew D. Adler & Kenneth Einar Himma eds., 2009); Kenneth Einar Himma, *The U.S. Constitution and the Conventional Rule of Recognition*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, *supra*, at 95, 111.

stitution is the subject matter of constitutional interpretation.[44] Indexicals are the Constitution's text's reference to what the Constitution is.[45] Beginning with the Preamble and ending with the Ratification Clause in Article VII, the Constitution repeatedly identifies the document in the National Archives as "this Constitution."[46] The Constitution's text also makes explicit that the Constitution was temporally expressed at the point in time when it was ratified. Article VII identified the particular time in which the "We the People" from the Preamble "[e]stablished" "this Constitution."[47] The Supremacy Clause then privileges "[t]his Constitution" as the "supreme Law of the Land."[48] The Constitution's indexicals and chronological identifiers, when coupled with the Supremacy Clause, identify the written Constitution—and only it—as the Constitution.

The Declaration of Independence is not identified by the written Constitution as a facet of the "supreme Law of the Land."[49] Therefore, the Declaration does not play a unique role in constitutional interpretation.

B. Current Legal Practice Does Not Include a Unique Role for the Declaration

Three important facets of our constitutional practice also exclude the Declaration of Independence from playing a unique role in constitutional interpretation. First, our Constitution is identified by its provenance, which excludes the Declaration. Constitutional provenance is the origin of a constitution.[50] Constitutional provenance is crucial because it is the characteristic that explains why a particular document—the document in the

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44. Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1641–67 (2009); *see also* Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 Nw. U. L. REV. 857, 864–72 (2009); Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Unwritten Constitution*, 81 U. CHI. L. REV. 1385, 1391–92 (2014).

45. Green, *supra* note 44, at 1610.

46. U.S. CONST. pmbl.; *id.* art. VII.

47. *Id*. art. VII.

48. *Id.* art. VI, cl. 2.

49. *Id.*

50. *See generally* Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715 (2011) (explaining this concept).

National Archives—is our polity's constitution and why other documents are not.[51] Americans in 1787, and today, recognize(d) that the Framing and Ratification process identified the Constitution, and that the Ratifiers possessed the authority to designate the document now located in the National Archives as the U.S. Constitution.[52] No matter how much more normatively attractive another document is, it is not the U.S. Constitution if it did not go through that Framing and Ratification process.

This same provenance excludes the Declaration of Independence from being the subject of constitutional interpretation. This provenance identifies—includes—only one subject matter: the written Constitution in the National Archives. The Declaration is not identified by that provenance.

Second, our practice of Constitutional amendment shows that the Declaration of Independence is not part of the Constitution and therefore is not a subject of constitutional interpretation. It does so by identifying constitutional amendments as having the authority to displace existing constitutional text and all other facets of our legal practice that are contrary to the amendment.[53] The Constitution also recognizes that these changes—amendments—are equivalent to and part of the written Constitution.[54] The Constitution's authorization of amendments shows that documents and practices outside of the written Constitution (and its amendments) are not the Constitution, and that the sole subject of constitutional interpretation is the written Constitution itself and its amendments.

The amendment process does not amend the Declaration. Therefore the Declaration is not a subject matter of constitutional interpretation.

Third, all federal officers take action that identifies only the written Constitution as the subject matter of constitutional interpretation. All officers take an oath to support only "the Constitution of the United States."[55] This is the same "Constitution

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51. *Id.* at 738.

52. Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation,* 103 Nw. U. L. Rev. 703, 716–17 (2009).

53. U.S. CONST. art. V.

54. *Id.*

55. 5 U.S.C.A. § 3331 (2018).

of the United States" identified in Title I of the United States Code.[56] The officers' oaths bind them to follow the Constitution and to privilege it over the Declaration.

C. Supreme Court Practice Does Not Have Room for a Unique Interpretive Role for the Declaration

My third jurisprudential argument is that Supreme Court practice identifies the written Constitution as the sole subject matter of interpretation. The common thread running through the seven Supreme Court practices I identify below is their prioritization of the written Constitution over other potential sources of constitutional law, including the Declaration of Independence.

First, the Supreme Court explains its rulings as required by the written Constitution. For example, in *District of Columbia v. Heller*,[57] the Court stated that:

> The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. . . . Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.[58]

Second, the Supreme Court justifies changes in constitutional doctrine by reference to the written Constitution. For instance, in *Crawford v. Washington*,[59] the Court stated:

> Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. . . . In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is suffi-

56. 1 U.S.C.A., at lxi (2018).
57. 554 U.S. 570 (2008).
58. *Id.* at 636.
59. 541 U.S. 36 (2003).

> cient to make out a violation of the Sixth Amendment. *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.[60]

Third, the Supreme Court defends even its most controversial decisions as required by the written Constitution. Repeatedly, the plurality opinion in *Planned Parenthood v. Casey*,[61] justified its ruling by reference to the written Constitution.[62] "Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment."[63]

Fourth, the Supreme Court, even when it is implausible, identifies the written Constitution as the reason for its actions. I think the best example of this occurred in *Dickerson v. United States*.[64] Even though the Supreme Court in general, and Justice Rehnquist in particular, had repeatedly stated that *Miranda v. Arizona*[65] was not constitutionally required, in *Dickerson*, Chief Justice Rehnquist cagily claimed that *Miranda* "announced a constitutional rule," was a "constitutional decision," was "constitutionally based" and "constitutionally required."[66]

Fifth, the Supreme Court subordinates other forms of constitutional argument to the written Constitution, even when it would be plausible to use these other forms autonomously. For example, in *NLRB v. Noel Canning*,[67] the Court refused to rely on a longstanding constitutional tradition to supplant the constitutional text, even though it was invited to do so by the administration.[68] Instead, the Court found that the phrase "Recess of the Senate" was ambiguous and relied on the originalist interpretive method of "liquidation" to argue that constitutional

60. *Id.* at 68–69.
61. 505 U.S. 833 (1992).
62. *Id.* at 865, 901 (plurality opinion).
63. *Id.* at 846.
64. 530 U.S. 428 (2000).
65. 384 U.S. 436 (1966).
66. *Id.* at 432, 438, 440, 444.
67. 134 S. Ct. 2550 (2014).
68. *Id.* at 2559–60.

tradition had fixed the meaning of the phrase to permit intra-recess appointments.[69]

Sixth, dissenting justices appeal to the written Constitution against existing doctrine. Justice Ginsburg in *NFIB v. Sebelius*[70] agreed with Chief Justice Roberts that "the minimum coverage provision is a proper exercise of Congress' taxing power . . . . Unlike THE CHIEF JUSTICE, however, I would hold, alternatively, that the Commerce Clause authorizes Congress to enact the minimum coverage provision . . . [and] that the Spending Clause permits the Medicaid expansion exactly as Congress enacted it."[71] On the other end of the jurisprudential spectrum, Justice Scalia argued in the same case that:

> Congress has set out to remedy the problem that the best health care is beyond the reach of many Americans who cannot afford it. It can assuredly do that, by exercising the powers accorded to it under the Constitution. The question in this case, however, is whether the complex structures and provisions of the Patient Protection and Affordable Care Act (Affordable Care Act or ACA) go beyond those powers. We conclude that they do.[72]

Lastly, neither the Supreme Court, nor its justices, claim that their conclusions are at variance with the written Constitution. Despite the widespread belief in different versions of non-originalism—including versions that permit trumping the written Constitution with other modalities—both on and off the Supreme Court, no Supreme Court opinion or justice's opinion states that it is contrary to the written Constitution.[73]

In sum, Supreme Court practice, like the other important facets of our constitutional practice I described earlier, shows that our constitutional practice does not recognize the Declaration of Independence as part of the Constitution and therefore as holding a privileged place in constitutional interpretation.

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69. *Id.* at 2560–64.

70. 567 U.S. 519 (2012).

71. *Id.* at 589 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

72. *Id.* at 2642 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

73. AMAR, *supra* note 43, at xi.

IV. CONCLUSION

Let me close with a couple of caveats. First, my arguments dealt with constitutional *interpretation*: interpreting the Constitution's original meaning. There is another facet of originalist theory that has developed over the last fifteen years. Professor Barnett pioneered this distinction between interpretation and *construction*.[74] Construction occurs (at least) when the Constitution's original meaning is underdetermined—where it does not provide one right answer to a legal question.[75] A Declarationist could argue that in the so-called "construction zone," where the original meaning is not determinate, an interpreter should rely on the Declaration to construe—to create—constitutional meaning. My arguments do not address that move.

Second, I am not addressing the Reconstruction period or amendments. My arguments focused on the original Constitution, and a Declarationist could argue with greater plausibility that the Declaration was central to the creation and maybe the interpretation of the Reconstruction Amendments.[76] I also do not address that move.

In sum, I have argued that the proper role the Declaration of Independence in constitutional interpretation is one source of the original meaning. That is an important role, but it is limited, and more limited than what Declarationists have argued.

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74. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 118–30 (2004); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 65–72 (2011).

75. Barnett, *Interpretation and Construction*, *supra* note 74, at 68–69.

76. *See, e.g.*, Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMPLE L. REV. 361, 383–410 (1993) (making this argument and collecting historical evidence); Alexander Tsesis, *The Declaration of Independence and Constitutional Interpretation*, 89 S. CAL. L. REV. 369, 390–97 (2016) (same).

THE EXECUTIVE POWER OF REVERSAL

JOHN C. YOO*

I am going to talk a little about originalism, but more so how it relates to executive power and the power of reversal. The executive power of reversal is the President's power to reverse his predecessors' actions, with or without the coordination of the other branches of government. I will tie this in with some modern controversies.

The argument here is actually just a small point I made with my coauthor, Todd Gaziano, in a piece in the *Yale Journal on Regulation* where we argued a new President has the power to de-designate national monuments or reduce them in size.[1] It was not expected to be a controversial point about presidential power. But then 121 environmental law professors—I did not even know there were 121 of them—signed a letter saying that no President can reduce or de-designate a national monument.[2] They argued that the Antiquities Act's delegation of power to the President to designate a piece of land as a monument is a one-way ratchet: once a President designates a piece of land as a monument he, or a subsequent president, can never de-designate the monument without the approval of Congress.[3] Of course, I made the point that, "Well, what would happen if President Trump designated all the golf courses to be national monuments?" That means no president will ever be able to de-designate them. And I said, "Don't tell the President this or soon we will have a lot more national monuments."

I was very surprised this restrictive view was widely held. After further research, I came to the conclusion that this is the

* Emanuel S. Heller Professor of Law, University of California at Berkeley School of Law; Visiting Scholar, American Enterprise Institute; Visiting Fellow, Hoover Institution. I thank Helena Gu for her research assistance.

1. John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 YALE J. ON REG. 617 (2018).

2. Letter from 121 Envtl. Law Professors to Ryan Zinke, Secretary, U.S. Dep't of Interior, & Wilbur Ross, Secretary, U.S. Dep't of Commerce (July 6, 2017), https://legal-planet.org/wp-content/uploads/2017/07/national-monuments-comment-letter-from-law-professors_as-filed.pdf [https://perma.cc/9FWB-576X].

3. *Id.*

crux of many of the current debates on presidential power: not simply the use of presidential power to expand the presidency, but rather the presidential power to reverse actions or decisions made previously. I would have thought the presidential power of reversal was natural and inherent, but it has turned out to be quite controversial. This is the topic of a forthcoming article I am working on with Professor Saikrishna Prakash, titled "The Presidential Power to Reverse."

Many of the current debates on executive power are really debates about the executive's power of reversal: What is at issue in the debate over Deferred Action for Childhood Arrivals?[4] Reversal: does President Trump have the power to reverse the use of prosecutorial discretion by President Obama?[5] Does the President have the power to reverse a designation of land as a monument made by himself or a previous president?[6] Does he have the authority to fire Special Counsel Robert Mueller?[7] In that case, the issue is whether the President has the power to reverse a previous Justice Department regulation that places conditions on the President's own power to remove.[8] Can the President terminate the Paris Agreement,[9] as he did just recently, the North American Free Trade Agreement,[10] or even the World Trade

4. Vanessa Romo, Martina Stewart & Brian Naylor, *Trump Ends DACA, Calls On Congress To Act*, NPR (Sept. 5, 2017, 3:57 PM), https://www.npr.org/2017/09/05/546423550/trump-signals-end-to-daca-calls-on-congress-to-act [https://perma.cc/P4H2-H4W7].

5. Hans A. von Spakovsky & David Inserra, *Thank Trump if he Finally Ends the Unconstitutional DACA Program*, THE HILL (Sept. 1, 2017, 5:10 PM), http://thehill.com/blogs/pundits-blog/immigration/348924-thank-trump-if-he-finally-ends-the-unconstitutional-daca [https://perma.cc/VCS2-T69Q].

6. Devin Henry, *Five Things to Know About Trump's National Monuments Order*, THE HILL (Dec. 4, 2017, 4:10 PM), http://thehill.com/policy/energy-environment/363180-five-things-to-know-about-trumps-national-monuments-order [https://perma.cc/D5CB-QQG2].

7. John Yoo & Saikrishna Prakash, Opinion, *Of Course Trump Can Fire Mueller. He Shouldn't*, N.Y. TIMES (Apr. 13, 2018), https://www.nytimes.com/2018/04/13/opinion/trump-fire-mueller.html [https://nyti.ms/2IPCfp5].

8. *Id.*

9. Michael D. Shear, *Trump Will Withdraw U.S. From Paris Peace Agreement*, N.Y. TIMES (June 1, 2017), https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html [https://nyti.ms/2rv52tR].

10. Ana Swanson, *Trump administration unveils goals in renegotiating NAFTA*, WASH. POST: WONKBLOG (July 17, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/07/17/trump-administration-outlines-goals-for-nafta-rewrite/?utm_term=.837af7e88b59 [https://perma.cc/WJK9-2D5D].

Organization Treaty?[11] Does the President have the right to withdraw regulations that were issued by previous administrations?[12] Can he subject new regulations to a cost-benefit analysis and replace the old ones?[13] This is an issue of reversal that seems to be the theme underlying these debates about presidential power. The difference is that the President is using these powers to shrink his political authority, rather than expand it, as past Presidents of both parties have done.

I argue that not only is there a presidential power of reversal but that, in some ways, the power is more vigorous than the reversal power of the other two branches. Compare how the other two branches exercise their own powers of reversal. The Supreme Court reverses past Supreme Court opinions with new opinions, and Congress repeals past statutes with new statutes. In both of those cases, like the presidential power, the Constitution's text does not state how to undo past decisions.

We have always assumed the way to undo a past decision is by following the same formal process used to achieve it in the first place.[14] This is clearest with statutes. There is no provision in the Constitution that tells us how to undo a statute. We have always naturally assumed that to repeal a congressional statute, Congress must take the same action and pass another statute that repeals the first.[15] But there is not always a direct correlation for reversal with the presidency. There are actions for which the President must receive the advice and consent of the Senate; however, to undo those actions the President can act on his own to reverse without the Senate's advice and consent.[16] For example, the President, under the Constitution,

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11. Ellyn Ferguson, *Congress Can Stop Trump From Ditching WTO, Analysts Say*, ROLL CALL (July 5, 2018, 1:28 PM), https://www.rollcall.com/news/policy/congress-stop-trump-ditch-wto [https://perma.cc/CP5E-X3T7].

13. *See* Maeve P. Carey, *Can a New Administration Undo a Previous Administration's Regulations?*, CONG. RES. SERV. (Nov. 21, 2016), https://fas.org/sgp/crs/misc/IN10611.pdf [https://perma.cc/UM8Z-MPB4].

13. Rachel Augustine Potter, *How the Trump Administration Can Use Benefit Cost Analysis to Justify Deregulation*, BROOKINGS INST. (Aug. 1, 2017), https://www.brookings.edu/research/how-the-trump-administration-can-use-benefit-cost-analysis-to-justify-deregulation/ [https://perma.cc/SN3C-8C5X].

14. Karen Petroski, *Retheorizing the Presumption Against Implied Repeals*, 92 CAL. L. REV. 487, 496 (2004).

15. *Id.*

16. U.S. CONST. art. II, § 2, cl. 2; Robert J. Delahunty & John Yoo, *Executive Power v. International Law*, 30 HARV. J.L. & PUB. POL'Y 73, 81 (2006).

must receive the advice and consent of the Senate to appoint executive branch officers.[17] But when it comes time to reversing the appointment, most executive positions are undone by a single executive action: firing.[18] Two examples include the officers who contested their terminations in *Humphrey's Executor*[19] and *Morrison v. Olson*.[20]

Some people argue that Congress can place limitations on the President's removal power.[21] But it is important to study cases like *Humphrey's Executor* and *Morrison v. Olson* in those places where separation of powers is taught in constitutional law. Those two cases are about the executive undoing an action that originally had been undertaken by the President and Senate together.[22] This issue has not been settled. For example, there was a huge constitutional controversy on this issue with the Tenure of Office Act of 1867, which led to President Andrew Johnson's impeachment and near-removal from office.[23] This question about the limits that can be placed on the President's removal power was not fully settled by the

17. U.S. CONST. art. II, § 2, cl. 2.

18. Delahunty & Yoo, *supra* note 16, at 81.

19. Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

20. Morrison v. Olson, 487 U.S. 654 (1988).

21. *See, e.g.*, Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1783–84 (2006) (arguing that "[d]espite the prevailing intuition that Congress cannot remove officers, the case for a congressional removal power is a compelling one," and that the President "has no constitutional right to remove presidentially appointed non-executive officers" and "has far less removal authority than is commonly supposed").

22. *See Morrison*, 487 U.S. at 692 (examining whether a "good cause" removal provision placed by Congress on the attorney general's ability to remove an independent counsel impermissibly burdened the President's ability to faithfully execute the laws of the United States); *Humphrey's Ex'r*, 295 U.S. at 618–19 (explaining that President Franklin Roosevelt removed William E. Humphrey from his office as Commissioner of the Federal Trade Commission in 1933 after Humphrey had been nominated for that position by President Herbert Hoover in 1931 and confirmed by the Senate).

23. *See* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667, 746–58 (2003) (detailing the history of President Andrew Johnson's battle with Congress over the constitutionality of the Tenure of Office Act, which restricted the President's ability to remove certain executive officers without the approval of the Senate, and describing Johnson's impeachment and acquittal by a single vote).

Supreme Court in *Myers v. United States*,[24] and we are still fighting about it today.

Consider treaty termination. The President must get the advice and consent of the Senate to make a treaty,[25] but the President can terminate a treaty by himself.[26] While that might have been controversial at the founding, it does not seem to be controversial now. Congress terminates treaties by itself as well.[27] We do not follow the same formal process to undo a treaty that we used to make the treaty. When it comes to the presidency, we have come to assume that this has to do with presidential power over foreign policy.

As a case in point, America's treatment under the Washington administration of the Franco-American Treaty of Alliance in 1778 is very interesting and worth more study than it has ever received.[28] France's contributions were critical to America's successful fight for independence. When the French Revolution occurred and every nation in Europe tried to invade France, the French quite reasonably sent an ambassador to the United States.[29] The ambassador reminded the American government of France's aid to the American fight for

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24. 272 U.S. 52, 106 (1926) (deciding whether the President has exclusive power of removing executive officers of the United States without congressional approval and answering the question in the affirmative), *overruled in part by* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

25. U.S. CONST. art. II, § 2, cl. 2.

26. *See* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 265 (2001) ("Terminating a treaty in accordance with its express terms or with international law is a power not mentioned directly in the Constitution, but was obviously part of the traditional executive's foreign affairs power.").

27. *See, e.g.*, Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 789 (2014) (describing how Congress passed legislation in 1798 stating that the four treaties the United States currently had with France would henceforth be considered terminated).

28. *See* John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305, 1311 (2002) (noting that in debates over treaty interpretation and power over foreign affairs scholars have tended to overlook the significance of George Washington's Neutrality Proclamation and his cabinet's debate over the interpretation of the Franco-America Treaty of Alliance of 1778 on which the Neutrality Proclamation relied).

29. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 782 (2012) ("The United States henceforth received an official ambassador from France, and, following the French Revolution, President Washington recognized the new French government in 1793 by receiving Citizen Genet.").

independence and asked the United States to return the favor.[30] The French sought to utilize their mutual defense treaty to build a navy on American soil for use in fighting the British.[31]

There was a great debate in the Washington cabinet about whether to obey the terms of the treaty.[32] What did President Washington do? He declared neutrality.[33] He effectively changed the foreign policy of the United States as it had existed under the Continental Congress. There was debate at that time, and ever since, about control of foreign policy and who gets to declare neutrality. Neither Thomas Jefferson nor Alexander Hamilton disputed that it was the President's right to make that decision.[34] Both men argued about where the source of that power came from and how far it could go, but neither Jefferson nor Hamilton, who both served in Washington's cabinet, thought that Congress could decide whether to declare neutrality or not. In a way, Washington was not just setting foreign policy. He was reversing the foreign policy of a previous government.

Another historical example concerns the Emancipation Proclamation and the decision to use force in the Civil War. President Buchanan's view was that secession was unconstitutional, but that the President had no constitutional authority to stop it from happening.[35] Abraham Lincoln was

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30. *See* William Casto, *America's First Independent Counsel: The Planned Criminal Prosecution of Chief Justice John Jay*, 1 GREEN BAG 2D 353, 354 (1998) (noting that "[a]s soon as he landed, [the ambassador] began encouraging Americans to attack France's enemies by land and sea").

31. *See id.* (explaining that Ambassador Genet's "most successful project was to launch a privateer fleet that attacked British shipping up and down the East Coast").

32. *See* Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373, 410–11 (2012) (describing the debate in Washington's cabinet between Alexander Hamilton, Thomas Jefferson, and Edmund Randolph over the validity of the treaty with France).

33. *See* George Washington, A Proclamation by the President of the United States of America (Apr. 22, 1793), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789–1897, at 156 (James D. Richardson ed., Washington, 1898).

34. *See* Reinstein, *supra* note 33, at 429 (noting that the cabinet vote in support of Washington's issuance of the Neutrality Proclamation was unanimous).

35. *See* Craig S. Lerner, *Saving the Constitution: Lincoln, Secession, and the Price of Union*, 102 MICH. L. REV. 1263, 1282 (2004) (noting Buchanan's argument that the South did not have a right to secede but that the federal government did not have legal authority to invade those states).

elected and immediately decided that he could reverse that prior policy and even reverse that reading of the Constitution, which Buchanan had published in all the national newspapers during the lead-up to secession.[36]

It is this point—that no President has the right to bind future Presidents in the use of their presidential powers—that underlies many of our modern debates. It is at the core of the executive power. This was a big fight in the Reagan administration. There were a number of people who sued and attacked the Reagan administration's deregulatory agenda by saying that President Reagan could not undo existing regulations.[37] These challenges repeatedly made it to the D.C. Circuit,[38] and this phenomenon is what is really going on behind the *Chevron*[39] doctrine. The D.C. Circuit, and ultimately the Supreme Court in *Chevron*, said you can use the same process to deregulate as you used to regulate, even though the delegations never mentioned how you would undo a regulation.[40]

Financial regulations raise an interesting thought experiment, because it is unclear whether they are reversed,

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36. *See* Abraham Lincoln, President of the United States, Message to Congress in Special Session (July 4, 1861), *in* 4 COLLECTED WORKS OF ABRAHAM LINCOLN 421 (Roy P. Basler ed., 1953), https://quod.lib.umich.edu/l/lincoln/lincoln4/1:741?rgn=div1;view=fulltext [https://perma.cc/3M3U-V5KM].

37. *See* Martin Tolchin, *The Rush to Deregulate*, N.Y. TIMES (Aug. 21, 1983), https://www.nytimes.com/1983/08/21/magazine/the-rush-to-deregulate.html [https://nyti.ms/2yKeDzJ].

38. *See, e.g.*, Office of Commc'n of United Church of Christ v. FCC, 707 F.2d 1413, 1443 (D.C. Cir. 1983) (reviewing orders of the Federal Communications Commission deregulating the radio industry); Comput. & Commc'ns Indus. Ass'n v. FCC, 693 F.2d 198, 206 (D.C. Cir. 1982) (reviewing a claim that the Federal Communications Commission impermissibly deregulated services in the telecommunications industry), *cert. denied*, 461 U.S. 938 (1983).

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

40. *See id.* at 865–66 (1984) (holding that the Environmental Protection Agency's interpretation of the Clean Air Act was entitled to deference because it was based on a permissible construction of the statute); *Office of Commc'n of United Church of Christ*, 707 F.2d at 1443 ("[I]n the absence of more specific congressional direction, we cannot say that the Commission has overstepped either the bounds of its statutory authority or its administrative discretion in undertaking most of the deregulatory actions under review."); *see also* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983) (holding that rescission or modification of a rule is subject to the same informal rulemaking procedures as promulgation).

repealed, or deregulated. Take, for example, Sarbanes-Oxley,[41] Dodd-Frank,[42] or the statutory expansions of regulation. It is really the agencies that have been heavily regulating securities.[43] When I was in law school, we spent all this time on something called Rule 10b-5.[44] I was very disappointed to learn that it was not Congress that passed Rule 10b-5—it was done by the SEC.[45] It is the fundamental bar on insider trading.[46] So, what if a President came into office on January 21st, 2017, and said, "I hereby repeal all regulations and return all executive branch–made law to the state it was in on January 19th, 2009?" Could the President just do it all at once—repeal and reverse? And could the President do it simultaneously for every regulation and say, "I'm returning power to Congress"?

When the constitutional system says that what the President is really doing is exercising delegated authority—say, with regard to the monuments or some other regulatory powers[47]—and we are pretending there are no nondelegation limits to that, then Congress can condition and describe the mechanism for undoing that sort of action.[48] But most statutes do not delegate authority to the President and then spell out how to reverse the use of delegated authority.[49] They are usually silent. So, the President's power to reverse his constitutional decisions

41. Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of the U.S. Code).

42. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

43. *See* John C. Coffee, Jr., *Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1036 (2012) (noting the replacement of auditor self-regulation with the PCAOB); James D. Cox & Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 TEX. L. REV. 1811, 1842–43 (2012) (discussing the significant market impact when the SEC adopted Rule 19c-3 and again when the SEC implemented the pilot program exempting certain stocks from the Uptick Rule).

44. 17 C.F.R. § 240.10b-5 (2018).

45. *Id.*

46. *Id.* § 240.10b5-1.

47. *See generally* JOHN YOO & TODD GAZIANO, AM. ENTER. INST., PRESIDENTIAL AUTHORITY TO REVOKE OR REDUCE NATIONAL MONUMENT DESIGNATIONS (2017).

48. *Id.* at 7 (noting in the context of the Antiquities Act that in the absence of Congressional assignment of a revocation power the president maintains discretionary power to revoke national monument designations).

49. *But cf.* Administrative Procedure Act § 2(c), 5 U.S.C. § 551(5) (2012) (including the agency process for repealing a rule within the definition of "rule making").

creates a presumption that when Congress hands over that power and does not say anything about how to undo it, the same reversal power is inherent.[50]

I think the President is empowered to revert to the status quo before his predecessor was in office, and then the issue is whether Congress can stop him. That is the power of executive reversal.

50. YOO & GAZIANO, *supra* note 48, at 19 ("It is a general principle of government that the authority to execute a discretionary power includes the authority to reverse the exercise of that power.").

FEDERALISM AND THE ORIGINAL FOURTEENTH AMENDMENT

KURT T. LASH*

This essay focuses on the creation of the Fourteenth Amendment and its impact on the founding principles of constitutional federalism. My conclusion, in brief, is that although the Fourteenth Amendment dramatically expanded the list of rights the citizens can assert against the states, it does so in a manner perfectly consistent with the principles of Madisonian federalism. In fact, the man who drafted Section One of the Fourteenth Amendment insisted that those federalist principles be preserved as the country moved forward.[1]

The story of the Fourteenth Amendment begins on December 4, 1865, the opening day of the 39th Congress.[2] The Civil War was over,[3] the Thirteenth Amendment was moments away from ratification,[4] and representatives from the former rebel states stood before the Clerk of the House, waiting for their names to be called and to be readmitted to the seats that they had abandoned four years before.[5] Their names were never called and they were left there—literally standing on the floor

* E. Claiborne Robins Distinguished Chair in Law, University of Richmond School of Law.

1. KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 125–26 (2014).

2. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1 (1865).

3. Although effectively over at this point, the Civil War did not legally end until 1866. *See* J.G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 50 (Univ. of Ill. Press rev. ed. 1951) (1926).

4. *See* NANCY ERICKSON, S. HIST. OFF., S. PUB. 112–17, THE SENATE'S CIVIL WAR 24, https://www.senate.gov/artandhistory/history/resources/pdf/SenatesCivilWar.pdf [https://perma.cc/DS8N-8BHF] (last visited Sept. 10, 2018) (noting that the Thirteenth Amendment was ratified on December 6, 1865); *see also* THOMAS MCINTYRE COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 202 n.1 (Boston, Little, Brown, & Co. 1880) (noting that the Thirteenth Amendment was officially adopted on Dec. 18, 1865).

5. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3–5 (1865) (detailing the debate over whether to reinstate the representatives from the former Confederate States).

of the House.[6] Defying the President of the United States, the Republicans in Congress refused to readmit the representatives of the former rebel states.[7] Instead, the Republicans went about trying to determine when the southern states could be safely readmitted to the Union.[8] There were two big problems that needed to be solved before the southern representatives could retake their seats.

First, the freedmen in the South needed to be protected from the infamous "Black Codes" that had denied freed men the equal rights of citizenship and the equal protection of person and property.[9] But second and even more importantly, Congress had to prevent southern Democrats from taking over Congress once they were readmitted to the Union.[10] This was a distinct possibility, ironically enough, because of the passage of the Thirteenth Amendment.[11]

Under the original Constitution, slaves counted as three-fifths of a person for the purposes of slave state representation.[12] Now that those slaves were free, they would count as a full five-fifths of a person, and automatically increase the political power of the traitors of the Union.[13] Congress could not let that happen.[14] So in addition to protecting the rights of the freedmen, Republicans had to find some way to constrain the

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6. *See id.* at 3–6.

7. *Id.*; *see also* ERICKSON, *supra* note 4, at 5, 27–28 (noting President Johnson's desire to grant immediate representation to the former Confederate States).

8. To this end, Congress created the Joint Committee of Fifteen on Reconstruction to determine if, and under what conditions, Congress would readmit representatives from the former confederate states. *See* BENJAMIN B. KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1865–1867, at 37–38 (1915).

9. *See* WILLIAM H. BARNES, HISTORY OF THE THIRTY-NINTH CONGRESS OF THE UNITED STATES 99, 146–47, 261–262 (New York, Harper & Bros. Publishers 1868) (discussing examples of "Black Codes" that existed during this period and the resulting gross deprivation of basic rights).

10. *See id.* at 312 (discussing the dangers of granting full representation to the former confederate states).

11. *See id.*; *see also* LASH, *supra* note 1, at 68.

12. *See* U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2.

13. *See id.* amend. XIV, § 2; *see also* LASH, *supra* note 1, at 68.

14. *See* BARNES, *supra* note 9, at 312 (noting the dangers of the South's increased representation).

political power of the southern states before granting them readmission.[15]

These two problems eventually would be solved by Section One and Section Two of the Fourteenth Amendment.[16] But first, Congress had to decide whether an amendment was needed at all. Radical Republicans insisted that Congress enjoyed unlimited power to reconstruct the country.[17] They rejected the theory of federalism and dismissed the Tenth Amendment as irrelevant in a post–Civil War world.[18] According to their view, Congress had no need to go to the people to ask for a new amendment granting Congress new powers.[19] Congress could move immediately, and do so by way of legislation, like the Civil Rights Act of 1866.[20]

Not everyone in the 39th Congress, however, accepted the Radical Republicans' nationalist view of the Constitution.[21] Moderate and conservative Republicans agreed that Congress needed to act, but they insisted that the Constitution, properly interpreted, constrained the powers of the national government.[22] Before Congress could act, the people had to grant Congress the power to do so by adding a new amendment to the Constitution. One of these moderate Republicans was John Bingham, the author of Section One of the Fourteenth Amendment.[23] Bingham agreed with the goals of civil rights legislation, but insisted that in pursuing those goals, Congress had to pass a new amendment.[24] And until that happened, he believed

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15. *See id.* at 324–25, 330 (discussing the importance of the representation issue and debating different approaches to a solution).

16. Section One included the Equal Protection Clause. U.S. CONST. amend. XIV, § 1. Section Two provided the new basis for representation, including protections against voting discrimination. *See id.* amend. XIV, § 2.

17. *See* LASH, *supra* note 1, at 78–79, 116; *see also* BARNES, *supra* note 9, at 366 (radical Republican Thaddeus Stevens arguing that "no amendment is necessary" for Congress to protect the rights of freedmen).

18. *See* LASH, *supra* note 1, at 78–79 ("[T]he radical [Republicans'] position rejected the idea of state autonomy in any form and viewed the national government as having general oversight powers over any matter affecting civil liberties in the states.").

19. *See id.*

20. *See id.* at 115–16.

21. *See id.* at 78–81, 116, 125–29.

22. *See id.* at 78–79, 125–29.

23. *See id.* at 81–85, 152.

24. *See id.* at 126–29.

the Tenth Amendment prohibited the very legislation that Congress was trying to pass.[25]

Speaking to his colleagues in the House of Representatives, Bingham insisted that Congress follow the principles of James Madison, and he quoted to his colleagues the Federalist Papers No. 45: "The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the state."[26]

This Madisonian principle, declared Bingham, was written into "the very text of the Constitution itself" through the Tenth Amendment.[27] In support of this statement, he quoted the amendment to his colleagues: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."[28] Bingham believed in a constitution of enumerated national powers and enumerated national rights.[29] All non-enumerated subjects were reserved to the people in the states.[30] And what the Constitution lacked, Bingham insisted, was a clear statement requiring the states to respect the enumerated rights of national citizenship, particularly those listed in the Bill of Rights.[31] Although applying the Bill of Rights against the states would have the effect of expanding the list of subjects listed in Article One, Section Ten, which were already constraining the states, neither Bingham nor any of the other moderate Republicans wanted to transform the basic federalist structure of the original Constitution.[32]

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25. *See id.* at 129.

26. CONG. GLOBE, 39th Cong., 1st Sess. 1093 (1865) (quoting THE FEDERALIST, NO. 45 (James Madison)).

27. *Id.*

28. *Id.*

29. *Id.* at 1291 (Speaking in opposition to the Civil Rights Act because of the lack of enumerated authority in the Constitution, Bingham stated, "I should remedy [the States' abuses of power] not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future.").

30. *See id.*

31. *Id.* at 1093–94 ("[B]ut where is the express power to define and punish crimes committed in any State by its official officers in violation of the rights of citizens and persons as declared in the Constitution?").

32. *Id.* at 1292 ("I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations

The federal government would remain a government of limited enumerated powers, and it was precisely because of their continued belief in the federalist constitution that moderates like Bingham and the other Republicans insisted that an amendment was necessary in the first place.[33] Bingham therefore proposed an amendment[34]—one empowering Congress to enforce the privileges and immunities of American citizenship, and the equal due process rights of all persons.[35] His proposal ultimately became Sections One and Five of the Fourteenth Amendment.[36]

Those amendments would solve one problem, but more was needed to be done before it was safe to readmit the southern states. Other members, therefore, proposed an additional amendment that would prevent the incoming rebel Democrats from taking over Congress.[37] Representation in the House would be based on all persons in a state, black and white, but only if the state agreed to give both blacks and whites the right to vote.[38] If a state refused to enfranchise the freedmen, its representation would be proportionally reduced.[39] Then additional proposals were added—one that prevented rebel oath breakers from holding political office, and another one that prohibited slave owners from receiving compensation for their emancipat-

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by State officers of the bill of rights, but leaving those officers to discharge the duties enjoined upon them . . . ."); *see also* Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 344–349 (2011).

33. CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1865) (statement of Rep. Bingham) (discussing that while the states were bound to follow the Bill of Rights, the federal government had no mechanism to enforce these enumerated rights; such enforcement mechanism needed to be granted through the Fourteenth Amendment).

34. *Id.* at 14.

35. *Id.*

36. *See* Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389, 1450 (2018).

37. CONG. GLOBE, 39th Cong., 1st Sess. 142 (1865) (statement of Rep. Blaine) ("[The amendment] conclusively deprives the southern States of all representation in Congress on account of the colored population so long as those States may choose to abridge or deny to that population the political rights and privileges accorded to others.").

38. *Id.*

39. *Id.*

ed slaves.[40] All of these proposals were gathered together into a five-section amendment, namely the Fourteenth Amendment.[41]

At the time of proposal Bingham insisted that this amendment maintain the basic principles of constitutional federalism.[42] In fact, as the amendment went before the states for ratification, Bingham continued to fight for the equal rights of the states.[43] Midway through ratification, Radical Republicans led by Thaddeus Stevens tried to convince their colleagues that the proposed amendment was not actually necessary, and that Congress had full power to control the internal laws of the southern states, even to the point of kicking out of the Union any readmitted state that later misbehaved.[44]

Once again, it was John Bingham who stood up for the principles of limited national power and independence of the states from federal control. He condemned Stevens' effort to "fling aside" the proposed amendment as "a violation of the letter and spirit of the Constitution of the country."[45] Quoting the Tenth Amendment, Bingham declared:

> Under [the Constitution] the rights of the States are as sacred as those of the nation; its express provision is that—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In strange conflict with this is the proposition of this bill, that if the State organized and admitted under it exercise the essential powers of local State government thus reserved to the people, contrary to the provisions of this act, the State shall lose its right to be represented in Congress. The equality of the States and the

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40. U.S. CONST. amend. XIV, §§ 3, 4; CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1865) (statement of Rep. Stevens).

41. U.S. CONST. amend. XIV.

42. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1865) (discussing how the amendment would not change the federal structure because it would only allow the federal government to prevent States from actions they were never originally allowed to do).

43. *See* John A. Bingham, Speech at Bowerston (Aug. 24, 1866), *in* CINCINNATI COMMERCIAL, SPEECHES OF THE CAMPAIGN OF 1866, IN THE STATES OF OHIO, INDIANA, AND KENTUCKY 19 (1866).

44. *See* CONG. GLOBE, 39th Cong., 2d Sess. 250 (bill proposed by Rep. Stevens including a provision declaring: "If the provisions of this section should ever be altered, repealed, expunged, or in any way abrogated, this act shall become void, and said State lose its right to be represented in Congress.").

45. *Id.* at 501, 504.

> equality of men in the rights of persons before the law is what the Constitution enjoins and the people demand.[46]

Bingham's view prevailed. A congressional majority rejected the radicals' proposal by standing with Bingham's proposed Fourteenth Amendment and its vision of limited national power.[47] By the summer of 1868, a sufficient number of states had ratified the Amendment and on July 28, 1868, Secretary of State William Seward declared that the Amendment was now part of the federal Constitution.[48]

Not long afterwards, Congress quietly re-passed the Civil Rights Act.[49] This time they had constitutional power to pass such legislation,[50] and this time John Bingham supported the bill.[51] In the end, the country received an amendment that not only radically transformed the nature of the Bill of Rights, but also preserved the original vision of constitutional federalism.[52] Henceforth, the enumerated rights of citizens, including those listed in the first eight amendments, were protected against state abridgment.[53] In addition, Congress's enumerated powers were expanded to secure those rights.[54] Non-enumerated rights remained under the control of the people in the several States, so long as they conformed to the basic principles of due process and equal protection.[55]

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46. *Id.* at 504.

47. *Id.* at 813–17.

48. Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 GEO. L.J. 1275, 1330 (2013).

49. CONG. GLOBE, 41st Cong., 2d Sess. 3884 (1870) (re-passage of the Civil Rights Act on May 27, 1870); Lash, *supra* note 36, at 1454.

50. Lash, *supra* note 36, at 1457.

51. *Id.* at 1465–66.

52. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 242 (1988) ("[The Republicans] accepted the enhancement of national power resulting from the Civil War, but did not believe the legitimate rights of the states had been destroyed, or the traditional principles of federalism eradicated. Nor did they agree that the Constitution's guarantee clause authorized endless national intervention in state affairs.").

53. *See* CONG. GLOBE, 35th Cong., 2d Sess. 982 (1859) (John Bingham discussing how constitutionally guaranteed rights imposed limitations on state power).

54. U.S. CONST. amend. XIV, § 5 ("Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); *see also* FONER, *supra* note 52, at 242 (discussing how moderate Republicans accepted the enhancement of national power following the Civil War).

55. See Lash, *supra* note 36, at 1440, 1467.

One question that still remains today is whether the Fourteenth Amendment's Privileges or Immunities Clause was linked to the Civil Rights Act. It was believed that the Civil Rights Act was linked to Article IV's Comity Clause[56] and that Article IV's Comity Clause was related to *Corfield v. Coryell*.[57] In *Corfield*, Justice Bushrod Washington listed all of the fundamental rights that had to be equally extended to visitors as they went from state to state.[58] In his list of fundamental rights, Justice Washington included the right to pursue happiness and the right to vote as subject to certain residency rules established by Congress.[59] Democrats and opponents of the Civil Rights Act raised *Corfield v. Coryell* to suggest that Republicans supported the electorally unpopular possibility of giving black Americans the right to vote.[60] As a result, Congress abandoned the holding of *Corfield v. Coryell* and went on to promulgate different understandings of Article IV.[61] Thus, the Civil Rights Act cannot be properly linked to the Privileges or Immunities Clause. The Civil Rights Act was about equal protection of certain interests to persons and property.[62] John Bingham, along with other moderate Republicans, repeatedly described the Civil Rights Act as an effort to enforce the Due Process Clause.[63] How he and other moderate Republicans viewed the right to vote is a complicated issue, but the Republicans cer-

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56. *See* U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states").

57. *See* 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230); Lash, *supra* note 36, 1391–92.

58. *Corfield*, 6 F. Cas. at 551–52 (listing the fundamental rights that had to be equally extended to visitors as they went from state to state).

59. *Id.*

60. LASH, *supra* note 1, at 122 ("[Democrat Andrew Jackson Rogers] also turned to [Representative] Wilson's use of *Corfield* against him. Wilson had denied the Act would give black people the political right of suffrage and then had selectively quoted from Washington's opinion for examples of the civil rights that would be protected under the Act . . . . At this point in the Reconstruction debates, any bill that opened the door to black suffrage was doomed to fail.").

61. *See* Lash, *supra* note 36, at 1422–23 (discussing how [Congressman] Trumbull agreed with his opponents that the Comity Clause, relied upon in cases like *Corfield*, "did nothing more than protect out-of-state citizens, and that the Civil Rights Bill protected an altogether different set of rights").

62. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson); Lash, *supra* note 36, 1392–93, 1417–18.

63. CONG. GLOBE, 39th Cong., 1st Sess. 1117–18 (1866) (statement of Rep. Wilson); CONG. GLOBE, 39th Cong., 1st Sess., 1088, 1291 (1866) (statements of Rep. Bingham).

tainly were not trying to grant the right to vote.[64] That is why they eventually moved away from *Corfield*.[65]

Another interesting question concerns the meaning of the Citizenship Clause—an excruciatingly difficult topic that was under-theorized and under-discussed at the time of the drafting of the Fourteenth Amendment.[66] Of course, the main concern behind the Citizenship Clause was to make sure that the former slaves were going to be citizens of the United States and of the state in which they resided.[67] But Congress also needed to make sure that they had power to draft legislation like they drafted in the Civil Rights Act,[68] which provided that all people born in the United States were citizens.[69] As a result, they added the Clause to the Fourteenth Amendment at the last minute.[70] It was the last addition to Section One,[71] and it was not something that Bingham had originally included in his proposed amendment.[72] The Citizenship Clause got some last-minute conversation that primarily dealt with the Clause's impact on Native American tribes,[73] and more specifically how the Fourteenth Amendment would affect the status of those in treaty agreements with Native Americans.[74] A few congressman were concerned about how the Amendment would apply to the population of Asian immigrants, especially those immi-

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64. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson); CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866) (statement of Sen. Trumbull).

65. Lash, *supra* note 32, at 382 & n.251, 393.

66. *See* Garrett Epps, *The Citizenship Clause: A "Legislative History"*, 60 AM. U. L. REV. 331, 352, 359, 359 n.114 (2010) (explaining the limited nature of sources on the drafting of the Citizenship Clause, because the draft of Fourteenth Amendment adopted by the House of Representatives did not address citizenship).

67. *See* Oforji v. Ashcroft, 354 F.3d 609, 620–21 (7th Cir. 2003) (Posner, J., concurring) ("The purpose of the rule was to grant citizenship to the recently freed slaves . . . .").

68. *See* CONG. GLOBE, 39th Cong. 1st Sess. 1291 (1866) (statement of Rep. Bingham).

69. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (1870)) (codified as amended at 42 U.S.C. §§ 1981–1982 (2012)).

70. *See* Epps, *supra* note 66, at 359 & n.114.

71. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (proposal of Sen. Howard to add Citizenship Clause to the draft of the Fourteenth Amendment).

72. *See id*. at 813 (Rep. Bingham's initial proposal for the Fourteenth Amendment).

73. *See id*. at 2890–97.

74. *See id*.

grants coming to California.[75] Others were concerned with how the Amendment would affect gypsies.[76] But these issues received only perfunctory discussion during the deliberating period, and then no discussion during the ratification period.[77]

Importantly, one non-enumerated right that remained under state control even after the Fourteenth Amendment was the right to vote.[78] States remained free to deny freedmen the franchise, so long as the state was willing to accept reduced representation in Congress.[79] To men like Frederick Douglass, a former slave and a statesman, that was unacceptable: if the unenumerated subjects of local municipal law were left to the voting people in the States, then the voting people in the states should include both black and white voters.[80] But even as Douglass called for a Fifteenth Amendment giving blacks the right to vote, he nevertheless recognized the need to preserve a federalist constitution that limited the power of the national government:

> The Civil Rights Bill and the Freedmen's Bureau Bill and the proposed constitutional amendments, with the amendment already adopted and recognized as the law of the land, do not reach the difficulty, and cannot, unless the whole structure of the government is changed from a government by States to something like a despotic central government, with power to control even the municipal regulations of States, and to make them conform to its own despotic will. While there remains such an idea as the right of each State to control its own local affairs,—an idea, by the way, more deeply rooted in the minds of men of all sections of the country than perhaps any one other political idea,—no general assertion of human rights can be of any practical value. To change the character of the government at this point is nei-

75. *See id.* at 2890–92.

76. *See id.*

77. *See* Epps, *supra* note 66.

78. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson) ("[S]uffrage is a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a republican form of government.").

79. *See id.*

80. *See* Frederick Douglass, *A Treacherous President Stood in the Way* (1866), *reprinted in* THE ATLANTIC (Aug. 16, 2017), https://www.theatlantic.com/politics/archive/2017/08/a-treacherous-president-stood-in-the-way/537066/ [https://perma.cc/EWZ9-GSXQ].

> ther possible nor desirable. All that is necessary to be done is to make the government consistent with itself, and render the rights of the States compatible with the sacred rights of human nature.[81]

Douglass believed this could be accomplished by giving every loyal citizen the elective franchise.[82] Douglass got his wish when Congress passed the Fifteenth Amendment.[83] Together, the Reconstruction Amendments expanded individual freedom while preventing the creation of a "despotic central government."[84]

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81. *Id.*

82. *Id.* ("This unfortunate blunder must now be retrieved, and the emasculated citizenship given to the negro supplanted by that contemplated in the Constitution of the United States, which declares that the citizens of each State shall enjoy all the rights and immunities of citizens of the several States,—so that a legal voter in any State shall be a legal voter in all the States.").

83. U.S. CONST. amend. XV, § 1 ("The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

84. FONER, *supra* note 52, at 242.

PROTECTING THE ORIGINALIST CONSTITUTION

JOHN O. MCGINNIS*

My subject is Article V, the amendment process itself. The capacity of the people to change their fundamental laws surely qualifies as a first principle of constitutionalism. This essay makes three points. First, constitutional amendments are the best way of updating our Constitution. The consensus they require is likely to create better improvements than judicial updating that comes from non-originalist approaches to interpreting the Constitution. Second, unfortunately, constitutional updating by the Supreme Court has directly interfered with Article V because it incentivizes people to work through the courts rather than through the amendment process. We thus need originalism to make the process work as well as it can. Finally, this essay discusses constitutional amendments to the amendment process itself, both to make it function better as a constraint on the power of Congress and to make it easier to amend more generally.

As Michael Rappaport and I describe in great detail in our book, *Originalism and the Good Constitution*, the most striking feature of the amendment process is its requirement of supermajoritarian consensus to change our fundamental law.[1] Article V requires either two-thirds of Congress or two-thirds of the states to propose an amendment, and then three-quarters of the states, through conventions or legislatures, to ratify an amendment.[2] Supermajoritarian consensus is a good way to make and amend the Constitution.

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* George C. Dix Professor in Constitutional Law, Northwestern University School of Law. This is lightly edited transcript of talk at the Federalist Society Student Symposium at Georgetown. Much of this talk is based on joint work with Michael Rappaport who deserves equal credit or blame for most of these ideas. And Mike himself deserves the sole credit for raising the problems with the state petition process in Article V.

1. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 63–80 (2013).

2. U.S. CONST. art. V.

We can see the virtues of supermajoritarian rules for constitutional amendments and constitution-making by contrasting it with majority rule.[3] Something close to majority rule is generally thought to be the best approach to ordinary legislation, but permitting a mere majority to entrench provisions in our fundamental law would be problematic.[4] First, because entrenched norms cannot be easily changed, controversial amendments can be extremely divisive and partisan. Yet a majority tends to enact exactly those divisive and partisan changes.[5] Supermajority rules happily permit only norms with substantial consensus and bipartisan support to be entrenched.[6] A broad consensus for constitutional amendments maintains legitimacy, allegiance, and even the affection that citizens feel for their fundamental document as it becomes part of their common bond, making them citizens of a single nation.[7]

The long-term nature of entrenchments also makes it less likely that simple majorities will enact desirable amendments. Individuals have a heuristic problem in thinking about the future; they are often disposed to believe the future is going to be just like the past.[8] Stock markets and housing bubbles go up and up until they suddenly do not. Supermajority rules compensate for this deficiency by restricting the agenda of proposed amendments because fewer proposals have a realistic chance at being passed.[9] A restricted agenda encourages a rich-

3. *See* MCGINNIS & RAPPAPORT, *supra* note 1, at 35–38.

4. *Id.* at 12; John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rule: Three Views of the Capitol*, 85 TEX. L. REV. 1115, 1171 (2007).

5. MCGINNIS & RAPPAPORT, *supra* note 1, at 39–40 (explaining that simple majorities tend to enact partisan entrenchments for two reasons: "partisan political action is often beneficial to members of a party," and "legislators may favor partisan behavior even if citizens do not").

6. *Id.* at 38–39 (explaining how a supermajority entrenchment rule only allows for the entrenchment of those provisions that enjoy consensus support).

7. *Cf.* Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV 389, 394 (2004) (stating that constitutionalism helps transcend prior communal identities).

8. *See* AMOS TVERSKY & DANIEL KAHNEMAN, JUDGEMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 23–25 (Daniel Kahneman et al. eds., 1982).

9. MCGINNIS & RAPPAPORT, *supra* note 1, at 54.

er stream of information and deliberation about the amendments, improving their quality.[10]

Finally, a strict supermajority rule for amendments improves the quality of entrenchments by helping to create a veil of ignorance[11] because amendments cannot be easily repealed—they have to go through the same Article V process to be repealed.[12] Citizens and legislatures cannot be certain how amendments are going to affect themselves later in life or their children. Hence, they are more likely to consider the long-term public interest than their short-term personal interest when determining whether to support revision.[13]

Consequently, updating the Constitution through the prescribed Article V amendment process is superior to updating it through judicial interpretation because the amendment process requires a national consensus. Updating the Constitution through judicial interpretation, by contrast, gives judges discretion in choosing how our country keeps up with the times. This is problematic for three reasons. First, judicial updating of the Constitution is accomplished by a small number of Supreme Court Justices, whereas constitutional lawmaking and the amendment process require the broader participation of many people across the country. Second, the Supreme Court is drawn from a very narrow class of society—elite lawyers living in Washington, D.C., perhaps the most artificial city in the world, a classic one-company town.[14] And today that narrowness is even more extreme than in the past, as each current Justice has

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10. *Id.*; *see also id.* at 219 n.43 (noting that Congress has approved and sent to the states for ratification only thirty-three amendment proposals, resulting in more accurate information about and greater awareness of the merits of the proposals).

11. *See* Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 922–23 (1990) (explaining the veil of ignorance).

12. *See, e.g.*, U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

13. MCGINNIS & RAPPAPORT, *supra* note 1, at 54.

14. *See* John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541, 542–43 (1999) (discussing factors that make Supreme Court Justices remote); *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting) ("[T]he Federal Judiciary is hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between.").

attended one of two law schools, Harvard or Yale.[15] As for geographic diversity, when Justice Scalia was alive they at least hailed from four of the five boroughs of New York City.[16] Finally, constitutional lawmaking is supermajoritarian, while the Supreme Court can rule five to four. These several reasons suggest that doctrines fabricated by Supreme Court Justices are not as likely as amendments to improve our Constitution.

Yet another problem with judicial updating is that it interferes with the amendment process itself. During the period when originalism was the dominant mode of interpretation, hugely important amendments were passed, including but not limited to the Reconstruction Amendments. The Sixteenth Amendment permitted the income tax, [17] the Seventeenth Amendment permitted the recollection of senators,[18] and the Nineteenth Amendment gave women the right to vote.[19] Many of these amendments were passed by people who might have been thought to have a vested interest *against* the amendment. Two examples are the Seventeenth and Nineteenth Amendments. In ratifying the Seventeenth Amendment, state legislatures gave up their power to choose senators.[20] In the Nineteenth Amendment, men diluted the power of their vote by ex-extending the franchise to women.[21]

But as non-originalism has become more powerful, the amendment process has fallen into disuse for the enactment of profound social change. And that is not surprising, for it is

15. William Wan, *Every current Supreme Court justice attended Harvard or Yale. That's a problem, say decision-making experts*, WASH. POST: SPEAKING OF SCIENCE (July 11, 2018) https://www.washingtonpost.com/news/speaking-of-science/wp/2018/07/11/every-supreme-court-justice-attended-harvard-or-yale-thats-a-problem-say-decision-making-experts/ [https://perma.cc/K3LW-JU67].

16. James Barron, *A Conservative Bloc, a Liberal Bloc, and Now, a New York Bloc*, N.Y. TIMES, May 12, 2010, at A1 (noting that Justice Ginsburg was born in Brooklyn, Justice Sotomayor was born in the Bronx, Justice Kagan was born in Manhattan, and Justice Scalia grew up in Queens).

17. U.S. CONST. amend. XVI.

18. U.S. CONST. amend XVII.

19. U.S. CONST. amend XIX.

20. *See* U.S. CONST. art. I, § 3, cl. 1, *repealed by* U.S. CONST. amend XVII, cl. 1.

21. The U.S. Constitution, at ratification, did not explicitly limit suffrage to males, but rather stated that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2, cl. 1.

originalism that protects the amendment process.[22] If judges can change the Constitution, most people will put their energy into trying to get the right judge appointed and creating a culture where it is thought proper for judges not to be constrained by the original meaning of the Constitution.[23] Of course, that is not a hypothetical culture; at least until recently it *was* our culture. Thus originalism and the amendment process are mutually supportive. There can be no normatively attractive originalism without the amendment process because Article V permits each generation to enshrine its values in the Constitution. But equally, there can be no effective amendment process without originalism.[24] The Article V amendment process and originalism march under a single banner. And what does that banner read? It says, "We the People," and not "We the Elite Judges."

Sometimes it is said the amendment process is too difficult, and that is why we need judicial updating.[25] But many important, even transformative amendments have been enacted under Article V. And if we look at the six proposed amendments that have fallen just short, those that passed Congress but failed in the state legislatures, it is hardly clear that on balance we would be better off with them. One would have purported to entrench slavery beyond constitutional amendment,[26]

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22. John O. McGinnis & Michael B. Rappaport, *An Originalist Future*, 15 ENGAGE 34, 38 (2014) ("Finally, the amendment process that originalism protects permits each generation to make the Constitution its own, by deciding whether to place its additional provisions in the Constitution on much the same terms as previous generations did.").

23. *See, e.g.*, David A. Strauss, *Do We Have a Living Constitution?*, 59 DRAKE L. REV. 973, 975 (2011) ("If having a 'living' Constitution means having a Constitution that changes over time in ways other than by formal amendment, then in a fundamental way there is only one plausible answer to that question.").

24. *See* John O. McGinnis, *How Originalism Energizes the Amendment Process*, L. & LIBERTY (Sept. 14, 2017), http://www.libertylawsite.org/2017/09/14/how-originalism-energizes-the-amendment-process/ [https://perma.cc/X42U-4DLR] (arguing that it is living constitutionalism, not originalism, that has made the amendment process ineffective).

25. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 24 (5th ed. 2015) (referring to the amendment process as "cumbersome," and advocating for the need for judicial amendment within a "changing society").

26. This proposed amendment in 1861 was known as the "Corwin Amendment," named after Rep. Thomas Corwin of Ohio, and would have explicitly barred any amendment to the Constitution interfering with the institution of slavery: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by

and another would have created a confusing and unworkable process for apportioning representatives among the states.[27] Now it is true that the Equal Rights Amendment (ERA) also came close to ratification,[28] but its failure illustrates the problems non-originalism poses for the amendment process.

The ERA was proposed directly after the Warren Court, which was possibly the most activist court in our history with respect to disregarding the meaning of the Constitution.[29] Not surprisingly, citizens were wary of giving more power to a Court that had a history of interpreting the Constitution according to its policy preferences rather than in accordance with the Constitution's original meaning. Sure enough, opponents played up the possibility that the ERA would lead to extrava-

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the laws of said State." JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–2002, at 118 (2d ed. 2003); *see also* A. Christopher Bryant, *Stopping Time*: *The Pro-Slavery and 'Irrevocable' Thirteenth Amendment*, 26 HARV. J.L. & PUB. POL'Y 501 (2003) (providing a thorough background of the Corwin Amendment).

27. Originally known as "Article the first" in the First Congress of 1789, the proposed "Congressional Apportionment Amendment" stated:

> After the first enumeration required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which, the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred, after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

APPENDIX TO THE HISTORY OF THE FIRST CONGRESS, 2 ANNALS OF CONG. 1984 (1790–1791). The ramifications would have been significant: "Had that amendment been ratified then, or at some subsequent moment, and left in effect until today, in a country presently with 300 million people we would thus be talking about the first Congress following the 2010 Census having 10,000 House members. To just 100 senators." Tom Schaller, *Getting a Bigger House*, FIVETHIRTYEIGHT (Sept. 18, 2009, 8:00 PM), https://fivethirtyeight.com/features/getting-bigger-house/ [https://perma.cc/43AC-MQXT].

28. Marjorie Hunter, *Leaders Concede Loss on Equal Rights*, N.Y. TIMES, June 25, 1982, at A13 (detailing the failure of the ERA in 1982, as it had only been passed "by 35 states, three short of the three-fourths it needed to become part of the Constitution."). The ERA stated: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." H.R.J. Res. 208, 92d Cong. (1972).

29. *See, e.g.*, ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 84 (1990) ("[A]ny correspondence between the original understanding and the Court's rulings was often accidental . . . .").

gances such as unisex bathrooms during the debate over its ratification.[30] Moreover, the Supreme Court had already taken the wind out the sails of the ERA. Without examining the original meaning, the Court had suggested much more substantial scrutiny for sex discrimination.[31] State legislatures could have rationally believed that if the Court was already going to take care of the problem, why should they themselves take a hard vote? The larger point is this: many constitutional amendments regarding the proper scope of federal power or the proper balance of the administrative state never came into being because of judicial updating. There are a lot of mistakes about a non-originalist interpretation of the Constitution. But one real tragedy is the constitutional amendments that have not been born.

I do not want to be accused of Panglossianism—I am not arguing that we have a perfect Constitution. So I am going to conclude by suggesting that there is one important aspect of Article V that is not a success: an effective amendment process that can bypass Congress, because we occasionally need to think about amendments that will reign in Congress's power and perquisites. For instance, hoping that Congress will muster a two-thirds majority to propose congressional term limits is like expecting that turkeys will vote for Thanksgiving. Unfortunately, as Michael Rappaport has detailed in his ground breaking work, the state petition process in Article V for amending the constitution seems largely broken.[32] It has never

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30. James C. Clark, *Fear of Unisex Bathrooms Doomed the ERA*, ORLANDO SENT. (Apr. 28, 1991), http://articles.orlandosentinel.com/1991-04-28/news/9104280615_1_equal-rights-amendment-senate-the-amendment-two-votes [https://perma.cc/TY5M-7D9Y] ("After the Senate failed to pass the bill, opposition began to develop. Conservative groups claimed that the amendment would actually hurt women, lead to unisex bathrooms and force women to take part in combat."); Allison K. Lange, *The Equal Rights Amendment Has Been Dead for 36 Years. Why It Might Be on the Verge of a Comeback.*, WASH. POST (June 18, 2018), https://www.washingtonpost.com/news/made-by-history/wp/2018/06/18/the-equal-rights-amendment-has-been-dead-for-36-years-why-it-might-be-on-the-verge-of-a-comeback/ [https://perma.cc/WXV3-MKSK] ("Advocates [against the ERA] convinced lawmakers that the amendment would force women to sign up for the draft, decriminalize rape, allow for same-sex marriages, give men permission not to support their families and require Americans to use unisex toilets.").

31. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny in a sexual discrimination claim under the Equal Protection Clause of the Fourteenth Amendment).

32. Michael B. Rappaport, *The Constitutionality of a Limited Convention*, 28 CONST. COMMENT. 53, 55 (2012) ("The convention method simply does not work.").

been invoked in two centuries.[33] We can explain the reasons for that history. It is unclear, for instance, what the agenda of the convention that the states would call would be. Some people even think that the scope of the convention would be unlimited, and that makes a lot of very rational people wary of making the whole Constitution up for grabs.[34] An amendment to the amendment process could fix that process.

I am not especially partial to any particular language, but Michael Rappaport has the best proposal that I have seen.[35] Let state legislatures come up with a common proposed amendment, and it will automatically go to the states for ratification, without intervention by Congress.[36] It would be ratified by the same process by which amendments proposed by Congress are ratified.[37] With that one change to the amendment process aside, the most important thing that can be done for the amendment process is to follow the original meaning of the Constitution.[38] That in turn will create a more vibrant culture of constitutional democracy where social movements push their own constitutional amendments, and we will have a nationwide debate about them.[39]

This proposed amendment only addresses what is clearly broken in Article V: the state petition process. The related question of whether we should amend the Constitution to change the degree of supermajoritarian consensus for any amendment is a very difficult one. We certainly do not want the amendment process to be any harder than it already is. And it may well be, on balance, a useful amendment to move in the direction of a weaker supermajority requirement—for instance, we could still require the approval of three-quarters of the states,

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33. *Id.* ("Not only has it never been used to enact an amendment, but no convention has ever been called" (citation omitted).).

34. *Id.* ("The most important reason why the convention method does not work is the fear of a runaway convention.").

35. *See* Michael Rappaport, *Revisiting the Constitution: End Congress's Monopoly on Amendments*, N.Y. TIMES: ROOM FOR DEBATE (Nov. 3, 2016, 5:45 PM), https://www.nytimes.com/roomfordebate/2012/07/08/another-stab-at-the-us-constitution/revisiting-the-constitution-end-congresss-monopoly-on-amendments [https://perma.cc/47N7-BVK2].

36. *Id.*

37. U.S. CONST. art. V.

38. *See* McGinnis, *supra* note 24.

39. *See* Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 49–50 (2005).

but measured by population. That would make it more difficult for just a few states to hold out.

Nevertheless, it is important to look at the amendments that came closest to succeeding. As noted above, there are a number of very problematic amendments that came close to ratification.[40] So in my view the greatest problem, and the greatest reason that we had a disappearance of potentially good amendments, is the idea that judges could *create* constitutional law. This bad idea generated tremendously different incentives in the constitutional change process, moving us to focus on the Court rather than our fellow citizens. The most important step for revivifying the amendment process is thus not amending the Constitution but instead reading the Constitution as it is written.

40. *See supra* notes 26–27 and accompanying text.

JUSTICE SCALIA'S EIGHTH AMENDMENT JURISPRUDENCE: THE FAILURE OF SAKE-OF-ARGUMENT ORIGINALISM

CRAIG S. LERNER*

INTRODUCTION

In his penultimate Term on the Supreme Court, Justice Scalia identified the case that "has caused more mischief to our juris-

* Professor of Law, Antonin Scalia Law School, George Mason University. The author thanks Renee Lerner, Nelson Lund, Daniel Polsby, and Jeremy Rabkin for helpful comments.

prudence, to our federal system, and to our society than any other."[1] Few would guess the culprit: *Trop v. Dulles*.[2] To the extent that *Trop* can claim any fame, it is for Chief Justice Warren's pronouncement that, "The [Eighth] Amendment must draw its meaning from the *evolving standards of decency* that mark the progress of a maturing society."[3]

One need not be well versed in theories of constitutional interpretation to understand why such a statement provoked Justice Scalia. The statement is a candid assertion of what has become known as living constitutionalism—the bête noire of Justice Scalia's originalism.[4] According to a narrative embraced by Justice Scalia and other originalists, the idea expressed in that disreputable sentence has given rise to sundry decisions that have mutilated the constitutional fabric of the republic.[5] For example, during the oral argument in the 2013 challenge to California's constitutional amendment foreclosing same-sex marriage, Justice Scalia inquired, "[w]hen did it become unconstitutional to exclude homosexual couples from marriage? 1791? 1868[?]"[6] Counsel for petitioner, evoking the spirit of *Trop v. Dulles*, responded, "There's no specific date in time. This is an evolutionary cycle."[7]

The case in which Justice Scalia pronounced his indictment of *Trop* exemplifies, in his view, the mischief that arises when one adopts the view that "evolving standards," rather than the text's fixed original meaning, are paramount in judicial interpretations of the Constitution. Justice Scalia leveled his charge

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1. Glossip v. Gross, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., concurring).

2. 356 U.S. 86 (1958).

3. *Id*. at 101 (emphasis added); *see also* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

4. For other illustrations of living constitutionalism, see Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 443 (1934) (the "great clauses of the Constitution" should not be "confined to the interpretation which the [F]ramers, with the conditions and outlook of their time, would have placed upon them"); Missouri v. Holland, 252 U.S. 416, 433 (1920) ("[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.").

5. *See infra* note 339.

6. Transcript of Oral Argument at 38, Hollingsworth v. Perry, 570 U.S. 693 (2013) (No. 12-144).

7. *Id.* at 40.

against *Trop* in response to Justice Breyer's dissenting opinion in the 2015 case of *Glossip v. Gross*, which involved a challenge to Oklahoma's execution protocol. [8] Justice Breyer there emerged as the most recent in a line of Justices who have called into question the constitutionality of the death penalty.[9] Intellectual contortions are required to make this argument, according to Justice Scalia, for "[i]t is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*."[10] To achieve this impossible feat, Justice Breyer, like others before him, is obliged to acknowledge *Trop* as the inspiration for his constitutional jurisprudence. Thus emboldened, Justice Breyer writes, "[the] 'claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail.'"[11]

It was in the course of his response to this argument that an exasperated Justice Scalia condemned *Trop* in the sweeping terms that introduced this Article.[12] The sentence immediately preceding this indictment is also worthy of close attention:

> If we were to travel down the path that Justice Breyer sets out for us and once again consider the constitutionality of the death penalty, I would ask that counsel also brief whether our cases that have abandoned the historical understanding of the Eighth Amendment, beginning with *Trop*, should be overruled.[13]

Implicit in this sentence is the remarkable concession that Justice Scalia tolerated *Trop* and the cases that followed it for the 28 years he had served on the Supreme Court, despite the fact that those cases severed the Eighth Amendment from what Jus-

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8. 135 S. Ct. 2726, 2731 (2015).

9. *See, e.g.*, Baze v. Rees, 553 U.S 35, 71 (2008) (Stevens, J., concurring); Callins v. Collins, 510 U.S. 1141, 1143 (1994) (Blackmun. J., dissenting); Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); *id.* at 232 (Marshall, J., dissenting); Furman v. Georgia, 408 U.S. 238, 241–42 (1972) (Douglas, J., concurring); *id.* at 263 (Brennan, J. concurring); *id.* at 329 (Marshall, J. concurring).

10. *Glossip*, 135 S. Ct. at 2747 (Scalia, J., concurring); *see also* U.S. CONST. amend. V ("No person shall be held to answer for a capital crime . . . unless on a presentment or indictment of a Grand Jury . . . .").

11. *Glossip*, 135 S.Ct. at 2755 (Breyer, J., dissenting) (quoting Atkins v. Virginia, 536 U.S. 304, 311 (2002)).

12. *See id.* at 2749 (Scalia, J. concurring).

13. *Id.*

tice Scalia viewed as its original meaning. If *Trop* really had "caused more mischief to our jurisprudence, to our federal system, and to our society than any other,"[14] surely Justice Scalia should have stated his intention, or at least his willingness, to overrule the decision long ago, not only for its effect on Eighth Amendment jurisprudence but also for the symbolic value of reaffirming a commitment to the Constitution's original meaning. Why was Justice Scalia willing to apply *Trop* for nearly three decades, and what had he come to learn by 2015 that prompted him, at least contingently,[15] to call for *Trop*'s reconsideration?

In answering this puzzle, we confront what Professor Nelson Lund has called in a recent consideration of Justice Scalia's jurisprudence, "the dilemma of constitutional originalism."[16] At this late date in the American republic, precisely how is a judge in our common law tradition, of which Justice Scalia considered himself a member, to follow the original meaning of the Constitution, to which Justice Scalia professed allegiance? As Lund writes, "The tension between the doctrine of *stare decisis* and the principle of originalism became acute in the wake of the Warren Court's creation of a large number of precedents that disregarded both the original meaning of the Constitution and boatloads of existing precedent."[17] Lund then illustrates the difficulty by considering a line of cases "that does not involve a provocative political issue," that is, the dormant commerce clause.[18] He demonstrates that Justice Scalia's commitment to originalism was diluted by an eclectic deference to precedent.[19]

This Article analyzes the tension between originalism and precedent in a politically and morally fraught context: the

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14. *Id.*

15. The quotation from *Glossip* suggests that Justice Scalia would still not be willing to reconsider *Trop*, unless Justice Breyer pressed the issue of the constitutionality of the death penalty.

16. Nelson Lund, *Antonin Scalia and the Dilemma of Constitutional Originalism*, PERSPECTIVES IN POLITICAL SCIENCE (George Mason Univ. Legal Studies Research Paper Series, LS 16–36, forthcoming). He is not the first to make this observation or even to use this terminology. *See, e.g.*, Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 133 (1991).

17. Lund, *supra* note 16, at 10–11.

18. *Id.* at 11.

19. *Id.* at 13–14.

Eighth Amendment. By the time Justice Scalia joined the Supreme Court in 1987, the jurisprudence in this area, particularly with respect to the death penalty, had swollen into a thicket of precedents. And in an important sense, all of these precedents claimed *Trop* as their distant, or not-so-distant, ancestor. How is an originalist to reconcile the conflicting demands of the Constitution on the one hand and these precedents on the other? Justice Scalia's contention that the Eighth Amendment forecloses only those modes of punishment considered cruel and unusual in 1791 complicates the question. Consider that punishment practices in 1791 were often barbaric when viewed from the predominant modern perspective. When confronted with the choice between the original meaning of the Constitution and a clearly erroneous precedent that better aligns the Constitution with the moral tenor of the times, which is an originalist judge to choose?

Academics critical of originalism as an interpretative methodology have long focused on the inability of originalism to account for, let alone justify, deeply entrenched, but dubiously originalist precedents, such as the *Legal Tender Cases*,[20] *International Shoe Company v. Washington*,[21] a litany of New Deal cases,[22] and, most significantly, *Brown v. Board of Education*.[23] Justice Scalia's willingness to defer to these precedents highlighted, for these scholars, the opportunism of his originalism, the way it provided "rule of law" cover for the promotion of a conservative political agenda.[24] Curiously, several scholars

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20. 79 U.S. (12 Wall.) 457 (1871); *see also* Kenneth Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367. *But see* Robert Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL'Y 1017, 1022 (2008) (arguing that, under the original meaning of the Coinage Clauses, the Court reached the correct result, albeit through flawed reasoning).

21. 326 U.S. 310 (1945); *see also* Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 25–27 (2007).

22. *See* Thomas Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 523 (1995).

23. 347 U.S. 483 (1943); *see also* Pamela S. Karlan, *What Can* Brown *Do For You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1060 (2009) ("because *Brown* has become the crown jewel of the *United States Reports*, every constitutional theory must claim *Brown* for itself"). *But see* Michael McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (providing an originalist defense of *Brown*).

24. *See* Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 398 (2000) (arguing that Justice Scalia's originalism would require *Brown*'s reversal). For a defense of Justice Scalia's blend of originalism and

sympathetic to an originalist methodology have also criticized Justice Scalia's jurisprudence in this regard. Nelson Lund and Randy Barnett have attacked what they regard as his inconsistency in stridently adhering to the Constitution's meaning in some cases and then humbly deferring to nonoriginalist precedents in others—with scarcely an explanation of why some precedents deserve respect and others should be overruled.[25]

In a lecture delivered in 1988, Justice Scalia invited precisely this criticism, by implying that (in an Eighth Amendment context) he was only a "faint-hearted originalist."[26] This concession would become, over the next three decades, Exhibit A in any prosecution of Justice Scalia for inconsistency and hypocrisy.[27] Seldom noted, however, is that after making this concession, Justice Scalia seemed to withdraw or, at a minimum, qualify it. At least in Justice Scalia's own mind, he was not so much a "faint-hearted originalist" as a judge who ordinarily could reconcile the demands of the Constitution with even unprincipled nonoriginalist decisions, such as *Trop*. He wrote:

> The vast majority of my dissents from nonoriginalist thinking (and I hope at least some of those dissents will be majorities) will, I am sure, be able to be framed in the terms that, *even if the provision in question has an evolutionary content*, there is inadequate indication that any evolution in social attitudes has occurred.[28]

In other words, Justice Scalia argued that, at least in the context of the Eighth Amendment, he often could accept even the grotesquely nonoriginalist *Trop* as good law (that is, he could accept for the sake of argument that the Eighth Amendment has evolutionary content) and still prevail in upholding the Constitution's meaning. Thus, he suggested that he was a "pure-

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precedent, see Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017).

25. See Lund, *supra* note 16; Randy Barnett, *Scalia's Infidelity: A Critique of Faint-Hearted Originalism*, 75 U. CIN. L. REV. 7 (2006).

26. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

27. *See, e.g.*, Richard A. Posner & Eric J. Seagall, *Faux Originalism*, 20 GREEN BAG 2D 109, 112–13 (2016); Chemerinsky, *supra* note 24, at 389–99; Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1062–63 (1990).

28. Scalia, *supra* note 26, at 864 (emphasis added).

originalist[]-accepting-for-the-sake-of-argument-evolutionary-content."[29]

This Article is the first to use this framework to consider Justice Scalia's Eighth Amendment jurisprudence. Justice Scalia anticipated that his opinions would be framed as arguments in the alternative: first, that the Eighth Amendment, properly understood, did not foreclose a punishment; and, in the alternative, that even if nonorginalist precedents were followed, the result would be the same, because there was "inadequate indication that any evolution in social attitudes has occurred."[30] "Sake-of-argument originalism" was Justice Scalia's ingenious solution to the "dilemma of constitutional originalism," at least in the area of the Eighth Amendment. The dilemma could be resolved by seamlessly reconciling originalism and precedent. Given this Article's title, there is no spoiler alert needed before announcing that this solution failed—both objectively and by Justice Scalia's own estimation. This Article illustrates why and what lessons might be drawn, particularly for those sympathetic to an originalist methodology.

The starting point, in Part I, is a closer look at *Trop v. Dulles*. Justice Scalia's sake-of-argument originalism is premised on his ability to apply *Trop* as if it were an ordinary precedent, but even a cursory reading of Chief Justice Warren's plurality opinion hints at grave difficulties with this project. It is not simply that Chief Justice Warren's opinion invited judges to update the meaning of the Eighth Amendment to align it with evolving standards of decency; the even more startling aspect of the opinion is how unconstrained Chief Justice Warren was in ascertaining those standards of decency. Among other criteria, Chief Justice Warren unabashedly drew upon his own moral sentiments in discerning civilized standards. *Trop* thus encouraged judges, particularly of the "heroic" cast, to promote justice as they understood it.

Part II is a close reading of Justice Scalia's essay *Originalism: The Lesser Evil*, in which the project of sake-of-argument originalism is outlined. The essay forthrightly acknowledges the foremost difficulty with principled originalism: the risk that the Constitution's original meaning will conflict with long-

29. *Id.*
30. *Id.*

established precedent and contemporary moral attitudes. Although Justice Scalia would eventually become renowned, or vilified, as our nation's preeminent originalist, his attitude towards originalism in the essay is in fact opaque. At times, he endorses it enthusiastically, and yet the very title is not what one would expect from an unabashed partisan of originalism. Indeed, at various points, *Originalism* suggests an impatience and even contempt for pure originalism. It is the sort of "theory" one expects from academics who are ignorant of the compromises demanded of men and women in the arena of political life. At the end of the essay, Justice Scalia nonetheless manages to convey that he will carry the banner of originalism proudly, notwithstanding these demands. He will be able, he asserts, to reconcile nonoriginalist precedents, including *Trop*, with originalism.

And yet the basis of his confidence was unclear. Part III considers how sake-of-argument originalism played out in the context of many of Justice Scalia's Eighth Amendment cases. Although Justice Scalia at times insinuates that he is a "pure originalist" and only a nonoriginalist "for the sake of argument," many of his opinions have the opposite character. Justice Scalia hoists the originalist flag (sketching the argument under the Amendment's original meaning), but then devotes the bulk of his argument to an analysis of nonoriginalist precedents. In some cases, Justice Scalia boldly proclaims that these precedents should be reconsidered or overturned, but in others, he humbly follows even those precedents he identifies as erroneously decided.

As explored in Part IV and the Conclusion, Justice Scalia's hopeful expectation that he could achieve originalist results through sake-of-argument originalism was overwhelmingly disappointed. One problem is that his strategy presumes that there has not been a meaningful "evolution in social attitudes" with respect to punishment since 1791. The deeper problem with Justice Scalia's hopeful expectation is that a fair reading of *Trop* suggests that it is not enough for the community's "social attitudes" to remain durable or be reflected in contemporary legislation. The relevant question is whether the attitudes of the legal elites who purport to divine these "social attitudes" remain durable and mirror the attitudes of society at large. *Trop* was an invitation to the sort of judicial adventurism that sub-

sequent case law could never stifle. A careful reading of Chief Justice Warren's opinion, as well as Justice Frankfurter's vitriolic dissent, should have indicated that, from an originalist perspective, any line of cases that begins with *Trop* will not end well.

I. *TROP V. DULLES*: EVOLVING STANDARDS OF DECENCY

Who was this Albert Trop that Justice Scalia faults, at least indirectly, for corrupting the American republic? An Army private stationed in Casablanca in 1944, Trop was sentenced to the stockade for a breach of discipline.[31] He escaped and, along with a companion, wandered along a road toward Rabat.[32] Not the hardiest of souls, Trop reported that "[t]he going was tough. We had no money to speak of, . . . and we were getting cold and hungry."[33] So he returned to the stockade.[34] Trop's "desertion" lasted less than a day.[35]

At a distance of several decades, Trop's escapade seems almost comic. Yet in the throes of what was, in the words of the U.S. government defending its harsh punishment of another World War II deserter, "a desperate struggle with a power which had come dangerously close to enslaving mankind,"[36] Trop's crimes were of the utmost seriousness. A general court martial sentenced him to three years of hard labor.[37] And Trop should have considered himself lucky. Eddie Slovik, the other deserter just referenced, who also escaped from his unit and also haplessly turned himself in almost immediately thereafter, was executed in January 1945, shortly after Trop's desertion.[38]

Trop served his prison term and, in 1952, applied for a passport.[39] The State Department rejected his application, finding

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31. Trop v. Dulles, 356 U.S. 86, 87 (1958) (plurality opinion).

32. *Id.*

33. *Id.* at 88.

34. *Id.*

35. *Id.* at 87.

36. Letter from V.M. McElroy, Clerk of Court, U.S. Army Judiciary, to Maurice Lepavsky, Adjutant, Jewish War Veterans of the United States (Sept. 9, 1974), https://catalog.archives.gov/id/6231405 [https://perma.cc/49X9-PSAK] (image 4).

37. *Trop*, 356 U.S. at 88 (plurality opinion).

38. Fred L. Borch III, *Shot by Firing Squad: The Trial and Execution of Pvt. Eddie Slovik*, ARMY LAW., Mar. 2012, at 5, 5.

39. *Trop*, 356 U.S. at 88 (plurality opinion).

that he had lost his citizenship, pursuant to a Civil War statute, upon his conviction for desertion.[40] Trop filed suit seeking a declaration that he was still a citizen.[41] It does not appear that he initially raised an Eighth Amendment objection to the deprivation of his citizenship. The reason was self-evident: if it was not "cruel and unusual" to execute Eddie Slovik, how could it be "cruel and unusual" to strip Albert Trop of his citizenship? Trop quite sensibly based his argument on statutory grounds. A district court denied his petition, and a divided panel of the Second Circuit affirmed.[42]

In the Supreme Court, Trop challenged the constitutionality of that decision on two grounds: first, that Congress lacked the power to impose the punishment of denationalization; and second, assuming that Congress possessed such a power, that the imposition of denationalization as a punishment in his case violated the Eighth Amendment.[43] Trop's first argument was

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40. *Id.*

41. *Id.*

42. Trop v. Dulles, 239 F.2d 527, 528, 530 (2d Cir. 1956). Writing for the majority, Judge Learned Hand rejected Trop's statutory argument that because he did not desert to an enemy (he merely ambled away), the Civil War statute was inapplicable. *Id.* at 529. Such a distinction—desertion to enemy versus desertion *simpliciter*—was, Judge Hand observed, absent from the text of the statute. *Id.* Judge Hand also held that Trop's Eighth Amendment argument was procedurally barred, because it was not raised below. *Id.* at 529–30.

Chief Judge Clark dissented in a short opinion that was later adopted by reference in Chief Justice Warren's Supreme Court opinion. *See Trop*, 356 U.S. at 101 n.33 (plurality opinion) (incorporating *Trop*, 239 F.2d at 530 (Clark, C.J., dissenting)). Especially given that Chief Judge Clark was the principal author of the Federal Rules of Civil Procedure of 1938, *see* Michael E. Smith, *Judge Charles E. Clark and The Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 915 (1976), his treatment of the procedural issue was spare and unpersuasive. He wrote: "It is unfair to the capable and experienced lawyer who presented this appeal to hold that he did not present this argument." *Trop*, 239 F.2d at 530 (Clark, C.J., dissenting). Procedural defaults often cause "unfairness," although the hardship is generally ascribed to the aggrieved party, not the appellate litigator. Furthermore, Chief Judge Clark devoted exactly four sentences to the substance of Trop's appeal, incorporating by reference the "masterful analysis of expatriation legislation set forth in Comment, The Expatriation Act of 1954, 64 Yale L.J. 1164, 1189–99 [(1955)]." *Id.* Chief Judge Clark wrote that he "doubt[ed] if I can add" to the arguments raised in this student note, but he nonetheless *did* add that "[i]n my faith, the American concept of man's dignity does not comport with making even those we would punish completely 'stateless.'" *Id.* Chief Judge Clark's invocation of "man's dignity" prefigured the breathless moralism of Chief Justice Warren's opinion.

43. *Trop*, 356 U.S. at 94, 99 (plurality opinion).

arguably foreclosed by *Perez v. Brownwell*,[44] in which the Court held that Congress possessed the power, under its authority to maintain relations with a foreign power, to strip an American of citizenship.[45] Yet *Perez* and *Trop* could be distinguished on the basis of whether the petitioner in each case had actually inserted himself into the affairs of a foreign power: Perez *had* unlawfully voted in a foreign election,[46] but Trop had *not* deserted to a foreign country. Five Justices held that the source of the Congressional power to impose denationalization in Trop's case must be located in a different constitutional power, the only viable candidate being the power to maintain the military forces.[47] And Chief Justice's Warren's plurality opinion (which was joined by three other Justices) and Justice Brennan's solitary concurring opinion coalesced around the argument that denationalization bears no rational relationship to the power to maintain the military forces.[48]

This argument is, on its face, dubious. A dissenting Justice Frankfurter pointed out that desertion, especially in wartime, is a grave problem, and he neatly posed the question: "Can it be said that there is no rational nexus between refusal to perform this ultimate duty of American citizenship and legislative withdrawal of that citizenship?"[49] In any event, it is sufficient here to note that five Justices held that Congress did not have the power to strip Trop of citizenship. There consequently was no need to address Trop's remaining Eighth Amendment argument that denationalization was "cruel and unusual punishment," and Chief Justice Warren's fateful ruminations on that topic were unnecessary to the resolution of the case.

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44. 356 U.S. 44 (1958). *Perez* was decided on the same day as *Trop*.

45. *Id.* at 62.

46. *Id.* at 46.

47. *Trop*, 356 U.S. at 106–07 (Brennan J., concurring); *id.* at 120–22 (Frankfurter, J., joined by Burton, Clark, and Harlan, JJ., dissenting).

48. *See id.* at 97–98 (plurality opinion of Warren, C.J., joined by Black, Douglas, and Whittaker, JJ.); *id.* at 105 (Brennan, J., concurring).

49. *Id.* at 121–22 (Frankfurter, J., dissenting). A Harvard Law Review student note restated Justice Frankfurter's question in a way that left no doubt as to its sympathy with his position: "[I]n the light of the strong national interest in maintaining military discipline in time of war, it is questionable whether congressional selection of the expatriation sanction as a means to that objective can be deemed so unreasonable as to be constitutionally invalid." Note, *The Supreme Court, 1957 Term*, 72 HARV. L. REV. 77, 170 (1958).

In turning to the Eighth Amendment,[50] the *Trop* Court was painting on a nearly blank canvas. In its only significant prior Eighth Amendment case, *Weems v. United States*,[51] decided in 1910, the Court intimated that it was open to a broader interpretation of the Eighth Amendment than might be inferred from the text alone. The text of that Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[52] The Amendment, by its plain terms, imposes three limitations: (1) with respect to bail, it cannot be excessive; (2) with respect to fines, they cannot be excessive; and (3) with respect to punishment, it cannot be cruel and unusual. Prohibitions (1) and (2), on *excessive* fines and bail, arguably embody a proportionality principle: the fine or bail must be measured relative to the culpability of the offense. The third restriction speaks more broadly of all "punishment," but a necessary logical inference is that the "not excessive" restriction in (1) and (2) does not apply. By its plain language, the third limitation, prohibiting "cruel and unusual punishments," is broader in scope than (1) and (2), but it does not embody a proportionality principle. The phrase simply prohibits punishments that are "cruel and unusual," that is, barbaric *and* bizarre. It is important to note the conjunctive nature of the prohibition. Even punishments that are cruel comply with the Amendment if they are not also unusual, and vice versa. This analysis might yield the meaning of the Amendment if that meaning were appropriately gleaned through a concededly narrow focus on the text.

Of course, it is possible that "cruel and unusual" was a term of art, and that the original meaning is thus more complex than could be derived from such a narrowly textual analysis.[53] The Court reached this conclusion in *Weems*, which discerned a constitutional prohibition against punishments that are dispro-

50. Chief Justice Warren first addressed the question of whether denationalization constituted "punishment," or was merely the non-penal consequence of a court martial conviction. He concluded the former, over the persuasive objections of a dissenting Justice Frankfurter. *Compare* Trop, 356 U.S. at 99–100 (plurality opinion), *with id*. at 124 (Frankfurter, J., dissenting).

51. 217 U.S. 349 (1910).

52. U.S. CONST. amend. VIII.

53. *See* Samuel L. Bray, *"Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution*, 102 VA. L. REV. 687, 689 (2016).

portionate to the offense of conviction.[54] In *Weems*, a Philippine court, having convicted a customs official of falsifying a public document, imposed a sentence of fifteen years of *cadena temporal*—that is, the offender was to be chained around his ankles and wrists for the entirety of his prison term.[55] After a haphazard survey of the historical materials surrounding the drafting of the Eighth Amendment, the *Weems* Court struck down the sentence.[56] There is some language in the opinion suggesting that the punishment was unconstitutional because of its barbarity.[57] But there is far more sweeping language indicating that the punishment was invalid because it was not proportioned to the offense.[58]

Weems proved to have little influence on the development of the law until *Trop v. Dulles*. The Eighth Amendment portion of Chief Justice Warren's *Trop* opinion draws upon the historical findings of the *Weems* Court and at least begins on a curiously originalist note:

> The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta.[59]

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54. *See Weems*, 217 U.S. at 380–81.

55. *Id.* at 357–58, 364.

56. *Id.* at 371–73, 382.

57. *Id.* at 366 ("No circumstance of degradation is omitted. It may be that even the cruelty of pain is not omitted. He must bear a chain night and day. He is condemned to painful as well as hard labor. What painful labor may mean we have no exact measure.").

58. *Id*. at 367 ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense."). As to whether proportionality should be measured from the perspective of 1791 or from that of contemporary society, the Court's answer was the latter: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions." *Id*. at 373.

59. Trop v. Dulles, 356 U.S. 86, 99–100 (1958) (plurality opinion) (footnotes omitted).

So far, there is little with which Justice Scalia would disagree.[60] At this point, however, Chief Justice Warren veers off the originalist rails. He announces that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[61] It is unclear what is intended by this airy proclamation, nor is its meaning inferable from either the English Declaration of Rights or the Magna Carta.[62] After then discussing *Weems* at some length, Chief Justice Warren writes that the Amendment's meaning "is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[63]

Let us assume that this statement of the law is correct. What would one expect to follow in a judicial opinion? Presumably, Chief Justice Warren needs to identify where one looks to find those "standards." Then we can ask whether those identified standards pose any impediment to denationalization as a criminal punishment.

If these were indeed our expectations, they are immediately disappointed. After invoking the idea that the relevant criterion is the "standards . . . of a maturing society," Chief Justice Warren announces, "*We* believe . . . that use of denationalization as a punishment is barred by the Eighth Amendment."[64] In the next two paragraphs, Chief Justice Warren unburdens himself of his own moral intuitions. He observes that banishment "is a form of punishment more primitive than torture, for it de-

60. In *Harmelin v. Michigan*, 501 U.S. 957 (1991), Justice Scalia also identified the origins of the Eighth Amendment in the English Declaration of Rights and the Magna Carta. *Id.* at 967. That the "cruel and unusual punishment" language comes from the English Declaration of Rights is incontestable, but the assertion that the Amendment also derives from the Magna Carta, with which there is no linguistic overlap, is doubtful. *See* Craig S. Lerner, *Does the Magna Carta Embody a Proportionality Principle?*, 25 GEO. MASON. U. C.R.L.J. 271, 299 (2015).

61. *Trop*, 356 U.S. at 100 (plurality opinion).

62. If what is intended is that punishment should be proportioned to an offense, then that principle is appreciated (and applied) by small children and animals. Indeed, the law of contracts, which is premised on an ability to anticipate the future and forge voluntary, binding agreements in consequence, seems to reflect more robustly human abilities than does the criminal law principle of proportionality. If what is intended is that, given "the dignity of man," one should not torture human beings, it is not clear that animals do not also possess a dignity that is outraged when they are tortured. There is nothing distinctively human about the dignity that renders immoral the torture of a sentient and intelligent being.

63. *Trop*, 356 U.S. at 101 (plurality opinion).

64. *Id.* at 101 (emphasis added).

stroys for the individual the political existence that was centuries in the development."[65] Chief Justice Warren also quotes approvingly from the dissenting opinion in the Second Circuit, in which Chief Judge Clark had written: "*In my faith*, the American concept of man's dignity does not comport with making even those we would punish completely 'stateless' . . . ."[66] Apparently, the first clue to the "standards of a maturing society" is the moral sense or "faith" of an Article III judge.

The second clue to the "standards of a maturing society" is to be found, as Chief Justice Warren holds, in the attitudes that prevail throughout the world. He writes, "The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime."[67] Chief Justice Warren finds support for this proposition in two studies produced by the United Nations, two academic treatises on international law, and a student note from the Yale Law Journal, which, quoting Chief Judge Clark, he describes as a "masterful" analysis of international attitudes.[68] So far, it would not appear that Chief Justice Warren has devoted any attention to *American* attitudes, but earlier in the opinion he had offered this assurance:

> Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.[69]

Apparently, the reason that capital punishment does not run afoul of the constitutional prohibition against cruelty is not that it is explicitly contemplated by the Constitution,[70] but that it is still "widely accepted" in America, despite what Chief Justice

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65. *Id.*

66. *Id.* at 101 n.33 (emphasis added) (quoting Trop v. Dulles, 239 F.2d 527, 530 (2d Cir. 1956) (Clark, C.J., dissenting)).

67. *Id.* at 102.

68. *Id.* at 101 n.33 (quoting *Trop*, 239 F.2d at 530 (Clark, C.J., dissenting) (citing Comment, *The Expatriation Act of 1954*, 64 YALE L.J. 1164, 1189–99 (1955))); *see id.* at 101–03.

69. *Id.* at 99.

70. *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital . . . crime . . . .").

Warren suggests, forebodingly, are "forceful" counterarguments.[71]

Chief Justice Warren's arguments in this section are risible. His assertion that "only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion"[72] is wrong: the very U.N. document he cites collects materials from dozens of nations and shows that several countries had entire sections in their constitutions or relevant laws that provide mechanisms for stripping persons of citizenship. The grounds for this punishment are broad and often encompass military desertion. The Argentine Constitution of 1949 provides: "An Argentine national by birth shall lose his citizenship if he . . . [d]eserts from the Argentine armed forces . . . ."[73] New Zealand's law, as of 1948, authorized the stripping of citizenship if a naturalized person "[h]as shown himself by act or speech to be disloyal or disaffected towards His Majesty";[74] and Thailand's law, as of 1952, authorized the revocation of nationality for "any act contrary to public well-being."[75] Notwithstanding the "masterful" Yale Law Journal student note, there is no basis for Chief Justice Warren's assertion that there was "virtual unanimity" in the international community opposed to stripping persons of citizenship.

Furthermore, one would think that the starting point of any assessment of "civilized standards" is a consideration of *American* standards. Chief Justice Warren's recognition that "*our* history" does not support the abolition of the death penalty (whatever the trends might be in the rest of the world) is perhaps an acknowledgment of the primacy, or at least the relevance, of American attitudes. Any honest assessment of "our history" renders preposterous the assertion that stripping a person of citizenship for desertion is contrary to our traditions. As the Supreme Court observed in 1885, military desertion, "[f]rom the very year of the Declaration of Independence," has always been treated as a capital offense, "the only qualification

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71. *Trop*, 356 U.S. at 99 (plurality opinion).

72. *Id.* at 103 (citing U.N. OFFICE OF LEGAL AFFAIRS, LAWS CONCERNING NATIONALITY, at 379, 461, U.N. Doc. ST/LEG/SER.B/4/, U.N. Sales No. 1954. V.1. (1954)).

73. U.N. OFFICE OF LEGAL AFFAIRS, *supra* note 72, at 2.

74. *Id.* at 346.

75. *Id.* at 457.

being that since 1830 the punishment of death cannot be awarded in time of peace."[76] On March 3, 1865, Congress passed an act providing that all military deserters are "deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship."[77] The penalties specified in the 1865 law were extended in 1912 to persons who "avoid any draft into the military or naval service."[78] There were many cases of military desertion during World War I, and all of those persons were deemed to have forfeited their rights of citizenship.[79] On March 5, 1924, President Coolidge restored the citizenship of some of those deserters, but "unless (or until), pardoned," such persons were deemed to have "forfeit[ed] their rights of citizenship."[80] As the book cited by Chief Justice Warren[81] observes, World War I deserters "assumed the risk of becoming stateless persons, and a large number of them automatically became such under the operation of the laws of the United States."[82] If "our history" forecloses the argument that the death penalty is unconstitutional, as Chief Justice Warren concedes, it is impossible to see how "our history" does not operate in a similar fashion with respect to the punishment of denationalization.

A dissenting Justice Frankfurter acerbically criticized the majority's miscellaneous arguments. With respect to Chief Justice Warren's "faith" that banishment is a form of torture worse than death itself, Justice Frankfurter asked, "[i]s constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?"[83] (The answer, apparently, is yes.) Justice Frankfurter also drew attention both to flaws in the majority's method for discerning the attitudes of "civilized nations" and to the fact that denationalization was an historically recognized punishment within the United States.[84]

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76. Kurtz v. Moffitt, 115 U.S. 487, 501 (1885).

77. Act of Mar. 3, 1865, ch. 79, § 21, 13 Stat. 487, 490 (1865).

78. Act of Aug. 22, 1912, ch. 336, § 1998, 37 Stat. 356, 356 (1912).

79. CATHERYN SECKLER-HUDSON, STATELESSNESS: WITH SPECIAL REFERENCE TO THE UNITED STATES 148 (Kraus Reprint Co. 1971) (1934).

80. *Id.* at 148–49.

81. *See* Trop v. Dulles, 356 U.S. 86, 102 n.35 (1958) (citing CATHERYN SECKLER-HUDSON, STATELESSNESS: WITH SPECIAL REFERENCE TO THE UNITED STATES (1934)).

82. SECKLER-HUDSON, *supra* note 79, at 149.

83. *Trop*, 356 U.S. at 125 (Frankfurter, J., dissenting).

84. *Id.* at 126.

Justice Frankfurter concluded by accusing the majority of departing from its appropriate "judicial function."[85]

Justice Frankfurter's dissenting opinion in *Trop* should have put the world on notice that Chief Justice Warren's opinion heralded a brave new world in Eighth Amendment jurisprudence. Henceforth, the touchstone of constitutionality would be "evolving standards of decency." And in discerning those "standards of decency," the criteria are so open-ended that the judicial power is immeasurably extended. Recall that Chief Justice Warren drew on four sources: his own moral intuitions (his "faith"), the opinions of the "civilized nations of the world" (as reflected in U.N. documents), academic literature (including law review student notes), and, last and perhaps least of all, "widely accepted" American practice. Chief Justice Warren's plurality opinion in *Trop* reflects the view that the Constitution's meaning is not frozen in time, but evolves with the moral intuitions of the community, as discerned by Supreme Court Justices. We now turn to the originalism, or varieties of originalism, that Justice Scalia espoused as a response to the living constitutionalism of *Trop v. Dulles*—a response that promised to infuse the law with more stability and legitimacy.

II. VARIETIES OF ORIGINALISM

As a jurist, Antonin Scalia is remembered in large part for his embrace of originalism as a theory of constitutional interpretation. But he was a professor for over a decade before joining the Court of Appeals for the District of Columbia Circuit, and his scholarship barely hinted at the theory of originalism he would later expound. His academic work in the 1970s and early 1980s focused on administrative law topics.[86] Other scholars, such as Robert Bork and Raoul Berger, were touting originalism as a more direct challenge to living constitutionalism than the more incremental, less theoretical approaches adopted by some Republican-appointed members of the Court, such as Chief Jus-

85. *Id.* at 127.

86. *See, e.g.*, Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions From the Public-Lands Cases*, 68 MICH. L. REV. 867 (1970).

tices Burger and Rehnquist.[87] Justice Scalia prudently avoided taking sides in this contentious debate[88] and consequently sailed through two Senate confirmations without a single dissenting vote.[89] Yet in 1989, just two years after he was ensconced on the Supreme Court, Justice Scalia published two essays—*The Rule of Law as a Law of Rules* and *Originalism: The Lesser Evil*—that divulged his thinking on constitutional interpretation and the craft of judging.[90] In the debate between originalism on the one hand and incrementalism on the other, he apparently sided with the former.

Justice Scalia introduces both essays with reflections on the majesty of being a judge. Justice Scalia begins *Originalism* by approvingly quoting Chief Justice Taft's comment: "I love judges, and I love courts. They are my ideals, that typify on earth what we shall meet hereafter in heaven under a just God."[91] *The Rule of Law* also opens with a grandiose depiction of the art of judging. Justice Scalia describes the practice of King Louis IX of France, who each Sunday invited litigants to present their suits to him personally, under an oak tree, where

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87. *See* Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043, 1047 (2006) ("Chief Justice Rehnquist, although an occasional adherent to originalism, is more fairly characterized as a pragmatist who took into account a variety of arguments resolving a case."); Stephanos Bibas, *The Rehnquist Court's Fifth Amendment Incrementalism*, 74 GEO. WASH. L. REV. 1078, 1078 (2006) ("The Burger and especially Rehnquist Courts chipped away at . . . expansive interpretations of individual rights without offering satisfying constitutional theories in support."); Richard A. Epstein, *The Federalism Decisions of Justice Rehnquist and O'Connor: Is Half a Loaf Enough?*, 58 STAN. L. REV. 1793, 1794 (2006) (arguing that Justices Rehnquist and O'Connor "should have pushed harder and moved farther than they ultimately did" in rolling back precedents in three areas: "the scope of the Commerce Clause, dual sovereignty and the Tenth Amendment, and the doctrine of sovereign immunity"); Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1337, 1358 (2002) ("[T]he Rehnquist Court . . . created exceptions to[] and 'reinterpreted' [Warren Court] precedents."); Lund, *supra* note 16, at 8–9.

88. When questioned by Senators about how much weight he would assign to precedent, Justice Scalia exhaled airy generalities. *See infra* text accompanying notes 388–389.

89. *See* 132 CONG. REC. 23,813 (1986); 128 CONG. REC. 19,630 (1982).

90. Scalia, *supra* note 26; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

91. Scalia, *supra* note 26, at 849 (quoting Alphaeus Thomas Mason, *William Howard Taft*, *in* 3 THE JUSTICES OF THE SUPREME COURT 1789–1969: THEIR LIVES AND MAJOR OPINIONS 2103, 2105 (L. Friedman & F. Israel eds., 1980)).

he would dispense perfect justice on a case-by-case basis.[92] As Justice Scalia observes, King Louis was a judge in the "Solomonic" sense, unconstrained by external law and guided only by an internal compass of right and wrong.[93]

Yet Justice Scalia rejects this ideal. Quoting Thomas Paine, Justice Scalia writes that in a democracy, "the law is king."[94] By this he intends that the judge is not authorized to follow his or her personal beliefs, but must enforce the popular will, as reflected in the laws. The judge in this sense is more akin to a humble pedant or bureaucrat than Louis IX or Solomon, let alone God in the heavens. The remainder of *Rule of Law* highlights the need for formal rules that trammel judges into narrow lines of reasoning. *Originalism* is an application of this principle to constitutional interpretation. For Justice Scalia, one of the principal benefits of originalism is the constraint it imposes on judges. Unlike a living constitutionalist judge, who in each case promotes those values that, in the words of Professor Owen Fiss, "give our society an identity and inner coherence," an originalist judge, in Justice Scalia's view, has the more mundane task of discerning the original meaning of the constitutional text and then deferentially applying it.[95] The judge, in Fiss's model, is heroic: he throws off the chains of law and precedent (mere "responsibility-mitigation mechanisms") and promotes justice.[96] By contrast, it is perhaps better that the judge, in Justice Scalia's model, have no opinion as to what justice requires, let alone interest in pursuing it, as such an inclination could tempt the judge to violate his judicial duty. At least as a judge, one should not have the slightest concern whether Karl Marx or John Locke, Immanuel Kant or Jeremy Bentham, provides a better account of the proper ordering of human affairs.[97]

It is surprising, then, that Justice Scalia should have introduced both essays with such majestic depictions of the art of

92. Scalia, *supra* note 90, at 1175–76.

93. *Id*. at 1176.

94. *Id*. (quoting THOMAS PAINE, COMMON SENSE (1776), *reprinted in* COMMON SENSE AND OTHER POLITICAL WRITINGS 3, 32 (Nelson F Adkins ed., Liberal Arts Press 1953)).

95. Scalia, *supra* note 26, at 853.

96. *See* Paul W. Kahn, *Owen Fiss: Heroism in the Law*, 58 U. MIAMI L. REV. 103, 104 (2003).

97. *See* Scalia, *supra* note 26, at 855.

judging. Soaring rhetoric can enlarge a judge's sense of his own importance and inflame the passion to do extralegal justice. Yet Justice Scalia depicts the originalist judge in this counter-intuitively heroic light. The first move in this direction is to dispel any suggestion that the task of an originalist judge is easy. The living constitutionalist, in Justice Scalia's account, merely puts a finger to the wind or searches his own moral intuitions; how hard is that? The originalist judge must sift through reams of historical information and often do so in a political maelstrom. Justice Scalia cites the example of a challenge to the independent counsel statute: with the eyes of the nation upon the Court, Justice Scalia generated a thirty-eight–page dissent in just two months.[98] The originalist judge must have a resolve and alacrity that one does not associate with a mere pedant (or law professor).

The originalist judge is also heroic precisely in the ability to resist temptation and *not* abuse his or her enormous power. As one author has suggested, the originalist judge can be likened to a Cincinnatus or George Washington.[99] With the opportunity to become a dictator, such men laid down their arms and deferred to the republic.[100] This, as Shakespeare reminds us, is true virtue: "O, it is excellent/ To have a giant's strength, but it is tyrannous/ To use it like a giant."[101]

If in one sense the originalist judge is a humble and deferential giant, there is another sense in which heroism consists precisely of a willingness to resist democratic impulses and thereby defend the republic. In *A Matter of Interpretation*, written in 1997, Justice Scalia invokes his dissenting opinion in *Maryland v. Craig*[102] as an example.[103] The majority in that case held that the Sixth Amendment's Confrontation Clause does not necessarily prohibit the state from allowing minors to testify by

98. *See id.* at 860–61.

99. Daniel R. Suhr, *Judicial Cincinnati: The Humble Heroism of Originalist Justices*, 5 FIU L. REV. 155, 156 (2009).

100. *Id.*

101. WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 2, sc. 2, *ll*. 107–09 (N.W. Bawcutt ed., Oxford Univ. Press 1991) (1623).

102. 497 U.S. 836 (1990).

103. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 43 (Amy Guttman ed., 1997).

closed-circuit television in a prosecution for child abuse.[104] To Justice Scalia, however, the balance struck in 1791 between defendants' rights and solicitude for witnesses—to allow confrontation "[i]n all criminal prosecutions"—was still binding on the courts.[105] Justice Scalia had no doubt that many people were "happy and pleased" with the Court's opinion in *Maryland v. Craig*,[106] but a heroic judge must resist the temptation to win plaudits. Still greater heroism is on display when the originalist judge resists the temptation to indulge personal preferences and instead applies the law. An illustrative example is Justice Scalia's decision in the flag-burning case.[107] Despite a personal aversion to the "bearded, sandal-wearing weirdos" who burned the flag, Justice Scalia recognized that "[i]f you play by the old way, you often have to reach decisions you don't enjoy."[108] It takes something like a heroic resolve to defy one's own opinions and steadfastly follow the law.

But are there limits to the heroism expected of an originalist judge? Justice Scalia's elusive discussion of precedent in *Originalism* suggests that there are. He writes: "In its undiluted form, . . . [originalism] is medicine that seems too strong to swallow."[109] One might think that Justice Scalia is gesturing to the possibility that the Constitution's original meaning could point in a direction that is perceived as morally indefensible, either by contemporary society or by the judge himself, but that is not the line of argument Justice Scalia pursues. Instead, he writes: "[A]lmost every originalist would adulterate [originalism] with the doctrine of *stare decisis*—so that *Marbury v. Madison* would stand even if Professor Raoul Berger should demonstrate unassailably that [*Marbury*] got the meaning of the Constitution wrong."[110] Justice Scalia's suggestion that the originalist Professor Berger might demonstrate that *Marbury* was wrongly decided is tantamount to an insinuation that the originalist enterprise, at least when undertaken by an academ-

104. *Craig*, 497 U.S. at 857.

105. *Id.* at 860–861 (Scalia, J., dissenting).

106. Scalia, *supra* note 103, at 44.

107. Texas v. Johnson, 491 U.S. 397 (1989).

108. Suhr, *supra* note 99, at 170 (quoting Bryan Whitson, *Justice Antonin Scalia: The Case for a "Dead Constitution,"* WM. & MARY NEWS (Mar. 21, 2004)).

109. Scalia, *supra* note 26, at 861.

110. *Id*.

ic, can wander into absurdity. In fact, Berger had never, to my knowledge, questioned *Marbury*. A far more relevant case that Berger *had* questioned was *Trop v. Dulles*.[111] Would abandoning *Trop* be medicine "too bitter to swallow"? At least in *Originalism*, Justice Scalia provides no answer.

Instead, Justice Scalia takes the argument in a different direction: "But *stare decisis* alone is not enough to prevent originalism from being what many would consider too bitter a pill."[112] Here, the "bitter pill" is not that originalism will call into question a well-entrenched precedent; the risk is that originalism will generate a result that "many" perceive as indefensible and no nonoriginalist precedent will allow a convenient escape. Justice Scalia poses precisely this difficulty in an Eighth Amendment context:

> What if some state should enact a law providing for public lashing, or branding of the right hand, as punishment for criminal offenses? Even if it could be demonstrated unequivocally that these were not cruel and unusual measures in 1791, and *even though no prior Supreme Court decision has specifically disapproved them*, I doubt whether any federal judge—even among the many who consider themselves originalists—would sustain them against an eighth amendment challenge.[113]

The punishment of flogging—"unequivocally" prevalent in America in 1791—raises an acute problem for an originalist. It is doubtful that "any federal judge" would sustain such a practice today, but how could an originalist judge rationalize this result? One solution would be to hold that the original meaning of the Eighth Amendment embodies an evolving content. Justice Scalia raises this possibility only to refute it: there is "no historical evidence," he writes, to support this interpretation.[114] At a minimum, this suggests that Justice Scalia was conversant and in agreement with the argument made by Professor Berger in *Death Penalties* to the effect that the Eighth Amendment was intended simply to foreclose those modes of punishment prohibited in 1791.[115] Only a "faint-hearted originalist," Justice

111. RAOUL BERGER, DEATH PENALTIES 116–22 (1982).
112. Scalia, *supra* note 26, at 861.
113. *Id* (emphasis added).
114. *Id*. at 862.
115. BERGER, *supra* note 111.

Scalia mocks, could fail to acknowledge this evidence, and he adds that "there is really no difference between the faint-hearted originalist and the moderate nonoriginalist, except that the former finds it comforting to make up (out of whole cloth) an original evolutionary intent, and the latter thinks that superfluous."[116]

After this scornful criticism of faint-hearted originalism, the essay takes a remarkable turn. Justice Scalia writes that "in a crunch," he would "prove a faint-hearted originalist[:] I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging."[117] This concession is effectively a self-accusation that Justice Scalia is no different from a "moderate nonoriginalist" except that he is inclined to "make up (out of whole cloth) an original evolutionary intent."[118] As to why he is faint-hearted, Justice Scalia gives no indication. Is it because a judicial holding affirming flogging would bring the courts into disrepute? Or is it because Justice Scalia could not, in good conscience, affirm a punishment he does not regard as moral?

Justice Scalia's initial attempt to evade these questions is to wish the problem away as inconceivable: "I cannot imagine such a case[] [involving flogging] arising."[119] However, the return of corporal punishment has been imagined and even advocated just two years ago in the pages of the *New York Times*.[120] And why is flogging cruel and unusual, but not lifetime solitary incarceration in supermax prisons—a punishment that did not exist in 1791? But these pedantic quibbles do not impress Justice Scalia. He "conclude[s] this largely theoretical talk on a note of reality."[121] His final answer to the problem of flogging is as follows:

> The vast majority of my dissents from nonoriginalist thinking (and I hope at least some of those dissents will be majorities) will, I am sure, be able to be framed in the terms that,

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116. Scalia, *supra* note 26, at 862.

117. *Id.* at 864.

118. *Id.* at 862.

119. *Id.* at 864.

120. Ross Douthat, Opinion, *Crime and Different Punishments*, N.Y. TIMES (Apr. 22, 2017), https://www.nytimes.com/2017/04/22/opinion/sunday/crime-and-different-punishments.html [https://nyti.ms/2p7oOdB].

121. Scalia, *supra* note 26, at 864.

> even if the provision in question has an evolutionary content, there is inadequate indication that any evolution in social attitudes has occurred.[122]

Justice Scalia's response to the self-accusation of faint-heartedness is to characterize himself as a "pure-originalist[]-accepting-for-the-sake-of-argument-evolutionary-content."[123] Judges of this category accept "for the sake of argument" that the Constitution has an "evolutionary content," but then defeat nonoriginalists on their own ground, through a demonstration that no such "evolution in social attitudes" has occurred. It is not clear on what basis the sake-of-argument originalist will prevail on this claim. How will such a judge canvass the "social attitudes" of the country and confirm that they have not changed since 1791? We turn to Justice Scalia's Eighth Amendment cases for answers.

III. JUSTICE SCALIA'S EIGHTH AMENDMENT OPINIONS

This review of Justice Scalia's Eighth Amendment cases—more specifically, those that interpret the meaning of "cruel and unusual punishments"[124]—divides his jurisprudence into three parts. In the first part, which corresponds to his first four

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122. *Id.*

123. *Id.*

124. This Article does not consider the "Excessive Bail" and "Excessive Fines" Clauses of the Eighth Amendment. Nor does this Article consider cases that applied the "Cruel and Unusual Punishments" Clause as a limitation on abusive prison conditions. For a provocative originalist attempt to interpret the Eighth Amendment prohibition of "cruel and unusual punishments" in tandem with the Thirteenth Amendment's sanction of "slavery" as "a punishment for crime," see Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983 (2009). Howe observes that prisoners after 1865, particularly in the South, were treated in extraordinarily inhumane ways, often involving the use of shackles, whips, and attack dogs. *Id*. at 1010. According to Howe, the "history of the treatment of southern prisoners in the century after 1865 supports the conclusion that the original public meaning for the Thirteenth Amendment was to permit slavery as a punishment for crime despite the main prohibition on slavery." *Id*. at 1018. And this in turn has implications for the Eighth Amendment, as "the slavery-as-punishment clause confounds the efforts of the broad originalist to justify protections afforded convicts under the Eighth Amendment today." *Id*. at 1026. This would include any limitation on whipping inmates, a result Justice Scalia would likely regard as "too bitter" to accept. *Compare* Scalia, *supra* note 26, at 861, *with* Barnett, *supra* note 25, at 13 (arguing that we should not "shrink[] in practice from the implications of a theory").

years on the Court, Justice Scalia only hinted at an originalist understanding of the Eighth Amendment. In the second part, Justice Scalia's opinion in *Harmelin v. Michigan*, he comprehensively laid out his originalist understanding of the Eighth Amendment. In the third part, which corresponds to the remainder of Justice Scalia's years on the Court, he drew upon *Harmelin* in disputes about the Eighth Amendment's meaning.[125]

As will be shown below, Justice Scalia's opinions are generally characterized by a mix of faint-hearted and sake-of-argument originalism. To the extent that there are brash proclamations of heroic originalism, it is unclear whether such rhetoric is driving the reasoning or merely decorating it. In addition, Justice Scalia's treatment of nonoriginalist precedents seems at time unprincipled. Some decisions are not accorded precedential weight while others, equally erroneous from an originalist perspective, are humbly followed. In his final decade on the Court, Justice Scalia seemed to recognize that *Trop* had opened a Pandora's Box, because judges felt liberated to read their own moral perceptions into the Amendment. His final words on the Eighth Amendment were an admission that sake-of-argument originalism had failed.

*A. Pre-*Harmelin *Cases*

This section divides Justice Scalia's pre-*Harmelin* cases into three topic categories: victim impact statements, the juvenile death penalty, and sentencing discretion in capital cases.

1. Victim Impact Statements

In his early years on the Court, Justice Scalia heard three cases that considered whether a victim impact statement ("VIS") could be introduced in capital sentencing hearings. [126] fendants in these cases argued that a VIS violated the Eighth Amendment because it put before the jury facts, such as the exemplary character of the victims and the anguish caused their children and parents, that did not necessarily reflect on the defendant's moral culpability. In *Booth v. Maryland,* a bare

125. *See, e.g.*, Ewing v. California, 538 U.S. 11, 31 (2003) (Scalia, J., concurring).

126. *See* Payne v. Tennessee, 501 U.S. 808 (1991); South Carolina v. Gathers, 490 U.S. 805 (1989); Booth v. Maryland, 482 U.S. 496 (1987).

majority credited this argument and overturned a capital sentence.[127]

A naïve textualist-originalist might react with incredulity: how is the introduction of a VIS "cruel and unusual *punishment*?" The *Booth* majority never quotes or even refers to the phrase "cruel and unusual punishment" in its legal analysis. Instead, the opinion links together a series of recent precedents to construct the argument that "death is a punishment different from all other sanctions";[128] the manner in which that sentence is imposed must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action";[129] in particular, the exclusive focus should be on factors that bear on the defendant's "personal responsibility and moral guilt";[130] whether the victim was of sterling character or not, at least if unknown to the defendant, is irrelevant when assessing the defendant's culpability—consequently, the introduction of the VIS violated the Eighth Amendment.[131]

Booth presented Justice Scalia with an opportunity during his first year on the Court to opine on the Eighth Amendment. However, *Booth* was argued late in a Term that spanned 160 cases, or more than twice the current docket.[132] Only four briefs were filed, and none referenced the Eighth Amendment's original meaning.[133] Unsurprisingly, Justice Scalia's dissenting opinion is light on anything resembling originalist analysis. In fact, it begins by quoting the same precedents relied upon by the majority, to the effect that death is a "punishment different

127. *Booth*, 482 U.S. at 504–05, 509.

128. *Id.* at 509 n.12 (quoting Woodson v. North Carolina, 428 U.S. 280, 303–04 (1976)).

129. *Id.* at 502 (quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976)).

130. *Id.* (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).

131. *Id.* at 505, 509.

132. *See Federal Judicial Caseloads, 1789–2016*, FED. JUD. CTR., https://www.fjc.gov/history/exhibits/graphs-and-maps/supreme-court-caseloads-1880-2015 [https://perma.cc/QP3T-ZJLH] (last visited Nov. 29, 2018).

133. In addition to petitioner's brief (only 11 pages long), *see* Brief of Petitioner-Appellant, Booth v. Maryland, 482 U.S. 496 (1987) (No. 86-5020), 1988 WL 1026294, and the government's response, there were amicus briefs filed by the NAACP and a victims' rights organization. *See* Brief of NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae Supporting Petitioner, Booth v. Maryland, 482 U.S. 496 (1987) (No. 86-5020), 1986 WL 727592; Brief of Stephanie Roper Foundation, Inc. as Amicus Curiae Supporting Respondent, Booth v. Maryland, 482 U.S. 496 (1987) (No. 86-5020), 1987 WL 880565.

from all other sanctions" (*Woodson*) and considerations not pertaining to "the defendant's personal responsibility and moral guilty" are irrelevant in capital sentencing proceedings (*Enmund*).[134] Justice Scalia then argues that "[i]t seems to me, however—*and, I think, most of mankind*—that the amount of harm one causes does bear upon the extent of [the offender's] 'personal responsibility.'"[135] Justice Scalia implicitly accepts, for the sake of argument, that the community's evolving notions of "enlightened policy" are owed judicial deference. However, he denies that most people today agree with the premise articulated by the majority—that a crime's harm, if unanticipated, should not be reflected in a capital offender's punishment.

Justice Scalia then observes that the criminal law is rife with cases in which punishment is calibrated to actual harm, irrespective of the offender's "moral guilt" (e.g., the reckless driver versus the equally reckless driver who causes a death).[136] This is even true in the context of capital punishment, Justice Scalia argues, citing the recent decision in *Tison v. Arizona.*[137] In that case, decided just months before *Booth*, two brothers had helped their father escape from prison and the trio had then kidnapped a married couple on a desert road.[138] Because the father had murdered the couple, the sons were held to be eligible for the death penalty, notwithstanding the fact that at the time of the murder the sons were collecting water.[139] As Justice Scalia observes, had the father shown mercy, the sons would not face the death penalty: "The difference between life and

134. *Booth*, 482 U.S. at 519 (Scalia, J., dissenting) (quoting *Woodson*, 428 U.S. at 303 and *Enmund*, 458 U.S. at 801).

135. *Id.* (emphasis added).

136. *Id.*

137. 481 U.S. 137 (1987). Justice Scalia failed to cite another precedent that also demonstrated that, even in capital sentencing proceedings, factors unrelated to "moral guilt" have been held admissible. In *Jurek v. Texas*, 428 U.S. 262 (1976), the Court held that the likelihood of recidivism is an admissible aggravating factor in Texas's capital sentencing scheme. *Id.* at 272–74. This factor, unrelated to moral guilt, but justified on utilitarian grounds, was not foreclosed by the Eighth Amendment. *See* Richard S. Murphy, *The Significance of Victim Harm:* Booth v. Maryland *and the Philosophy of Punishment in the Supreme Court*, 55 U. CHI. L. REV. 1303, 1321–22 (1988).

138. *Tison*, 481 U.S. at 140–41.

139. *Id.* at 141, 143–46.

death for these two defendants was thus a matter 'wholly unrelated to the[ir] blameworthiness.'"[140]

To this point, his opinion has not hinted at an originalist understanding of the Eighth Amendment. When Justice Scalia purports to "sum[]" up his argument, however, he writes that the majority's position—that capital punishment can be imposed only for "moral guilt" irrespective of actual harm—"does not exist, neither in the text of the Constitution, nor in the historic practices, nor even in the opinions of this Court."[141] But Justice Scalia had not yet himself addressed the "text of the Constitution" or any "historic practices."[142] His argument had accepted the Court's precedents and attempted to demonstrate that they were inconsistent with, or at a minimum did not dictate, the majority's result. Perhaps Justice Scalia's statement that the "text" is contrary to the majority opinion is tantamount to his hoisting the originalist flag and proclaiming that the already burgeoning capital punishment case law was flawed from the start. Such a foundational argument was unnecessary, for "not even the opinions of this Court" justify the result in *Booth*.[143]

Yet "the opinions of th[e] Court" were murkier than Justice Scalia acknowledged. Justice Scalia quotes *Enmund* in the first sentence of the opinion, to the effect that only considerations of "personal responsibility *and moral guilt*" are admissible in capital proceedings.[144] In the very next sentence, he truncates that quote, writing that for most of mankind "the amount of harm one causes does bear upon the extent of [one's] 'personal re-

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140. *Booth*, 482 U.S. at 519–20 (Scalia, J., dissenting) (alteration in original) (quoting *id.* at 504 (majority opinion)).

141. *Id*. at 520.

142. *Id*.

143. Justice Scalia then appends the observation that "recent years have seen an outpouring of popular concern for what has become known as 'victims' rights.'" *Id.* "Many citizens," Justice Scalia argues, have come to regard a criminal trial "in which a parade of witnesses" testify to the defendant's lamentable upbringing, but none speak to the victims' suffering, as unjust. *Id.* Neither the parties nor amici made this argument; it would seem to have been Justice Scalia's invention. It is intelligible, however, as a reflection of his "sake of argument" originalism: even if we assume that contemporary standards of enlightened policy are relevant in constitutional decision-making, Justice Scalia argues that the majority opinion has not correctly identified those standards.

144. *Booth*, 482 U.S. at 519 (emphasis added) (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).

sponsibility.'"[145] This is true, of course, but "most of mankind" would probably regard the amount of harm one causes as an imperfect proxy for *the moral guilt* one should bear.[146] Justice Scalia is on solid ground when he observes that the criminal law—for utilitarian reasons—regularly proportions punishment to "the amount of harm,"[147] irrespective of moral guilt. Philosophically minded observers have long lamented this feature of the law,[148] and the Court's precedents had seemingly held that in the capital context a more precise proportionality of punishment *to moral guilt* was required.[149] In any event, the quoted language in *Enmund* pointed in that direction, although the result in *Tison* seemed to indicate that that principle was subject to qualification.[150]

Two years later, in *South Carolina v. Gathers*, the Court reconsidered the admissibility of victim-related information in a

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145. *Id.*

146. For example, if I were to ask a colleague to come to my house to help me fix a water heater, and if, on the way to my house, that colleague were struck head-on by an eighteen-wheeler, I would regard myself as responsible for his death, but neither I nor a court of law would assign any "moral guilt." (His widow might disagree.)

147. *Booth*, 482 U.S. at 519 (Scalia, J., dissenting).

148. *See, e.g.*, LARRY ALEXANDER & KIMBLERY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW (2009).

149. *See, e.g.*, Enmund v. Florida, 458 U.S. 782 (1982); Woodson v. North Carolina, 428 U.S. 280 (1976). The introduction of victim impact statements raises the possibility of distinctions in capital sentencings being drawn among morally identical defendants. For example, if A murders his boss (a devoted husband and father) and B murders his boss (a serial philanderer), most people would say that A and B bear identical "moral guilt," at the very least if the personal characteristics of the victims were unknown to them.

150. The *Tison* opinion, authored by Justice O'Connor, is opaque on whether the sons anticipated, and thereby ratified, the murder committed by their father. At times, the majority opinion suggests that that the two sons were merely negligent and are eligible for the death penalty regardless of whether they appreciated the mortal risks they created. Tison v. Arizona, 481 U.S. 137, 152 (1987) (the defendants "*could have foreseen* that lethal force might be used" (emphasis added)). At other times, the opinion suggests that the sons are only eligible for the death penalty because they displayed the depravity associated with a conscious disregard for life. *See id.* at 157–58 (referring to "the reckless disregard for human life implicit in knowingly engaging in criminal activities *known* to carry a grave risk of death" (emphasis added)). Justice Scalia's argument that *Tison* endorses the consideration of factors unrelated to moral guilt (subjectively unanticipated harms) is consistent with the former reading, but not the latter. *See* Joshua D. Greenberg, *Is* Payne *Defensible?: The Constitutionality of Admitting Victim-Impact Evidence at Capital Sentencing Hearings*, 75 IND. L.J. 1349, 1377–78 (2000).

capital sentencing hearing.[151] In his brief dissenting opinion, Justice Scalia engaged in a full-throated declaration of his intention to overrule *Booth*, even saying that to adhere to such a precedent would be "a violation of my oath."[152] Precedent, Justice Scalia argued, is entitled to some weight, but "the freshness of error" weighs in favor of overruling an erroneous decision.[153] This is, he writes, "particularly true with respect to a decision such as *Booth*, which is in that line of cases purporting to reflect 'evolving standards of decency' applicable to capital punishment."[154] *Gathers* is the first Justice Scalia opinion to quote the notorious phrase from *Trop*, and the implication is that that the entire line of cases is of corrupt pedigree. This may be correct, but in *Booth* Justice Scalia had been content to prowl around in these precedents without calling for, or even inviting briefing on, their invalidation. Justice Scalia concludes his *Gathers* opinion by lumping together all the species of argument at his disposal:

> *Booth* has not even an arguable basis in the common-law background that led up to the Eighth Amendment, in any longstanding societal tradition, or in any evidence that present society, through its laws or the actions of its juries, has set its face against considering the harm caused by criminal acts in assessing responsibility.[155]

This is a neat illustration of sake-of-argument originalism. According to Justice Scalia, the Eighth Amendment, properly understood, is defined by the "common-law background" and does not invite an inquiry into evolving standards of decency, but even if it did invite such an inquiry, there is no evidence that contemporary society has "set its face against considering the harm caused by criminal acts in assessing responsibility."

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151. In his closing argument, the prosecutor referred to religious items that were in the victim's possession at the time of the offense. The fact that the defendant had scattered these items on the ground related to "the circumstances of the crime" and were appropriately the subject of comment. South Carolina v. Gathers, 490 U.S. 805, 811 (1989). However, the Court held that the content of those items and what they reflected about the victim's character (that he was a man of faith) were not relevant to the "circumstances of the crime." *Id.* at 811–12. According to the majority, the prosecutor's statement was "indistinguishable in any relevant respect from that in *Booth*." *Id.* at 811.

152. *Id.* at 825 (Scalia, J., dissenting).

153. *Id*. at 824.

154. *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

155. *Id*. at 825.

As in his *Booth* dissent, the originalist argument is announced, but not sketched in detail. It is hard to know what Justice Scalia means when he refers to "the common-law background." None of the seven briefs filed in this case mentioned the common law or provided historical background to the adoption of the Eight Amendment. He may be alluding to a point made by Justice Black in *Williams v. New York*,[156] that "both before and since the American colonies became a nation," judges in capital sentencing proceedings were provided "the fullest information possible concerning the defendant's life and characteristics."[157] Yet *Williams* did not suggest that full information concerning the crime's impact on the victim's family was ventilated at the sentencing hearing. In fact, as Justice Stevens observed in a later case, "'[v]ictim impact' evidence . . . was unheard of when *Williams* was decided."[158]

Even more significantly for an originalist such as Justice Scalia, victim impact statements did not exist at the time of the Eighth Amendment's adoption. Overwhelmingly, death sentences were mandatory upon conviction for designated crimes; the judge exercised no discretion after a guilty verdict for a capital offense.[159] Victim impact statements were twentieth-century innovations designed to balance the mitigating factors introduced by the defense in newly minted capital sentencing proceedings.[160] It could be argued that in the early years of the republic, criminal prosecutions were ordinarily directed by the victim or the victim's kin, who would expound, as the opportunity arose and evidentiary rules permitted, on the crime's impact.[161] Suffice it to say, it would have been helpful to know what Justice Scalia contemplated by "the common-law background," although, as already indicated, at this point in his

156. 337 U.S. 241 (1949).

157. *Id.* at 246–47.

158. Payne v. Tennessee, 501 U.S. 808, 857 (1991) (Stevens, J., dissenting).

159. *See* Miller v. Alabama, 567 U.S. 460, 506 (2012) (Thomas, J., dissenting) ("'[I]n the early days of the Republic,' each crime generally had a defined punishment . . . ." (quoting United States v. Grayson, 438 US. 41, 45 (1978)). It should be added that executive clemency was commonplace in the eighteenth and nineteenth centuries. *See infra* note 285.

160. *Cf. Payne*, 501 U.S. at 821–22.

161. *See* Douglas E. Beloof and Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481, 484–493 (2005).

tenure on the Court, he was an avowed originalist operating without any ammunition (at least not any supplied by the parties).

Another two years later, in *Payne v. Tennessee*, the Court overturned *Booth* in an opinion by Chief Justice Rehnquist. Justice Scalia's concurring opinion responds to Justice Marshall's dissenting opinion, which chastised the majority for contravening the doctrine of stare decisis.[162] Justice Scalia's opinion turns Justice Marshall's own prior attacks on stare decisis against him, observing that, as Justice Marshall himself had written, the doctrine cannot amount to an "imprisonment of reason."[163] At some point, a case is so badly reasoned that it loses its authority as a precedent to be humbly followed. Justice Scalia then adds: "If there was ever a case that defied reason, it was *Booth v. Maryland*, imposing a constitutional rule that had absolutely no basis in constitutional text, in historical practice, or in logic."[164] It is perilous to infer a theory of stare decisis from a spare sentence, and it was not incumbent upon Justice Scalia to articulate such a theory. But one conclusion that might be drawn is that, for Justice Scalia, constitutional decisions that are clearly erroneous—that have "absolutely no basis in the constitutional text, in historical practice, or in logic"—are not entitled to precedential weight. And yet if that principle invalidates *Booth*, why does it not also invalidate the equally erroneous and foundational *Trop*? Is it simply that *Trop* was not quite so "fresh"?

Payne generated negative attention in the academy,[165] and Justice Stevens's hostility to the decision did not abate,[166] even in his retirement.[167] In part, the criticism focused on the fact that the majority had, in the words of Justice Stevens, steered

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162. *Payne*, 501 U.S. at 844 (Marshall, J., dissenting).

163. *Id*. at 833–34 (Scalia, J., concurring).

164. *Id*. (citation omitted).

165. *See* Michael Vitiello, Payne v. Tennessee*: A "Stunning* Ipse Dixit*,"* 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 165, 167 & n.14 (1994) (collecting articles).

166. *See* Kelly v. California, 555 U.S. 1020, 1020–26 (2008) (Stevens, J., respecting the denial of the petitions for writs of certiorari).

167. *See* Hon. John Paul Stevens, A Conversation with the Honorable John Paul Stevens, Alliance for Justice at The George Washington University Law School (May 19, 2015), https://www.afj.org/multimedia/videos/content/a-conversation-with-the-honorable-john-paul-stevens [https://perma.cc/3TJW-UEH6].

the Court in a "sharp retreat from precedent."[168] Justice Stevens is here referring not just to *Booth* and *Gathers*, but a line of cases which, in his reading, mandated exclusive consideration of factors implicating "moral guilt" in capital sentencing proceedings, and which therefore foreclosed the use of a VIS in such cases. Justice Scalia's answer to this objection seems to have been: first, through a modest review of the precedents, Justice Scalia demonstrated that the cases did not in fact foreclose the introduction of a VIS in capital sentencing proceedings; and second, through immodest claims about the Eighth Amendment's original meaning, Justice Scalia argued (or at least intimated) that the entire line of precedents was, from an originalist perspective, wrongly decided. However, to the extent that Justice Scalia was modest, he was not altogether persuasive, as the precedents themselves were ambiguous and confused. To the extent that he was immodest, he failed to articulate the originalist argument with sufficient clarity to promote confidence in his conclusion.

2. Juvenile Death Penalty

Prior to his full articulation of a theory of the Eighth Amendment in *Harmelin*, Justice Scalia heard two cases involving the constitutionality of capital punishment when imposed on juvenile offenders. Justice Scalia's dissenting opinion in *Thompson v. Oklahoma*[169] and his majority opinion in *Stanford v. Kentucky*[170] are a mix of faint-hearted and sake-of-argument originalism. Both cases call into question Justice Scalia's commitment to the Eighth Amendment's original meaning, as he understands it, and both cases raise further questions about Justice Scalia's ability to construe *Trop* and its progeny in a way that promotes the rule of law.

In *Thompson*, the fifteen-year-old defendant raised his youth as a mitigating factor at the sentencing hearing, but the jury

168. *Kelly*, 555 U.S. at 1024 (Stevens, J., respecting the denial of the petitions for writs of certiorari). Assuming Justice Stevens is right, it is nonetheless difficult to state the reliance interest implicated by *Booth* and *Gathers* in a way that generates any concern that their reversal undermines rule of law values. Should the Court have taken account of the reliance interest of those contemplating premeditated murder of upstanding citizens?

169. 487 U.S. 815 (1988).

170. 492 U.S. 361 (1989).

and judge, both exercising discretion, nonetheless imposed the death penalty.[171] Citing *Trop*, Justice Stevens' plurality opinion surveys laws, practices, and opinions around the United States and the rest of the world; makes its own independent assessment; and concludes that, as a categorical matter, the execution of a fifteen-year-old offends "civilized standards of decency."[172]

Justice Scalia's response begins with a perplexing concession not directly relevant to the case at hand: he admits that if the issue posed was whether a fifteen-year-old could be executed in a mandatory sentencing scheme, which denied the judge the opportunity to consider the defendant's "maturity and moral responsibility," he would accept the "conclusion that such a practice is opposed by a national consensus, sufficiently uniform and of sufficiently long standing, to render it cruel and unusual punishment within the meaning of the Eighth Amendment."[173] Justice Scalia even writes that he would be willing to overturn a death sentence imposed on an offender younger than age sixteen if the law did not provide that the offender enjoyed a "rebuttable presumption that he is not mature and responsible enough to be punished as an adult."[174]

These concessions are inconsistent with the common law infancy defense, which Justice Scalia himself summarizes later in the opinion, according to which a fifteen-year-old was conclusively presumed to be a responsible adult.[175] In 1791, a mandatory death penalty upon a murder conviction was commonplace.[176] If the Eighth Amendment foreclosed only practices deemed barbaric in 1791, there could be no impediment to a *mandatory* death sentence when imposed on a fifteen-year-old. Justice Scalia's opening statement in *Thompson* rejects this position; indeed, Justice Scalia writes that a fifteen-year-old is entitled not only to an individualized sentencing, but also to a presumption of incapacity.[177] This may reflect contemporary "standards of decency" with respect to juvenile responsibility, but neither of these concessions has any basis in the law of

171. 487 U.S. at 819–21 (plurality opinion).
172. *Id.* at 821–38 .
173. *Id.* at 859 (Scalia, J., dissenting).
174. *Id.*
175. *Id.* at 864.
176. *See supra* at text accompanying note 159.
177. 487 U.S. at 859 (Scalia, J., dissenting).

1791. The inescapable conclusion is that Justice Scalia has repudiated his own originalist interpretation of the Eighth Amendment with regard to juvenile criminal responsibility.[178]

None of this was relevant to Thompson's case, because he was, consistent with binding precedent, allowed to argue youth as a mitigating factor in an individualized sentencing hearing.[179] Why, then, does Justice Scalia introduce the opinion with nonoriginalist dicta that undermine the originalist methodology he celebrates? The passage in *Thompson* foreshadows equally inexplicable dicta in the originalist opinion in *Heller v. District of Columbia*.[180] In that case, Justice Scalia, writing for the Court, struck down Washington, D.C.'s prohibition of handgun ownership on Second Amendment grounds.[181] And yet, having decided the issue presented, Justice Scalia larded the opinion with dicta that "nothing in our opinion should be taken to cast doubt" on a variety of modern regulations on handgun ownership[182]—regulations that have little or no basis in the practices of 1791. The dicta provoked accusations of hypocrisy from those sympathetic to Justice Scalia's originalism,[183] as well as those skeptical of it.[184] What makes this language in *Heller* and *Thompson* so perplexing is that it was unnecessary to resolve the cases. One of the supposedly great advantages that originalist judges have (when compared to originalist academics) is that they are only required to opine on "cases or controversies."[185] They can, therefore, put on their Article III blinders

178. *See* Craig S. Lerner, *Originalism and the Common Law Infancy Defense*, 67 AM. U. L. REV. 1577, 1584–85 (2018) ("When America's most famous originalist confronts the common law infancy defense in all its barbarity he is apparently driven into the camp of 'living constitutionalism.'").

179. *See* 487 U.S. at 862 (Scalia, J., dissenting) (citing Eddings v. Oklahoma, 455 U.S. 104 (1982)).

180. 554 U.S. 570 (2008).

181. *Id.* at 635.

182. *Id*. at 626.

183. *See* Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 U.C.L.A. L. REV. 1343, 1356–68 (2009); C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?* 32 HARV. J.L. & PUB. POL'Y 695, 728–35 (2009).

184. *See* Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U. L. REV. 1187, 1191 & n.27 (2015) (collecting articles).

185. *See* Barrett, *supra* note 25, at 1929–30 ("The Justices not only lack any obligation to work systematically through the United States Reports looking for errors; the 'case or controversy' requirement prevents them from doing so.").

and avoid the hypotheticals that might otherwise embarrass the principled originalist scholar.

When Justice Scalia turns to the facts presented in *Thompson*, he castigates the majority for disregarding the original meaning of the Eighth Amendment: "The plurality does not attempt to maintain that [the Eighth Amendment] was originally understood to prohibit capital punishment for crimes committed by persons under the age of 16."[186] However, Justice Scalia had just pages earlier acknowledged that he too would be unwilling to accept the Eighth Amendment's "original meaning" if the death sentence had been imposed mandatorily.[187] Justice Scalia proceeds to summarize the common law on juvenile responsibility, as if that common law (which permitted mandatory capital punishment on fifteen-year-olds) resolved the case.[188] This is the flag-hoisting originalist part of the opinion: how can the execution of a fifteen-year-old be unconstitutional when, Justice Scalia observes, the "historical practice," consistent with the common law, had been to countenance such executions?[189] In short, the original meaning of the Eighth Amendment does not foreclose Thompson's execution (at least if at sentencing he was allowed to argue his youth as a mitigating factor).

Justice Scalia then moves to the nonoriginalist precedents, for the sake of argument. The transition is marked when he writes that "[n]ecessarily, therefore, the plurality seeks to rest its holding on . . . 'evolving standards of decency.'"[190] The remainder of the opinion contests the plurality's claim that those standards have in fact evolved to the point that the execution of a fifteen-year-old is categorically regarded as uncivilized.[191] A crucial step in Justice Scalia's argument is his claim that those "standards" are to be discerned from what he calls "objective signs," and "[t]he most reliable objective signs consist of the legislation that the society has enacted."[192] Justice Scalia adds that the opinions of other nations, as well as the personal opinions of the Justices, are not relevant in an assessment of "*this* socie-

186. 487 U.S. 815, 864 (1988).
187. *Id.* at 859.
188. *Id.* at 864.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id*. at 865.

ty['s]" consensus.[193] Having set these ground rules, Justice Scalia mounts a plausible response to the plurality's claim that contemporary standards categorically foreclose the execution of a fifteen-year-old.[194]

But is Justice Scalia true to the precedents in his narrowly circumscribed definition of "standards"? The issue proved crucial in *Stanford v. Kentucky*, in which the Court upheld the execution of a seventeen-year-old. Justice Scalia's majority opinion begins with the originalist argument that such a punishment could not be unconstitutional, as it is not contrary to those modes of punishment that were prevalent in 1791.[195] Although Justice Scalia embellishes his argument with citations to Blackstone and Hale,[196] these authors endorsed punishments he would refuse to uphold as constitutional, such as flogging and the mandatory death penalty for fifteen-year-olds.[197] It is therefore unclear how much weight can fairly be assigned to their authority.[198]

Justice Scalia then engages the dissenters on their own non-originalist ground. Even assuming that "evolving standards of decency" govern the case, Justice Scalia reasons that there is no American consensus foreclosing the imposition of the death penalty on seventeen-year-olds.[199] On the question of how to discern those "standards," Justice Scalia offers this gloss on *Trop*: "When this Court cast loose from the historical moorings consisting of the original application of the Eighth Amend-

193. *Id.* at 868 n.4.

194. He observes that under the laws of the federal government and almost half the states, no bar exists to the execution of a fifteen-year-old. To the extent that jury decisions are also relevant, which Justice Scalia reluctantly allows, he adds that five different states have imposed death sentences on fifteen-year-olds from 1984 to 1986. *Id*. at 868–69.

195. Stanford v. Kentucky, 492 U.S. 361, 368 (1989).

196. *Id.*

197. *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *23–24; 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 24–29 (London, E. Rider 1800) (1736)).

198. At oral argument in *Thompson v. Oklahoma*, the counsel for Oklahoma invoked the authority of Blackstone, only to be rebuked by Justice Marshall. "I would say that our educational system and our government and everything else has sure progressed from Blackstone," said Justice Marshall, to which counsel responded, "Well, yes, your Honor." Transcript of Oral Argument at 32, Thompson, 487 U.S. 815 (No. 86-6169); *see also* Harry F. Tepker, Thompson v. Oklahoma *and the Judicial Search for Constitutional Tradition*, 38 OHIO N.U. L.J. 465 (2012).

199. *Thompson*, 492 U.S. at 377.

ment, it did not embark rudderless upon a wide-open sea. Rather, it limited the Amendment's extension to those practices contrary to the 'evolving *standards* of decency . . . .'"[200] Chief Justice Warren had not italicized "standards" in *Trop*. Justice Scalia, by this stylistic interpolation, presumably intended to buttress his argument that *Trop* did not authorize the Justices to act as, what he calls, "a committee of philosopher-kings"; rather they should defer to the "demonstrable current standards of our citizens," as evidenced by enacted laws.[201] This may be sound policy, and it certainly reflects Justice Scalia's own preference for firm rules that cabin judges' discretion and promote clarity and predictability; it is unclear, however, where in *Trop* Justice Scalia discerned this principle.

The crucial paragraphs of Chief Justice Warren's plurality opinion in *Trop* venture into precisely the kind of "wide-open sea" where philosopher-kings roam. For the proposition that evolving standards now regard denationalization as uncivilized, Chief Justice Warren did not cite a single American law, regulation, or even public opinion poll.[202] Indeed, he did not respond to Justice Frankfurter's strident invocations of American law and historical practice.[203] Instead, Chief Justice Warren pronounced (quoting Chief Judge Clark): "*In my faith*, the American concept of man's dignity does not comport with making even those we would punish completely 'stateless.'"[204] To the extent that any external validation of Chief Justice Warren's "faith," can be discerned, it is in the opinions of the "civilized nations of the world," in which he claims to find a "virtual unanimity" opposed to the punishment of statelessness.[205] If *Trop* is regarded as controlling precedent, it invites Justices to consider their own opinions, as well as those of academics, broadly defined, and the international community, in discerning contemporary "standards." Alternatively put, Justice Scalia's claim that only, or preeminently, American *laws* are rele-

200. *Id.* at 378–79 (alteration in original) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

201. *Id*. at 379.

202. *See Trop*, 356 U.S. at 101–04 (plurality opinion).

203. *Id.*; *see also id.* at 114–28 (Frankfurter, J., dissenting).

204. *Id.* at 101 n.33 (plurality opinion) (emphasis added) (quoting Trop v. Dulles, 239 F.2d 527, 530 (2d Cir. 1956) (Clark, C.J., dissenting)).

205. *Id*. at 102.

vant in arriving at contemporary standards is not faithful to *Trop* itself.

It is true that several of the cases that followed *Trop* purported to provide guidance for judges in discerning contemporary standards, emphasizing the importance of "objective" factors.[206] In *Stanford*, Justice Scalia deploys these precedents to channel the Court's discretion.[207] He writes, "'[F]irst' among the 'objective indicia that reflect the public attitudes toward a given sanction' are statutes passed by society's elected representatives."[208] Justice Scalia's quotation from *McCleskey* omits what immediately follows the quoted sentence: "We also have been guided by the sentencing decisions of juries, because they are 'a significant and reliable objective index of contemporary values.' Most of our recent decisions as to the constitutionality of the death penalty for a particular crime have rested on such an examination of contemporary values."[209] The first sentence draws attention to jury verdicts, the significance of which Justice Scalia often downplayed.[210] The second sentence hints at what "most of the recent decisions" have looked to, and the answers range far and wide. For example, in *Enmund*, cited approvingly by Justice Scalia, Justice White indeed drew attention to the fact that only eight jurisdictions authorized the death penalty for robbery,[211] but contrary to Justice Scalia's implication, Justice White's reasoning extended beyond that:

> Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, *it is for us ultimately to judge* whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.[212]

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206. *See* McCleskey v. Kemp, 481 U.S. 279, 300 (1987); Coker v. Georgia, 433 U.S. 584, 592 (1977); *see also* Penry v. Lynaugh 492 U.S. 302, 331 (1989).

207. Stanford v. Kentucky, 492 U.S. 361, 369 (1989).

208. *Id.* at 370 (alteration in original) (quoting *McCleskey*, 481 U.S. at 300).

209. *McCleskey*, 481 U.S. at 300 (quoting Gregg v. Georgia, 428 U.S. 153, 181 (1976)) (citing, *inter alia*, Enmund v. Florida, 458 U.S. 782, 789–96 (1982)).

210. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 868–69 (1988) (Scalia, J., dissenting).

211. *Stanford*, 492 U.S. at 371 (citing *Enmund*, 458 U.S. at 792).

212. *Enmund*, 458 U.S. at 797 (emphasis added).

Justice White then explained why, *in his opinion*, the death penalty was not merited when the offender's crime was robbery (even if an accomplice committed murder).[213] He also cited, as support, the "climate of international opinion" and H. L. A. Hart's *Punishment and Responsibility*.[214] If Chief Justice Warren, in *Trop*, could summon wisdom from a student note in the Yale Law Journal, Justice White cannot be faulted for his reliance on H. L. A. Hart.

3. Sentencing Discretion in Capital Cases

Furman v. Georgia, decided in 1972, only fifteen years before Justice Scalia joined the Court, inaugurated the era of death penalty jurisprudence. *Furman* was a 5–4 decision with every Justice writing separately.[215] Despite post hoc efforts to derive something remotely akin to a rule of law in that 118-page collection of opinions, *Furman*'s message was, in the words of one of the most insightful scholars to study it, "indecipherable."[216] What the vast majority of Americans did decipher from *Furman* was inchoate hostility to the death penalty, and the result was a sustained outpouring of denunciation of the Court and the enactment of thirty-five new death penalty statutes.[217] A majority of these statutes moved in the direction of a "mandatory" death penalty, but a substantial minority of states adopted sentencing hearings with specified standards (or "aggravating factors") that would warrant the imposition of a death sentence.[218]

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213. *Id.*

214. *Id*. at 796 n.22 (quoting Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977)); *id.* at 798 (quoting H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 162 (1968)).

215. The case presented two capital cases from Georgia and a third from Texas. Furman v. Georgia, 408 U.S. 238, 238 n.* (1972). A per curiam order, supported by five Justices, invalidated the death sentences under the Eighth Amendment. In separate opinions, two Justices (Brennan and Marshall) advocated abolition, while another three (Douglas, Stewart, and White) claimed only to reject the death penalty as it was administered. Effectively, the decision struck down death penalty statutues in thirty-nine states, the District of Columbia, and the federal government, though Rhode Island's completely discretionless capital sentencing scheme survived another four years. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 Harv. L. Rev. 355, 362 & n.22 (1995).

216. *See* Scott W. Howe, Furman's *Mythical Mandate*, 40 U. MICH. J.L. REFORM 435, 441 (2007).

217. *Id.* at 443.

218. *Id.* at 443–44.

The diversity of legislative responses to *Furman* is evidence that no one was sure what the Court expected, but the Court—or at least some Justices—picked up on the public's anger. In *Gregg v. Georgia*, a three-Justice plurality purported to synthesize *Furman* and upheld certain death penalty statutes.[219] Their opinion explained, "[W]here discretion is afforded a sentencing body [in capital cases] that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[220] In this inventive reconstruction, the opinions of Justices Stewart and White in *Furman* emerged as crucial. According to Justice Stewart's opinion, when the death penalty, as administered, is "wantonly and freakishly imposed" it violates the Eighth Amendment: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and usual."[221]

When viewed through the prism of *Gregg*, the principle of consistency emerged, it was said, as the mandate of *Furman*.[222] And yet the same year *Gregg* was decided, the Court also held, in *Woodson v. North Carolina* that mandatory capital punishment for specified categories of murder violated the Eighth Amendment.[223] This was baffling in that mandatory death penalty statutes seemed the most straightforward way to achieve consistency and to avoid disparities based on invidious characteristics, such as race.[224] But the *Woodson* Court held that the offender in a capital case was constitutionally entitled to an individualized assessment of his character and culpability.[225] Following *Woodson*, the Court held in *Lockett v. Ohio*[226] that States could not limit the kinds of mitigating evidence a sentencing body could consider. So at the time Justice Scalia joined the Court there were two lines of cases: one line, supposedly originating in *Furman*, had invalidated unfocused sentencing deci-

219. 428 U.S. 153, 168–76 (1976) (plurality opinion).

220. *Id*. at 189.

221. Furman v. Georgia, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring); *see also id*. at 313 (White, J., concurring). I confess myself unenlightened by this legendary *bon mot*. Yes, lightning is rare and often lethal; however, unless wielded by Zeus, how is lightning punishment?

222. *See* Howe, *supra* note 216, at 441–43.

223. 428 U.S. 280, 305 (1976) (plurality opinion).

224. *See* Howe, *supra* note 216, at 437.

225. 428 U.S. at 303–04.

226. 438 U.S. 586 (1978).

sionmaking in capital cases (the concern being capricious death sentences); the other line, originating in *Woodson*, had invalidated focused sentencing decisionmaking in capital cases (the concern being death sentences being imposed without an opportunity for mercy).[227] How would Justice Scalia traverse these inconsistent precedents while also remaining faithful to the Eighth Amendment's original meaning?

Walton v. Arizona[228] is the most significant of the pre-*Harmelin* cases that posed such a question. The petitioner raised two Eighth Amendment challenges: first, he argued that Arizona's death penalty statute inadequately channeled the sentencer's assessment of aggravating factors (in violation of *Furman*); and second, he argued that the statute inappropriately narrowed the sentencer's assessment of mitigating factors (in violation of *Woodson-Lockett*).[229] Justice Scalia joined Justice White's plurality opinion rejecting the *Furman* challenge, but with respect to the *Woodson* challenge, he contributed a concurring opinion, with ruminations on the emerging death penalty jurisprudence and the value of precedent in constitutional cases.[230]

Justice Scalia devotes the first part of his opinion to a survey of the *Furman* and *Woodson-Lockett* lines of cases, ridiculing Justice Blackmun's suggestion that there is "perhaps . . . an inherent tension" between the two lines of precedent as "rather like saying that there was perhaps an inherent tension between the Allies and Axis Powers in World War II."[231] It is a clever line, but the claim that the *Furman-Gregg* and the *Woodson-Lockett* lines of cases are as violently incompatible as Winston Churchill and Adolph Hitler is overstated. Many academic commentators have argued that when consistency and individuation are

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227. *See* Howe, *supra* note 216, at 437.

228. 497 U.S. 639 (1990); *see also* Penry v. Lynaugh, 492 U.S. 302 (1989).

229. 497 U.S. at 647, 649–50 (opinion of White, J.).

230. Walton also raised a Sixth Amendment argument that he was entitled to a jury determination of the aggravating factors that needed to be proven before a death sentence could be imposed. The majority opinion rejecting this argument is a brief recapitulation of precedents. *See id.* at 647–49. Justice Scalia concurred in this portion of the opinion. Justice Stevens dissented in a strikingly originalist opinion. *See id*. at 710 (Stevens, J., dissenting) ("If this question had been posed in 1791, when the Sixth Amendment became law, the answer would have been clear."). Years later, Justice Scalia would change his mind on the Sixth Amendment issue. *See* Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

231. *Walton*, 497 U.S. at 664 (Scalia, J., concurring in part and concurring in the judgment).

construed as guiding principles and not binding legal rules "the contradiction evaporates."[232] In any event, Justice Scalia concludes Part I of the opinion with the observation that States are struggling to comply with the Court's contradictory commands. It is time, he writes, "to reexamine our efforts in this area and to measure them against the text" of the Constitution.[233]

This sounds like a segue into foundational reflections. Part II of the opinion indeed begins by quoting the Eighth Amendment, but any expectations of a textual and originalist opinion are then dispelled. Justice Scalia writes that the *Furman* line of cases—rejecting the "wanton and freakish" death sentences that result from unchanneled jury decisionmaking as "cruel and unusual"—is "probably not what was meant by an 'unusual punishment.'"[234] Justice Scalia explains that, "as far as I can discern (this is not the occasion to explore the subject) . . . the text did not originally prohibit a form of punishment that is rarely imposed, as opposed to a form of punishment that is not traditional."[235] Justice Scalia adds, however, that, "the phrase can bear the former meaning," so he is "willing to adhere to the precedent."[236] By contrast, "[t]he *Woodson-Lockett* line of cases . . . is another matter,"[237] that is, it is indisputably unconstitutional.

Justice Scalia's argument is problematic on several levels. Preliminarily, let us note that if "this is not the occasion to explore the subject,"[238] why did Justice Scalia raise it at all? None of the parties did. Yet again a case came before the Court with not even an allusion in the briefs to the Eighth Amendment's original meaning. Justice Scalia could have ducked the ques-

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232. Mary Sigler, *Contradiction, Coherence, and Capital Discretion in the Supreme Court's Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1170 (2003) ("Because principles inform, but do not inevitably determine, legal outcomes, competing principles can coexist within the decision-making process."); *see also* Srikanth Srinivasan, *Capital Sentencing Doctrine and the Weighing-Nonweighing Distinction*, 47 STAN. L. REV. 1347, 1355 (1995) (arguing that Justice Scalia overstates the tension).

233. *Walton*, 497 U.S. at 669 (Scalia, J., concurring in part and concurring in the judgment).

234. *Id*. at 670.

235. *Id.*

236. *Id*. at 670–71.

237. *Id*. at 671.

238. *Id.* at 670.

tion of *Woodson*'s constitutionality, as Justice White did, but he seemed to go out of the way to opine on the issue, without any assistance from the parties. Justice Scalia's originalist arguments are at best allusive. There is his suggestion that the *Furman* line is less contrary to the Eighth Amendment than the *Woodson* line because mandatory death sentences were once commonplace in America.[239] Implicit is the claim that the Eighth Amendment derives its meaning from the modes and practices that existed in 1791. But as already noted, Justice Scalia had, with respect to fifteen-year-olds, conceded that an individualized determination in capital sentencing proceedings is constitutionally required.[240] This concession was apparently based on his observation that contemporary standards presume such an individualized determination. Arguably, however, contemporary standards require an opportunity for sentencing discretion and mercy in capital cases *even for adults*. If *Trop* is to be accorded precedential weight, then the *Woodson* line of cases is potentially as harmonious with the Eighth Amendment as the *Furman* line.[241]

The deeper problem with Justice Scalia's argument is that, assuming the Eighth Amendment derives its meaning from the modes and practices that existed in 1791, *Furman* is indefensible, as the aforementioned Professor Raoul Berger had argued.[242] (Curiously, not once in any of his Eighth Amendment opinions does Justice Scalia cite or acknowledge Berger's book on the Eighth Amendment.) There can be no doubt that, had Justice Scalia been on the Court in 1972, he would have been among the dissenters in *Furman*.[243] Even Justice Powell, no textualist or originalist, made the Scalia-esque observation that it is impossible for capital punishment to be unconstitutional when it is mentioned in the Constitution itself.[244] And Justice Rehnquist's unusually strident dissenting opinion adumbrates Justice Scalia's late dissents in death penalty cases, invoking

239. *Id.* at 671.

240. *See supra* at text accompanying notes 173–174.

241. Justice Stevens made this argument. *See Walton*, 497 U.S. at 718 (Stevens, J., dissenting).

242. BERGER, *supra* note 111, at 127–30.

243. Any doubts on this matter were laid to rest in *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) (*Furman* has "no proper foundation in the Constitution").

244. Furman v. Georgia, 408 U.S. 238, 418–20 (1972) (Powell, J., dissenting).

The Federalist Papers and accusing the majority of judicial fiat.[245] Apart from the fact that consistency does not seem to have been a motivating factor for most members of the *Furman* or *Gregg* Courts,[246] and the fact that consistency, shorn of other objectives, can promote cruelty,[247] the short response to Justice Scalia's suggestion that *Furman*'s mythical consistency rationale has "some basis" in the Eighth Amendment is that this suggestion is simply wrong, at least from a textualist and originalist perspective. As Professor Scott Howe has observed, "a consistency mandate does not comport with the language of the Eighth Amendment. The prohibition on cruel and unusual punishments implies substantive limits on decisional standards rather than merely a requirement of regularity."[248]

These difficulties aside, one might infer from *Walton* that Justice Scalia is articulating, or at least hinting at, a theory of originalism and stare decisis according to which the original meaning of the Constitution includes a judicial power to overturn demonstrably erroneous precedent. In other words, *Furman* may be wrong, but *Woodson* is demonstrably wrong, and so the latter, if not the former, deserves to be overruled. But this is *not* what Justice Scalia is arguing:

> Despite the fact that I think *Woodson* and *Lockett* find no proper basis, *they have some claim to my adherence because of the doctrine of stare decisis*. I do not reject the claim lightly, but I must reject it here. My initial and fundamental problem . . . is not that *Lockett* and *Woodson* are wrong, but that *Woodson* and *Lockett* are rationally irreconcilable with *Furman*.[249]

The "fundamental" reason Justice Scalia puts forth for overturning *Lockett* and *Woodson* is not that they are demonstrably erroneous, but that they conflict with the probably erroneous

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245. *Id.* at 466–68 (Rehnquist, J., dissenting).

246. As Scott Howe observes, the fact that the *Gregg* Court invalidated mandatory death sentence upends any notion that consistency was somehow what the Court sought to promote. Howe, *supra* note 216, at 436.

247. *See* Daniel D. Polsby, *The Death of Capital Punishment?:* Furman v. Georgia, 1972 SUP. CT. REV. 1, 27 (asking whether "a punishment imposed under a system of unmitigated harshness would be less cruel" than one "institutionalizing avenues of mercy").

248. Howe, *supra* note 216, at 436.

249. Walton v. Arizona, 497 U.S. 639, 672–73 (1990) (Scalia, J., concurring in part and concurring in the judgment) (emphasis added).

Furman. Were it not for this conflict, Justice Scalia suggests that he would continue to follow these precedents because even precedents with "no basis" in the Constitution nonetheless "have *some* claim to my adherence."[250] The word "some" is freighted with ambiguity, and two interpretations are possible. The first, advanced by the late Professor Steven Gey two years after *Walton* was decided, attributes originalist zeal to Justice Scalia. Gey argued that Justice Scalia's gratuitous resort to first principles in his *Walton* concurrence and his observation that *Furman* was "probably wrongly decided" hinted at his real objective: the eventual sweeping away of *Furman* and the entirety of the Court's (nonoriginalist) death penalty jurisprudence.[251] The second interpretation attributes more humility to Justice Scalia. His willingness to follow *Furman*, or at least his reconstruction of *Furman*, and his statement that he would even be willing to follow *Woodson*, absent its conflict with other precedents, reflects far more caution in overturning precedent than Gey allows. Time would tell which of these two interpretations was correct.

B. Harmelin v. Michigan

Four years after he joined the Supreme Court, Justice Scalia composed what purports to be his originalist understanding of the Eighth Amendment. In subsequent years, Justice Scalia and other like-minded Justices would cite his opinion in *Harmelin v. Michigan* to promote that originalist position. And yet the opinion is not, in fact, an exercise of pure originalism; it is better characterized as a medley of faint-hearted originalism and sake-of-argument originalism.

Before turning to *Harmelin*, we should recognize the difficulty Justice Scalia faced in being an originalist in 1991. As he observed decades later, in his early years on the Court, the parties and amici seldom provided historical arguments to assist an originalist Justice in crafting the kind of opinion he avowed as his ideal.[252] There was also a dearth of academic literature for Justices to draw upon. It is true that the *Weems* and *Trop* Courts

250. *Id.* at 672 (emphasis added).

251. *See* Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. L. REV. 67, 94–96 (1992).

252. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 401–02 (2012).

did provide historical justifications for their interpretations of the Eighth Amendment.[253] However, it was also fair to say, as Anthony Granucci did in 1969, that the historical origins of the Eighth Amendment had "never been adequately investigated."[254] In a short law review article, Granucci tried to remedy this deficiency. His article concluded that the English Declaration of Rights was enacted with two purposes: first, to prohibit punishments not authorized by statute, and second, to prohibit disproportionate punishments.[255] Although Granucci supported the first conclusion with a review of the history behind the provision's enactment, his support for the second conclusion consisted of a couple of older cases and a few sections from the Magna Carta.[256] Granucci also argued that the American Framers, through an erroneous reading of Blackstone, misconstrued the meaning of the English Declaration of Rights; in his account, they understood that the prohibition on "cruel and unusual punishments" foreclosed only tortuous, but not excessive or disproportionate, punishments.[257]

Over the next two decades, the twenty-eight-page Granucci article became a legal Rorschach Test: everyone saw something different in it, either to embrace, criticize, or ignore. In their *Furman* and *Gregg* opinions, Justices Brennan and Stewart approvingly cited the Granucci article, but glossed over his argument that the Framers had not intended the Eighth Amendment to embody a proportionality principle.[258] Meanwhile, the Solicitor General of the United States, defending the death penalty in *Gregg*, emphasized Granucci's argument that the Eng-

253. *See* Trop v. Dulles, 356 U.S. 86, 99–102 (1958) (plurality opinion); Weems v. United States, 217 U.S. 349, 368–73 (1910).

254. Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839, 839 (1969).

255. *Id*. at 860.

256. *Id*. at 852–860, 844–852; *see also* Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 45 (2000) (noting the scant evidence Granucci adduces to support his second conclusion).

257. *See* Granucci, *supra* note 254, at 865 (referring to "the American doctrine that the words 'cruel and unusual punishment' proscribed not excessive but tortuous punishments").

258. Furman v. Georgia, 408 U.S. 238, 274 (1972) (Brennan, J., concurring); Gregg v. Georgia, 428 U.S. 153, 169 (1976) (plurality opinion).

lish Declaration of Rights was primarily designed only to foreclose punishments outlawed by statute.[259]

Then, in 1982, Professor Raoul Berger published *Death Penalties*, which not only challenged the *Weems-Trop* line of cases, but also devoted nearly a chapter to a criticism of Granucci's article.[260] Berger identified sundry gaps, logical and historical, in Granucci's conclusion that the alternative rationale for the English Declaration of Rights was to embody a proportionality principle.[261] However, Berger *sub silentio* adopted Granucci's conclusion that the Framers had misconstrued the English Declaration of Rights and intended the Eighth Amendment solely to foreclose "tortuous" punishments.[262] Although the briefs in *Harmelin* provided an originalist with almost no material assistance, Justice Scalia could draw upon the work of Granucci and Berger.

Harmelin involved a life without parole sentence, imposed mandatorily in a scheme that deprived the sentencer of any discretion, given the offense of conviction (drug trafficking).[263] Yet again, the precedents were inconsistent, one line holding that the Eighth Amendment embodied a proportionality principle in capital and noncapital cases and another line holding that proportionality review applied only in the capital context. The latter position was set forth in *Rummel v. Estelle*,[264] in which the Court upheld a life with parole sentence imposed on a recidivist nonviolent offender. The Court held that, outside the death penalty context, any non-barbaric punishment that was legislatively ordained satisfied the Eighth Amendment.[265] The Court did add, albeit in a qualifying footnote, that a proportionality principle could be invoked in an extreme case, if, for example, overtime parking was punished by life imprisonment.[266] The former position originated in *Solem v. Helm*.[267] Overturning a life without parole sentence imposed on a recid-

259. Brief for the United States as Amicus Curiae at 20–21, Gregg v. Georgia, 428 U.S. 153 (1976) (No. 74-C237), 1976 WL 178718.

260. BERGER, *supra* note 111, at 29–43.

261. *Id.*

262. *Id*. at 44–49.

263. Harmelin v. Michigan, 501 U.S. 957, 961–62 (1991) (opinion of Scalia, J.).

264. 445 U.S. 263 (1980).

265. *Id.* at 272, 274.

266. *Id*. at 274 n.11.

267. 463 U.S. 277 (1983).

ivist nonviolent offender, the *Solem* Court suggested that the Eighth Amendment's proportionality principle applied in *both* capital and noncapital cases.[268]

Justice Scalia's opinion in *Harmelin* comprises four parts. Part I begins not on a strident originalist note, but by highlighting the "apparent tension" between *Solem* and *Rummel*.[269] After observing that "the doctrine of *stare decisis* is less rigid in its application to constitutional precedents," Justice Scalia announces his intention to overrule *Solem* as "simply wrong[:] the Eighth Amendment contains no proportionality guarantee."[270] The remainder of the first part of Justice Scalia's opinion, by far the longest, is his originalist Eighth Amendment manifesto. His exploration of the English and American primary sources and secondary literature culminates in his conclusion that neither the English Declaration of Rights nor the Eighth Amendment embodies a proportionality principle.[271] Although Justice Scalia at various points concedes there are plausibly held contrary views,[272] he overlooks important evidence. In his defense, much of this material was mined, cataloged, and analyzed in later scholarship far more comprehensive than that of Granucci and Berger; in this regard, one should principally note the work of Professor John Stinneford.[273] But the point here is not so much to critique Justice Scalia's originalist argument as to focus on the question of what role his originalism plays in driving the opinion.

Part II of Justice Scalia's *Harmelin* opinion is curiously devoted to arguing that the Framers acted wisely in not including a proportionality requirement, strengthening his resolve to overrule *Solem*.[274] A proportionality requirement is imprudent, Jus-

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268. *Id.* at 288–89.

269. Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (opinion of Scalia, J.).

270. *Id*.

271. *Id*. at 974.

272. *See, e.g.*, *id*. at 967–68 (acknowledging a disagreement among historians).

273. *See* John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. (2017); John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531 (2014); John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008).

274. 501 U.S. at 985 (opinion of Scalia, J.) ("There was good reason for that choice [not to embody a proportionality principle in the Eighth Amendment]—a reason that reinforces the necessity of overruling *Solem*."). One might wonder

tice Scalia argues, because it is impossible to compare the gravity of disparate offenses. In a footnote he addresses Justice White's objection that the absence of a proportionality requirement would mean that there is no constitutional bar to a life prison sentence as a punishment for overtime parking. Justice Scalia retorts that this is only a problem for those who think the Constitution must foreclose every unjust law.[275] This is a fair point, but at odds with what Justice Scalia had conceded in *Originalism: The Lesser Evil*. There, when the question posed was whether he would, as a judge, countenance flogging, he had written that he would be prepared to disregard the original meaning of the Constitution, as he understood it, to overturn the sentence.[276] By contrast, this footnote in *Harmelin* espouses the pure or heroic originalism that trumpets the original meaning, and holds it binding, even if it conflicts with contemporary moral sentiment.

Part III of Justice Scalia's opinion is a survey of the relevant nonoriginalist precedents. Justice Scalia argues that the Court has read the Eighth Amendment to require proportional punishment only in the death penalty context.[277] He acknowledges that *Weems* could be read to stand either for a prohibition of barbaric punishments or for a requirement of proportionality, but that the precedents declined to pursue the latter reading except in capital cases.[278] According to Justice Scalia, "*Rummel* treated this line of authority as an aspect of our death penalty jurisprudence, rather than a generalizable aspect of Eighth Amendment law."[279] He adds: "We would leave it there, but will not extend it further."[280]

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why Justice Scalia thinks it appropriate to spend an entire part of the opinion on the argument that the Framers of the Eighth Amendment acted wisely in omitting a proportionality requirement. *Cf.* Kansas v. Marsh, 548 U.S. 163, 186 (2006) (Scalia, J., concurring) ("As a general rule, I do not think it appropriate for judges to heap either praise or censure upon a legislative measure that comes before them . . . ."). In any event, Justice Scalia's praise of the Eighth Amendment's omission of a proportionality requirement is an implicit criticism of the many state constitutions that include such a requirement. *See, e.g.*, N.H. CONST. art. XVIII ("All penalties ought to be proportioned to the nature of the offense.").

275. *Harmelin*, 501 U.S. at 986 n.11 (opinion of Scalia, J.).

276. *See supra* at text accompanying note 118.

277. *See Harmelin*, 501 U.S. at 994–95 (opinion of Scalia, J.).

278. *See id.* at 992–94.

279. *Id.* at 994. This is not entirely accurate, given that *Rummel* indicated that extreme disproportionality (life imprisonment for overtime parking) could be

The "we" in Part III barely avoided being an "I." Only one other member of the Court joined this part of the opinion: Chief Justice Rehnquist.[281] Part III doubtless appealed to Chief Justice Rehnquist. It was consistent with his general approach of narrowly reading rather than overturning Warren and Burger Court precedents with which he disagreed.[282] But the holding of Part III is, for a principled originalist, puzzling. Justice Scalia's tolerance of proportionality in capital cases in Part III is inconsistent with the originalist portion of the argument (Part I), where he had emphasized that there was no basis for a proportionality requirement in the Eighth Amendment.[283] Part II added that the Framers had acted prudently in not including a proportionality requirement.[284] Then in Part III, Justice Scalia announces that, all that notwithstanding, he is willing to accept proportionality review in capital cases.

Part IV, which was joined not only by Chief Justice Rehnquist but also by Justices O'Connor, Kennedy, and Souter, addresses the mandatory nature of Hamelin's sentence and encapsulates the disjointed quality of Justice Scalia's opinion. It begins with originalist fanfare, citing the "text and history of the Eighth Amendment," and arguing that, given the history, "mandatory penalties may be cruel, but they are not unusual."[285] Yet Justice Scalia then concedes that the Court has required individualized sentencings in the capital context. Although these precedents have no basis in the Constitution, Justice Scalia is prepared to follow them: "We have drawn the line of required individualized sentencing at capital cases, and

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unconstitutional even outside that capital context. *See* Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980).

280. *Harmelin*, 501 U.S. at 994 (opinion of Scalia, J.).

281. *Id.* at 961.

282. *See supra* at note 87.

283. *See generally Harmelin*, 501 U.S. at 966–75 (opinion of Scalia, J.).

284. *See id.* at 985.

285. *Id.* at 994–95. Justices Scalia and Thomas often observe that "mandatory" death penalties were commonplace in the eighteenth and nineteenth centuries, yet they gloss over the fact that mandatorily imposed death sentences were regularly commuted through executive clemency. *See* STUART BANNER, THE DEATH PENALTY, AN AMERICAN HISTORY 54 (2002). Given that the practice of executive clemency has withered, *see* Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL'Y 833, 851–56 (2016), one might question the mechanical conclusion that mandatory death sentences remain consistent with the original meaning of the Eighth Amendment.

see no basis for extending it further."[286] Accordingly, the reason Justice Scalia rejects Harmelin's challenge to the mandatory nature of his sentence is not that it fails on originalist grounds, but that it is not supported by the Court's precedents.

A brief coda: A little more than a decade later, in *Ewing v. California*,[287] the Court considered a challenge to a twenty-five-years to life sentence for a recidivist nonviolent offender. In his concurring opinion, Justice Scalia cited his *Harmelin* opinion for the proposition that the Eighth Amendment does not embody a proportionality principle.[288] But he added that, "I might nonetheless accept the contrary holding of *Solem v. Helm*—that the Eighth Amendment contains a narrow proportionality principle—if I felt I could intelligently apply it."[289] Thus, the reason Justice Scalia voted to overturn *Solem* was not that it was contrary to the Constitution, as he laid out in Part I of his *Harmelin* opinion, but that it was judicially impracticable, as he laid out in Part II. So we are left with the question: what purpose was served by the originalist Part I?

*C. The Post-*Harmelin *Cases*

This section divides Justice Scalia's post-*Harmelin* cases into five topic categories: sentencing discretion in capital cases, the death penalty and the mentally retarded, the juvenile death penalty, significant cases in which Justice Scalia was silent, and execution protocol cases.

1. Sentencing Discretion in Capital Cases Revisited

For many years, the Court struggled to reconcile the *Furman* and *Woodson-Lockett* lines of cases, precedents that pointed in conflicting directions on the question of sentencing discretion in capital cases. On the one hand, *Furman* required channeled discretion, at least with respect to aggravating factors; on the other hand *Woodson-Lockett* required unfettered discretion, at least with respect to mitigating factors.[290] Justice Scalia consist-

286. *Harmelin*, 501 U.S. at 996.
287. 538 U.S. 11 (2003).
288. *Id.* at 31 (Scalia, J., concurring).
289. *Id.*
290. *See supra* at text accompanying notes 222–227.

ently argued, as he had in *Walton v. Arizona*,[291] that he would resolve the tension by overturning the cases arising from *Woodson*.[292] For example, dissenting in *Tennard v. Dretke*,[293] Justice Scalia wrote:

> I have previously expressed my view that [the] 'right' to unchanneled sentencer discretion has no basis in the Constitution . . . . I have also said that the Court's decisions establishing this right do not deserve *stare decisis* effect, because requiring unchanneled discretion . . . cannot rationally be reconciled with our earlier decisions requiring canalized discretion . . . .[294]

Here, exactly as in *Walton v. Arizona*, we are confronted with a passage that undermines Justice Scalia's reputation as an originalist. The first sentence restates his position that the Eighth Amendment does not require the sentencer (either a judge or jury) to have unfettered discretion to confer mercy in capital cases. Yet the second sentence suggests that Justice Scalia's refusal to follow the *Woodson* line of cases is not because it conflicts with the Constitution, but because it conflicts with another line of cases: the progeny of *Furman*.

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291. 497 U.S. 639, 672–73 (1990) (Scalia, J., concurring in part and concurring in the judgment).

292. *See, e.g.*, Ayers v. Belmontes, 549 U.S. 7, 24 (2006) (Scalia, J., concurring) ("I adhere to my view that limiting a jury's discretion to consider all mitigating evidence does not violate the Eighth Amendment."); Smith v. Texas, 543 U.S. 37, 49 (2004) (Scalia, J., dissenting) (citing his *Walton* opinion); Buchanan v. Angelone, 522 U.S. 269, 279 (1998) (Scalia, J., concurring) ("I continue to adhere to my view that the Eighth Amendment does not, in any event, require that sentencing juries be given discretion to consider mitigating evidence. Petitioner's argument 'that the jury at the selection phase must both have discretion to make an individualized determination and have that discretion limited and channeled,' . . . perfectly describes the incompatibility between the *Lockett-Eddings* requirement and the holding of *Furman v. Georgia* . . . that the sentencer's discretion must be constrained to avoid arbitrary or freakish imposition of the death penalty." (quoting *id.* at 275 (majority opinion)); Johnson v. Texas, 509 U.S. 350, 373 (1993) (Scalia, J., concurring) ("In my view the *Lockett-Eddings* principle that the sentencer must be allowed to consider 'all relevant mitigating evidence' is quite incompatible with the *Furman* principle that the sentencer's discretion must be channeled."); Sochor v. Florida, 504 U.S. 527, 554 (1992) (Scalia, J., concurring in part and dissenting in part) ("It has been my view that the Eighth Amendment does not require any consideration of mitigating evidence . . . a view I am increasingly confirmed in, as the byzantine complexity of the death penalty jurisprudence we are annually accreting becomes more and more apparent.").

293. 542 U.S. 274 (2004).

294. *Id.* at 293 (Scalia, J., dissenting).

As was discussed above,[295] Professor Gey speculated that *Walton* was just the first step in a more ambitious plan. Justice Scalia's ultimate goal, Gey argued, was to return to "first principles," overturn both *Furman* and *Woodson*, and end the Court's micromanagement of capital cases.[296] Professor Gey's prediction seemed reasonable, given Justice Scalia's rhetoric and professed commitment to originalism, but it proved to be mistaken. Although Justice Scalia repeatedly hinted (and eventually stated) that he regarded *Furman* as wrongly decided, at no point did he invite its reconsideration. Illustrative is *Callins v. Collins*,[297] in which Justices Scalia and Blackmun engaged in a revealing exchange on the question of how to resolve the conflict between *Furman* and *Woodson*.

Unlike Justice Scalia, Justice Blackmun regarded both lines of cases as sound and rooted in the Constitution. According to Justice Blackmun, the *Woodson* progeny is, of the two, even more firmly settled in our moral universe: it is hard to imagine, given our contemporary standards of decency, that a capital punishment scheme would generate a death sentence automatically and mandatorily, without affording a sentencer the possibility of extending mercy.[298] However, Justice Blackmun reasons that because of an inevitable "arbitrariness inherent in the sentencer's discretion to afford mercy," it is impossible simultaneously to achieve the directives of both the *Furman* and *Woodson* lines of cases.[299] The only way to reconcile the conflict between the two is to jettison the death penalty altogether.[300]

To Justice Blackmun's position, Justice Scalia tartly responds, "Surely a different conclusion commends itself—to wit, that *at least one* of these judicially announced irreconcilable commands which cause the Constitution to prohibit what its text explicitly permits must be wrong."[301] The phrase "at least one" is Justice

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295. *See supra* at text accompanying note 251.

296. *See* Gey, *supra* note 251, at 94–96.

297. 510 U.S. 1141 (1994).

298. *See id.* at 1150 (Blackmun, J., dissenting from the denial of certiorari) ("I believe the *Woodson-Lockett* line of cases to be fundamentally sound and rooted in American standards of decency that have evolved over time.").

299. *Id.* at 1153.

300. *Id.* at 1159 (the "death penalty, as currently administered, is unconstitutional").

301. *Id.* at 1141 (Scalia, J. concurring in the denial of certiorari) (emphasis added).

Scalia's hint that he regards both lines as wrong. And yet, if we assume *Trop* is good law, Justice Blackmun's argument is plausible, notwithstanding the Constitutional text's apparent endorsement of capital punishment. The reasoning would be as follows. There must have been an element of randomness, freakishness, and barbarity in the administration of capital punishment in 1791. However, given our evolved moral sensibilities, we demand greater consistency and confidence in the accuracy and fairness of our criminal justice system, at a minimum when the punishment is death. The Eighth Amendment requires courts to prohibit any punishment that would flout those evolved standards. To the extent that the death penalty as currently administered cannot comply with our moral expectations, it is unconstitutional.

Of course, this argument is premised on *Trop*, and Justice Scalia, in his brief opinion in *Callins*, suggests that he rejects this decision. He writes, "Convictions in opposition to the death penalty are often passionate and deeply held. There would be no excuse for reading them into a Constitution that does not contain them, *even if they represented the convictions of a majority of Americans*."[302] This is a ringing endorsement of principled originalism, akin to others we have already seen in Justice Scalia's opinions. Yet on other occasions Justice Scalia indicated a willingness to jettison pure originalism and defer to the evolved "convictions of a majority of Americans." We must therefore wonder whether such statements in *Callins* are seriously intended or are rhetorical fireworks.

Indeed, in 2002, Justice Scalia dropped the façade that he regarded *Furman* as only "*probably* not what was meant by [the Eighth Amendment]."[303] In *Ring v. Arizona*, the Court revisited the Sixth Amendment question that had been first posed in *Walton*, and it held that the Constitution precludes a judge from finding facts that render a defendant eligible for the death penalty: such aggravating factors must be found, as a threshold matter, by the jury. In his concurring opinion, Justice Scalia wrote that the *Furman* line of cases "has no proper foundation in the Constitution" and that *Furman* "erroneously abridged"

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302. *Id.* at 1142 (emphasis added).

303. Walton v. Arizona, 497 U.S. 639, 670 (1990) (Scalia, J., concurring in part and concurring in the judgment) (emphasis added).

the States' freedom to design procedures for imposing the death penalty.[304] Thus, Justice Scalia argued, there is no constitutional requirement that States specify aggravating factors that must be found before the death penalty is imposed.[305] Nonetheless, given that the States *had* designated aggravating factors, Justice Scalia assented to the majority's conclusion that the Sixth Amendment requires a jury to find that these factors are present in each individual case.[306]

In light of Justice Scalia's forthright opinion in *Ring*, we can say that Professor Gey's 1992 article proved in one sense correct. The qualifier in *Walton* that *Furman* was "probably" wrongly decided belied Justice Scalia's deepest thinking on the issue.[307] To the extent that *Furman* required States to channel a sentencer's discretion in imposing death, it has "no proper foundation in the Constitution."[308] Yet in another sense Gey was proven wrong. At no point, either in *Ring* or in any case afterwards, did Justice Scalia suggest that he was prepared to revisit *Furman* or its progeny, despite the fact that these cases "erroneously abridged" the States' ability to craft capital sentencing procedures.[309]

2. The Death Penalty and the Mentally Retarded

In *Atkins v. Virginia*, the Court revisited the issue, explored thirteen years earlier in *Penry v. Lynaugh*, of capital punishment for mentally retarded offenders. In *Penry*, a narrow majority had held that mentally retarded defendants were eligible for capital punishment (provided the jury was instructed that it could consider the defendant's mental deficiency as a mitigating factor).[310] In *Atkins*, Justice Stevens secured the votes of four other Justices to overturn *Penry*.[311]

Justice Scalia's dissent is characterized by sake-of-argument originalism, but he embellishes his opinion with heroic originalist flourishes. Justice Scalia begins by waving the

304. Ring v. Arizona, 536 U.S. 584, 610–11 (2002) (Scalia, J., concurring).
305. *Id.* at 611.
306. *Id.* at 611–13.
307. *See* Gey, *supra* note 251, at 101–02.
308. *Ring*, 536 U.S. at 610.
309. *See id*. at 611.
310. 492 U.S. 302, 340 (1992).
311. *See* 536 U.S. 304, 304 (2002).

originalist flag. He describes the majority opinion as the "pinnacle of our Eight Amendment death-is-different jurisprudence," which, he adds, "find[s] no support in the text or history of the Eighth Amendment; it does not even have support in current social attitudes . . . ."[312] According to Justice Scalia, the majority "makes no pretense that execution of the mildly mentally retarded would have been considered 'cruel and unusual' in 1791," for at that time only the "*severely* or *profoundly* mentally retarded, commonly known as 'idiots,'" were exempt from the criminal law.[313] Justice Scalia argues that the common law, which the Eighth Amendment reflected, excused only those offenders with IQs of 25 or below.[314] To buttress his argument, Justice Scalia cites a medical treatise from 1838, which itself recounts the 1834 murder trial of a cognitively disabled servant.[315]

However, that medical treatise concludes its narrative by observing that "to mete [punishment] out to [this offender] . . . was manifestly contrary to the principles of natural justice."[316] Indeed many contemporary Americans would likely regard the execution of an individual with an IQ of 26 as a violation of "natural justice." Would Justice Scalia, as a judge, affirm a death sentence on such an offender, as he implies was permitted at common law and, therefore, by the Constitution? Or would this be an instance, such as flogging, in which the punishment practices of 1791 would prove "too bitter to swallow?"[317]

Justice Scalia's originalism peters out after a mere two paragraphs. Apparently claiming victory on originalist grounds, he girds for battle on nonoriginalist terrain. He writes that the majority "is left to argue . . . that execution of the mildly retarded is inconsistent with . . . 'evolving standards of decency.'"[318] At great length, he engages the majority on the question of those

312. *Id.* at 337 (Scalia, J. dissenting).

313. *Id.* at 340.

314. *Id.*

315. *Id.* at 341 (citing ISAAC RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 65, 87–92 (Winfred Overholser ed., Harvard Univ. Press 1962) (1838)).

316. RAY, *supra* note 315, at 92.

317. *See supra* Part II at text accompanying notes 112–113.

318. *Penry*, 536 U.S. at 341 (Scalia, J. dissenting) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

"standards of decency." Justice Scalia points to the large number of states that have retained laws that authorize the death penalty for the mildly mentally retarded, and he criticizes the majority's "[f]eeble" attempt to "fabricate" a consensus to the contrary, which includes gestures to nebulous entities such as "the so-called world community." [319] Justice Scalia demonstrates that, as of 2002, American "standards of decency" had not converged on a prohibition of capital punishment for the mildly mentally retarded, at least if "standards" are to be gleaned from the legislative enactments of the States.[320] He also effectively observes that short-term trends should not be taken as evidence of enduring shifts, as opinions about punishment are apt to cycle over time.[321] Justice Scalia complains that the majority was "cavalier about the evidence of consensus," and indulged its own "feelings" and "intuition."[322] However fair a criticism, the majority was following the methods of Chief Justice Warren himself, whose *Trop* opinion surveyed international practices and the author's own moral sense.[323]

In his concluding remarks, Justice Scalia returns to pure originalism. Drawing upon the original meaning of the Eighth Amendment, as sketched by his *Harmelin* opinion, he announces that the Eighth Amendment forecloses only "always-and-everywhere 'cruel' punishments, such as the rack and the thumbscrew."[324] If this is true and dictates the result in *Atkins*, the question arises: why had Justice Scalia just spent several pages disputing the question of our current standards of decency? Justice Scalia carps that the Court's decision in *Atkins*, in line with its "death-is-different jurisprudence[,] . . . adds one more to the long list of substantive and procedural requirements," and "[n]one of these requirements existed when the Eighth Amendment was adopted."[325] One might be more sympathetic with Justice Scalia's criticism on this point had he not

319. *Id.* at 347.
320. *See id.* at 342.
321. *See id*. at 345.
322. *Id*. at 348.
323. *See Trop*, 356 U.S. at 101–02 (plurality opinion).
324. *Penry*, 536 U.S. at 349 (Scalia, J., dissenting).
325. *Id.* at 352–53.

himself acquiesced in this very "death-is-different" jurisprudence in *Harmelin*, despite his originalist reservations.[326]

3. Juvenile Death Penalty: Rhetorical Escalation

Three years after *Atkins* was decided, the Court revisited the question of the death penalty for juvenile offenders, last considered in *Stanford v. Kentucky*. Justice Kennedy's majority opinion in *Roper v. Simmons*[327] embarks on a tour of the "evolving standards of decency" and concludes that those standards foreclosed the execution of even the most heinous of murderers, aged seventeen years, eleven months.[328] Justice Scalia's dissenting opinion reflects his mounting exasperation with his colleagues and with the entire enterprise of discerning "evolving standards." As we shall see, his dissatisfaction with this line of cases, which he nonetheless continues to apply, results in rhetorical excesses.

Justice Scalia's dissent begins by denouncing the unjudicial character of the majority opinion, suggesting that Alexander Hamilton would be flummoxed and outraged had he witnessed Justice Kennedy's performance.[329] Justice Scalia adds that the majority arrives at its result by adverting "not to the original meaning of the Eighth Amendment, but to 'the evolving standards of decency,'" a line of cases that he calls "modern" and "mistaken."[330] Yet again, Justice Scalia opens an Eighth Amendment opinion with a celebration of originalism and, yet again, we are obliged to wonder what work originalism is doing in his opinion.[331] Our skepticism is aroused when Justice Scalia relegates to a footnote his summary of the common law infancy defense, which he argues the Eighth Amendment reflected.[332] It is, after all, not ordinary judicial practice to bury crucial links in an argument inside a footnote.

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326. *See supra* Part III.B (acquiescing in proportionality review of capital cases) at text accompanying notes 277–278.

327. 543 U.S. 551 (2005).

328. *See id.* at 578–79.

329. *See id.* at 607–08 (Scalia, J., dissenting).

330. *Id.* at 608.

331. For an attempt to determine the extent to which originalism drove the result of Justice Scalia's (and the Court's) Fourth Amendment decisions, see Lawrence Rosenthal, *An Empirical Inquiry into the Use of Originalism: Fourth Amendment Originalism in the Career of Justice Scalia*, HASTINGS L.J. (forthcoming 2018).

332. *Roper*, 543 U.S. at 609 n.1 (Scalia, J., dissenting).

In that footnote Justice Scalia observes that Simmons would lose under the common law infancy defense (and therewith the Amendment's original meaning). Citing Hale and Blackstone, Justice Scalia writes: "At the time the Eighth Amendment was adopted, the death penalty could theoretically be imposed for the crime of a 7-year-old, though there was a rebuttable presumption of incapacity to commit a capital (or other) felony until the age of 14."[333] Justice Scalia's short statement of the common law infancy defense, which he purports to embrace, would seem designed to render the common law contemptible to a modern observer.[334] Justice Stevens called attention to this footnote and challenged Justice Scalia that surely neither he nor contemporary standards would tolerate the execution of a seven-year-old child.[335] Justice Scalia did not respond. Given his willingness to update the common law infancy defense—to afford fifteen-year-olds a guaranteed discretionary sentencing in capital cases and even a presumption of incapacity[336]—we may assume he would also not permit the execution of a seven-year-old. What, then, is the point of the citation to Hale and Blackstone, other than to envelop the opinion in an aura of historical learning?

The bulk of Justice Scalia's dissent engages the majority on the nonoriginalist ground of whether "contemporary standards" foreclose the death penalty for juveniles. Justice Scalia's criticisms, although powerful, are at times overstated. For example, in calculating the number of states that foreclose the death penalty for juveniles Justice Scalia argues that one should not include states that altogether prohibit capital punishment: "Consulting States that bar the death penalty concerning the necessity of making an exception to the penalty for offenders under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car."[337] It is a clever, but flawed, line. Justice Scalia's way of counting would be akin to asking what percentage of Americans drink wine, and then excluding religious groups that don't drink alcohol at all.

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333. *Id.*

334. For a more elaborate and sympathetic treatment of the common law infancy defense, see Lerner, *supra* note 178.

335. *See Roper*, 543 U.S. at 587 (Stevens, J., concurring).

336. *See supra* at text accompanying notes 173–174.

337. *Roper*, 543 U.S. at 610–11 (Scalia, J., dissenting).

Although Justice Scalia's opinion is overwhelmingly non-originalist—for it concedes, at least for the sake of argument, that the case turns on contemporary standards—originalist denunciations of this entire enterprise are sprinkled throughout. In the middle of the opinion—again in a footnote—he disparages Justice O'Connor's suggestion that the Eighth Amendment, thanks to its "special character," "draws its meaning directly from the maturing values of a civilized society."[338] Justice Scalia responds:

> Nothing in the text reflects such a distinctive character—and we have certainly applied the "maturing values" rationale to give brave new meaning to other provisions of the Constitution, such as the Due Process Clause and the Equal Protection Clause. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 571–573 (2003); *United States v. Virginia*, 518 U.S. 515, 532–534 (1996); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847–850 (1992).[339]

The above-cited cases constitute a sort of Cerberus in Justice Scalia's judicial mythology, a triple-headed monster spawned by the idea that the Constitution embodies "maturing values." This line in *Roper* foreshadows his accusation, one decade later, that *Trop* has "caused more mischief to our jurisprudence" than any other case in the United States Reports.[340]

4. Silence

In several important Eighth Amendment cases in recent years what was most striking from Justice Scalia was something unaccustomed: silence.

In two cases, *Hall v. Florida*[341] and *Kennedy v. Louisiana*,[342] Justice Scalia joined dissenting opinions by Justice Alito that emit not a whiff of originalism. In *Hall*, which extended the rule of *Atkins v. Virginia* to mentally retarded offenders whose IQs are greater than 70, Justice Alito wrote in dissent that "[u]nder this Court's modern Eighth Amendment precedents, whether a punishment is 'cruel and unusual' depends on currently pre-

338. *See id.* at 627 n.9 (internal quotation marks omitted).
339. *Id.*
340. Glossip v. Gross, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., concurring).
341. 572 U.S. 701 (2014).
342. 554 U.S. 407 (2008).

vailing societal norms."[343] This is obviously a correct statement of the case law, and it is notable that Justice Scalia did not bother to add a separate dissenting opinion criticizing these precedents. Likewise, in *Kennedy*, Justice Scalia joined Justice Alito's opinion, which dissented from the majority's conclusion that the death penalty is categorically disproportionate for the rape of a child.[344] The focus of Justice Alito's opinion is whether there is a "national consensus" that forecloses the death penalty with respect to such an offense.[345]

In two cases involving juvenile offenders, *Graham v. Florida*[346] and *Miller v. Alabama*, Justice Scalia joined dissenting opinions by Justice Thomas. Here, one might think that Justice Scalia was relieved of making a truly originalist argument because his like-minded colleague did so for him. But Justice Thomas's dissenting opinion in *Graham*, overturning a life without parole sentence for a nonhomicide offense, resembles Justice Scalia's sake-of-argument originalism. It begins with a perfunctory statement of the Eighth Amendment's original meaning (citing Justice Scalia's *Harmelin* opinion).[347] The bulk of the opinion is then an elaborate survey of the laws and practices of the States, which disprove the majority's claim that national standards of decency foreclose Graham's sentence.[348]

In *Miller*, the Court invalidated a life without parole sentence imposed on a juvenile when the trial judge had no discretion, given the offense of conviction, to impose a lesser punishment.[349] Justice Thomas's dissenting opinion begins, as had so many by Justice Scalia, by arguing that the Eighth Amendment merely prohibits methods of punishment deemed barbaric at common law; and whether an acceptable punishment is imposed mandatorily or after an individualized sentencing is of no constitutional significance.[350] Justice Thomas adds that, even if one regarded this distinction as relevant, American law in

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343. 572 U.S. at 725–26 (Alito, J., dissenting).

344. 554 U.S. at 447 (Alito, J., dissenting).

345. *See id.* at 447–70.

346. 560 U.S. 48 (2010).

347. *Id.* at 98–100 (Thomas, J., dissenting) (citing Harmelin v. Michigan, 501 U.S. 957, 975–85, 990–94 (opinion of Scalia, J.)).

348. *See id*. at 106–15.

349. 567 U.S. 460, 489 (2012).

350. *Id.* at 506 (Thomas, J., dissenting).

1791 reveals a *preference* for mandatory punishment, for "each crime generally had a defined punishment."[351]

Yet the issue in *Miller* was not mandatory life without parole simpliciter, but mandatory life without parole *when imposed on a juvenile*. On this issue, Justice Thomas's originalist treatment is spare. He devotes three sentences to *juvenile* punishment from an originalist perspective, and this discussion is not only buried in a footnote but also itself cites a footnote (from Justice Scalia's dissenting opinion in *Roper*).[352] As both of those footnotes suggest, at common law a rebuttable presumption of incapacity expired upon one's fifteenth birthday, and one was then treated in the criminal law as an adult.[353] Justice Scalia had acknowledged decades ago that he would not follow this approach with respect to capital punishment: he would insist that a fifteen-year-old be accorded an individualized sentencing in a capital case, and even enjoy a rebuttable presumption of incapacity.[354] Such a requirement arises not from the common law, but from a modern consensus, and surely a modern consensus can also evolve with respect to juvenile life without parole. If it does, the common law should presumably be updated in this regard as well.

5. Execution Protocols

In two cases in the last decade of Justice Scalia's life, *Baze v. Rees* and *Glossip v. Gross*, the Court considered challenges to the constitutionality of the three-drug execution protocol that many states have adopted. In both cases, Justice Scalia joined the concurring opinions of Justice Thomas, who concluded that the original meaning of the Eighth Amendment was to foreclose only those punishments that are "deliberately designed to inflict pain."[355] In both cases, Justice Scalia wrote separately to address opinions by other Justices (Stevens in *Baze*, Breyer in

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351. *Id.*

352. *Id.* at 504 n.2 (citing Roper v. Simmons, 543 U.S. 551, 609 n.1 (2005) (Scalia, J., dissenting)).

353. See Craig S. Lerner, *Juvenile Criminal Responsibility: Can Malice Supply the Want of Years*, 86 TUL. L. REV. 309, 316–17 (2011).

354. *See* Thompson v. Oklahoma, 487 U.S. 815, 859 (1988) (Scalia, J., dissenting); *supra* Part III.A.2 (discussing the dissent).

355. Baze v. Rees, 553 U.S. 35, 94 (2008) (Thomas, J., concurring); *see also* Glossip v. Gross, 135 S. Ct. 2726, 2750 (2015) (Thomas, J., concurring).

Glossip), who suggested that capital punishment in any form might be unconstitutional.[356]

In *Baze*, Justice Scalia's response to Justice Stevens invokes, as relevant in determining the Eighth Amendment's original meaning, the Crime Bill of 1790, which was enacted by the same Congress that passed the Bill of Rights.[357] That law "made several offenses punishable by death," which, Justice Scalia argues, forecloses the argument that the same Congress that passed the Eighth Amendment regarded capital punishment as unconstitutional.[358] Yet the 1790 law did much more than endorse the death penalty; it even provided for the dissection of the corpses of executed murderers.[359] Furthermore, it provided for public whipping, "not exceeding thirty-nine stripes," for those guilty of perjury and embezzlement.[360] Given Justice Scalia's stated view that whipping is today unconstitutional, one may be skeptical of his claim that the 1790 law dictates what kinds of punishments are permitted by the Eighth Amendment.[361]

In *Baze*, Justice Scalia also laments that "[t]here is simply no legal authority for the proposition that the imposition of death as a criminal penalty is unconstitutional other than the opinions in *Furman v. Georgia* . . . which established a nationwide moratorium on capital punishment."[362] To the extent that this is true, we should recall that Justice Scalia himself had once written that the opinions of Justices Stewart and White in *Furman* are "arguably supported by [the] text."[363] Although he immediately added in that case that he regarded *Furman* as "probably"

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356. *See Glossip*, 135 S. Ct. at 2746 (Scalia, J., concurring); *Baze*, 553 U.S. at 87 (Scalia, J., concurring).

357. *Baze*, 553 U.S. at 88 (Scalia, J., concurring) (citing An Act for the Punishment of certain Crimes against the United States, ch. 9, 1 Stat. 112 (1790)).

358. *Id*.

359. An Act for the Punishment of certain Crimes against the United States, ch. 9, § 4, 1 Stat. at 113. The section was passed over the objection of Rep. Michael J. Stone of Maryland that it was cruel. *See* David P. Currie, *Constitution in Congress: Substantive Issues in the First Congress*, 61 U. CHI. L. REV. 775, 830–31 (1994).

360. An Act for the Punishment of certain Crimes against the United States, ch. 9, §§ 15, 16, 1 Stat. at 115–16.

361. See John D. Bessler, *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century*, 2 BRIT. J. AM. LEGAL STUD. 297, 306 (2013).

362. *Baze*, 553 U.S. at 88 (Scalia, J., concurring) (citation omitted).

363. Walton v. Arizona, 497 U.S. 639, 670 (1990) (Scalia, J., concurring in part and concurring in the judgment).

wrong,[364] and he later clarified that he thought it was certainly wrong,[365] Justice Scalia had nonetheless followed it all the years he was on the Court and had never invited its reconsideration. Justice Scalia is thus faulting Justice Stevens for following a case that Justice Scalia himself had been willing to apply for over two decades.

In both *Baze* and *Glossip*, Justice Scalia's indignation soars to new levels.[366] Painstakingly, he corrects each of Justice Breyer's errors in *Glossip*, which (in Justice Scalia's estimation) have been made and corrected before on many occasions. Justice Scalia denies that capital punishment has been shown to have no deterrent effect; he rejects the idea that erroneous convictions, assuming they even exist, constitute "cruel and unusual punishment"; he faults his colleagues for reading their own preferences into the Constitution; and he ridicules the claim that long delays before execution, preeminently the result of obstructionist judges such as Justice Breyer, render capital punishment unconstitutional.[367] Yet with respect to one argument, Justice Scalia does not directly engage Justice Breyer on the merits. As to whether retribution supports the death penalty in some cases, Justice Scalia announces that such moral arguments are "far above the judiciary's pay grade."[368]

The rhetorical difficulty for Justice Scalia is that, with respect to punishment, the most interesting arguments are necessarily moral. According to the "two millennia of Christian teaching" to which Justice Scalia ascribes, "retribution is a proper purpose (*indeed, the principal purpose*) of criminal punishment."[369] Is there a retributive—a moral—case for capital punishment? Consider this argument by Walter Berns:

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364. *Id*.

365. Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) (*Furman* has "no proper foundation in the Constitution").

366. Glossip v. Gross, 135 S. Ct. 2726, 2746–47 (2015) (Scalia, J., concurring) ("Welcome to Groundhog Day"; Justice Breyer's arguments are larded with "internal contradictions and (it must be said) gobbledy-gook"; Justice Breyer's arguments are "devoid of any meaningful legal argument"); *see also Baze*, 553 U.S. at 87–93 (Scalia, J., concurring).

367. *Glossip*, 135 S. Ct. at 2747–49.

368. *Id*. at 2748.

369. Antonin Scalia, *God's Justice and Ours*, FIRST THINGS, May 2002, at 17, 20 (emphasis added).

> Capital punishment . . . serves to remind us of the majesty of the moral order that is embodied in our law and of the terrible consequences of its breach. The law must not be understood to be merely [a] statute that we enact or repeal at our will and obey or disobey at our convenience, especially not the criminal law . . . . The criminal law must possess a dignity far beyond that possessed by mere statutory enactment or utilitarian and self-interested calculations, the most powerful means we have to give it that dignity is to impose the ultimate penalty. The criminal law must be made awful, by which I mean, awe-inspiring, or commanding "profound respect or reverential fear."[370]

Such a forceful argument for the moral necessity of the death penalty is unavailable to Justice Scalia. Whatever his views as a man and as a citizen, as a Justice, Antonin Scalia insisted that he "take[s] no position on the desirability of the death penalty."[371]

This position is consistent with raising doubts about abolitionist arguments about deterrence. However, when it comes to retributive arguments, which he views as the "principal" arguments with respect to punishment, Justice Scalia generates the following:

> Perhaps Justice Breyer is more forgiving—or more enlightened—than those who, like Kant, believe that death is the only just punishment for taking a life. I would not presume to tell parents whose life has been forever altered by the brutal murder of a child that life imprisonment is punishment enough.[372]

The first sentence is more a sarcastic jest than a reasoned argument. Justice Scalia cannot actually expound the Kantian position, which he likens elsewhere to the position of the Book of Exodus,[373] for this would be above a judge's humble pay grade.

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370. WALTER BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 172–73 (1979).

371. *Baze*, 553 U.S. at 93 (Scalia, J., concurring); *see also* Kansas v. Marsh, 548 U.S. 163, 199 (2006) (Scalia, J., concurring) ("The American people have determined that the good to be derived from capital punishment—in deterrence, and perhaps most of all in the meting out of condign justice for horrible crimes—outweighs the risk of error. It is no proper part of the business of this Court, or its Justices, to second-guess that judgment . . . ."); Scalia, *supra* note 369, at 17 ("[M]y views on the morality of the death penalty have nothing to do with how I vote as a judge").

372. *Glossip*, 135 S. Ct. at 2748 (Scalia, J., concurring).

373. *See* Morgan v. Illinois, 504 U.S. 719, 752 (1992) (Scalia, J., dissenting).

By contrast, Justices Stevens and Breyer, in their candid willingness to draw upon their moral intuitions, are judges in the heroic mode: they regard the death penalty, at least in its modern incarnation, as unjust, and they are prepared to strike it down. As the second sentence in the passage above suggests, Justice Scalia is open to retributive arguments in favor of the death penalty, and his elaborate descriptions of grotesque murders[374] serve as an implicit argument that a moral principle of proportionality could support capital punishment for certain crimes.[375] Yet his judicial humility forecloses a statement of this crucial moral argument. Consequently, his response to the heroic Justice Breyer is constrained to sounding notes of exasperation.

IV. RECONCILING ORIGINALISM AND PRECEDENT

Scholars have proposed a range of methods to reconcile originalist interpretive methodology with the background judicial norm of stare decisis.[376] The most straightforward solution

374. *See, e.g.*, *Glossip*, 135 S. Ct. at 2746 (Scalia, J., concurring) ("Petitioners, sentenced to die for the crimes they committed (including . . . raping and murdering an 11-month-old baby)"); Roper v. Simmons, 543 U.S. 551, 618 (2005) (Scalia, J., dissenting) ("[Defendant] then broke into the home of an innocent woman, bound her with duct tape and electrical wire, and threw her off a bridge alive and conscious."); Atkins v. Virginia, 536 U.S. 304, 338 (2002) (Scalia, J., dissenting) ("[Defendant] ordered [the victim] out of the vehicle and, after he had taken only a few steps, shot him one, two, three, four, five, six, seven, eight times in the thorax, chest, abdomen, arms, and legs."); Callins v. Collins, 510 U.S. 1141, 1143 (1994) (Scalia, J., concurring) (referring to separate case of eleven-year-old girl "raped by four men and killed by stuffing her panties down her throat" (citing McCollum v. North Carolina, No. 93-7200, *cert. denied*, 512 U.S. 1254 (1994))); Stanford v. Kentucky, 492 U.S. 361, 365 (1989) ("[Petitioner and accomplice] repeatedly raped and sodomized [the victim] after their commission of a robbery . . . [and then] shot her pointblank in the face and then in the back of her head."); Thompson v. Oklahoma, 487 U.S. 815, 859–61 (1987) (Scalia, J., dissenting) (providing "a fuller account" of defendant's crimes).

375. *See* Gey, *supra* note 251, at 121–22.

376. For many "living" or "new" originalists, nonoriginalist precedent does not pose a serious intellectual challenge. *See, e.g.*, Jack M. Balkin, *Nine Perspectives on* Living Originalism, 2012 U. ILL. L. REV. 815, 821 (arguing that his "framework originalism" accommodates foundational nonoriginalist precedents, such as *Brown* and the New Deal cases, far more easily than the old and rigid originalism Justice Scalia advocated).

is to disregard precedent.[377] Justice Scalia attributed this position, not altogether fairly, to his colleague Justice Thomas.[378] Other scholars argue that the Founders contemplated some version of stare decisis,[379] and that therefore an originalist Justice should defer to precedent, at least when the precedent is not clearly erroneous,[380] is very old,[381] is itself an originalist precedent,[382] is entrenched,[383] or is one that does not impair the democratic process.[384]

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377. *See* Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005).

378. *See* KEN FOSKETT, JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS 281–82 (2004) (quoting Justice Scalia as saying that Justice Thomas "does not believe in stare decisis, period"). A fairer summary of Justice Thomas's position might be that he is prepared to reconsider clearly erroneous precedents, however old. *See, e.g.*, E. Enters. v. Apfel, 524 U.S. 498, 538 (Thomas, J. concurring) (stating willingness to reconsider *Calder v. Bull*, 3 U.S. (3 Dall.) 398 (1798), because he had "never been convinced of the soundness" of limitation of ex post facto clause to criminal cases). But as discussed above, his treatment of the Eighth Amendment and juvenile criminal culpability can hardly be described as rigorously originalist. *See supra* Part III.C.4.

379. *See* John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 828 (2009) ("[G]iven the absence of an alternative source of law and its conformity with the history, the argument for treating precedent as a matter of common law is compelling."); Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1863–66 (2012) ("Stare decisis might simply be a recognized common law doctrine . . . . Having (allegedly) been in effect at the time of the Founding, . . . it therefore continues to be in effect today."); *see also* JACK M. BALKIN, LIVING ORIGINALISM 121 (2011) ("[A] common law style system of precedents was entirely foreseeable and indeed is implicit in the constitutional framework of a country with a common law tradition."). *But see* Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse* Stare Decisis, 93 VA. L. REV. 1437, 1440 (2007) ("[I]t is debatable whether the doctrine of stare decisis *can* be reconciled with popular sovereignty-based originalism. Stare decisis is rooted in preconstitutional English common law and flourished in a milieu that presupposed parliamentary sovereignty and the authority of political actors to correct all errors of judicial review.").

380. *See* Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedent*, 87 VA. L. REV. 1, 19 (2001) ("The same courts that recognized a presumption against overruling permissible past constructions of 'doubtful' provisions also acknowledged the need to overrule constructions that went beyond the range of ambiguity.").

381. *See* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 268 (2005) (discussing the "liquidating" role of early precedents).

382. *See* Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 BYU L. REV. 1729 (2010).

383. *See* McGinnis & Rappaport, *supra* note 379, at 825, 835 (arguing that the "original meaning of the Constitution embraces at least some precedent" and that

This Article has tried to understand why the originalist Justice Scalia followed the nonoriginalist *Trop v. Dulles* for nearly three decades, despite the harm he thought this precedent had done to Eighth Amendment jurisprudence and to the American republic.[385] The previous section surveyed many of his Eighth Amendment opinions and found a variety of statements and assumptions about the weight of precedent when balanced against the Constitution's original meaning. On the one hand, there are opinions festooned with brash assertions about the frailty of precedent in constitutional cases. When in this frame of mind, Justice Scalia was disposed to overrule or eviscerate precedents (*Payne*, *Woodson*, *Lockett*, *Solem*) that he viewed as inconsistent with the Eighth Amendment's original meaning. On the other hand, there are opinions humbly invoking stare decisis, professing deference even to foundational precedents that Justice Scalia at times intimates, and at other times outright states, were wrongly decided (*Trop* and *Furman*). Was there a rhyme and reason to Justice Scalia's methods?

In a recent article sympathetic to Justice Scalia's approach, Judge (formerly Professor) Amy Barrett argues that Justice Scalia was not as unprincipled as his critics have asserted in his harmonization of originalism and stare decisis.[386] Even Judge Barrett, however, acknowledges that Justice Scalia never articulated a "theory" to explain which precedents were entitled to deference and which were not.[387] The absence of a theory, perhaps even the contempt for a "theory" and the preference for something like prudence or practical wisdom, characterized Justice Scalia's utterances and writings over the decades. When questioned in his confirmation hearings as to whether he would reconsider long-settled precedents, he responded that

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even originalist judges should defer to precedent "in three specific situations: when following precedent would avoid enormous costs, when a precedent is entrenched, and when following precedent would correct failures in the supermajoritarian enactment process").

384. *See* Lash, *supra* note 379, at 1442 ("The cost of judicial error increases with the severity of the intrusion into the democratic process, and this accordingly increases the need for strong pragmatic justifications if precedent is to control.").

385. *See* Glossip v. Gross, 135 S.Ct. 2726, 2749 (2015) (Scalia, J., concurring) (referring to *Trop* as the case that "has caused more mischief to our jurisprudence, to our federal system, and to our society than any other").

386. *See* Barrett, *supra* note 24, at 1922.

387. *See id.* at 1928.

he "strongly believe[d]" in stare decisis and that some precedents were "so woven in the fabric of the law" that they are "too late to correct."[388] He continued: "There are some things that are done, and when they are done, they are done and you move on."[389] Those with an academic or theoretical cast of mind might point out that this begs the question as to which precedents you move on from and which you do not, and to this Justice Scalia regularly resorted to the assurance, "I am not a nut."[390] In 1997, Laurence Tribe invited Justice Scalia to elaborate, observing that the seemingly capricious invocation of stare decisis invites the objection that a professed originalist jurist is simply "importing [his] own views and values."[391] Justice Scalia responded that stare decisis challenged any theory of interpretation, but that he "attempt[ed] to constrain [his] own use of the doctrine by consistent rules."[392]

Yet what were those "rules?" In Judge Barrett's account, Justice Scalia regarded the Court's Eighth Amendment jurisprudence as flawed in two respects: first, it looked to "evolving standards of decency"; and second, it required that a punishment be proportionate to the gravity of the offense.[393] According to Judge Barrett, the standard that Justice Scalia used to distinguish those nonoriginalist precedents that he was willing to follow from others that he was prepared to ignore was whether a precedent could be "intelligently appl[ied]."[394] There is a certain logic to this position. To the extent that stare decisis is valuable, it is in large part because it promotes stability, but if a precedent is so ambiguous that its application is uncertain, then stare decisis does not render judicial decisions predictable. Nevertheless, the "intelligent application" principle, both in general and specifically as Judge Barrett construes it with regard to the Eighth Amendment, can be criticized. Consider two lines of precedent: one that forecloses executions on even-

388. Jason J. Czarnezki et al., *An Empirical Analysis of the Confirmation Hearings of the Justices of the Rehnquist Natural Court*, 24 CONST. COMMENT. 127, 181 (2007).

389. *Id*.

390. *See, e.g.*, Adam Liptak, *In Re Scalia the Outspoken v. Scalia the Reserved*, THE N.Y. TIMES (May 2, 2004), https://www.nytimes.com/2004/05/02/us/in-re-scalia-the-outspoken-v-scalia-the-reserved.html [https://nyti.ms/2DTszur].

391. Scalia, *supra* note 103, at 140.

392. *Id*.

393. Barrett, *supra* note 24, at 1936–37.

394. *Id.* at 1937.

numbered days of the month and another that forecloses executions that are unjust. The "intelligent application" principle could be understood to uphold the first precedent, but not the second, as the first can be algorithmically applied and the second is hopelessly ambiguous.

With respect to the Eighth Amendment, moreover, the "intelligent application" rule arguably leads one to the opposite conclusion reached by Judge Barrett (and Justice Scalia). *Trop* is said to foreclose punishments contrary to "evolving standards of decency"; *Solem* is said to foreclose punishments that are disproportionate to the offense's seriousness.[395] It is unclear why the former holding is easier to "intelligently apply" than the latter. For several decades, European courts have, more or less intelligently, applied a "proportionality principle" in the criminal and noncriminal context.[396] The *Trop* "evolving standards of decency" test can only be regarded as easier to "intelligently apply" because Justice Scalia read it, through the prism of later cases, to narrow judicial decision-making to a consideration of legislative enactments. Yet as has been observed above, this is not true to Chief Justice Warren's *Trop* opinion, which gathered "standards of decency" from a variety of sources, including the unknowable bosom of Chief Justice Warren's own moral intuitions.[397] By contrast, Justice Powell's *Solem* opinion carefully sketched a framework for proportionality analysis—that is, from intra- and inter-jurisdictional analyses of how roughly similar offenses are punished.[398] In *Harmelin*, Justice Scalia rejected Justice Powell's approach as having "no conceivable relevance to the Eighth Amendment."[399] Yet the same

395. *See supra* at text accompanying notes 266–268.

396. *See* Richard G. Singer, *Proportionate Thoughts About Proportionality*, 8 OHIO ST. J. CRIM. L. 217, 218–21 (2010).

397. *See supra* at text accompanying notes 64–70.

398. *See* Solem v. Helm, 463 U.S. 277 (1983). Justice Powell first compared Helm's offense (habitual offender passing a forged $100 check) to other South Dakota offenses that generated the imposed life sentence (e.g., treason, first-degree manslaughter, first-degree arson, kidnapping). *Id.* at 298. He plausibly concluded that Helm's offense differed markedly in its gravity. *Id.* at 299. Justice Powell then observed that no other jurisdiction would impose a life sentence on Helm for the same or comparable offense. *Id.* at 299–300. One may fairly question whether his opinion has any basis in the Constitution, but Justice Powell's claim that his analysis turned on "objective" factors—that is, factors one could "intelligently apply"—is defensible.

399. Harmelin v. Michigan, 501 U.S. 957, 989 (1991) (opinion of Scalia, J.).

objection could be leveled against the use of legislative enactments to identify our evolved standards of decency, a technique that Justice Scalia endorsed.[400]

Judge Barrett concedes that Justice Scalia exposed himself to the charge of being a "faint-hearted" originalist by his willingness to engage in this *Trop*-based project.[401] But she argues that he acceded to nonoriginalist precedents only because "the results in the cases were the same as those he would have reached under his preferred reasoning."[402] This is the core idea of sake-of-argument originalism, but the project was problematic from its inception. To be sure, there is a quality evoking nobility in agreeing to fight your enemies on terrain favorable to them, but as Robert E. Lee learned, conceding Cemetery Ridge to George Meade was not a sound plan. Why was Justice Scalia hopeful that he could prevail in achieving originalist results by conceding *Trop* and then construing the Eighth Amendment in light of contemporary standards of decency? Perhaps Justice Scalia's confidence reflected his belief that popular views about punishment were not only markedly different from those held by legal elites, but also more in line with those that prevailed two hundred years ago. In several opinions, not just in the Eighth Amendment context, Justice Scalia depicted his elite contemporaries as out-of-touch with popular opinion.[403] In *Kansas v. Marsh*, he mocked the "sanctimon[y]" of critics of the American death penalty, adding that the abolition of capital punishment in Europe was engineered "in spite of popular opinion rather than because of it."[404] If contemporary

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400. *See* Thompson v. Oklahoma, 487 U.S. 815, 865 (1988).

401. Barrett, *supra* note 24, at 1921.

402. *Id.* at 1937.

403. *See* Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("[T]he Court has taken sides in the culture war."); United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) ("[T]his most illiberal Court . . . has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the countermajoritarian preferences of the society's law-trained elite) into our Basic Law"); Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) ("When the Court takes sides in the culture wars, it tends to be with the knights rather than the villains—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn.").

404. 548 U.S. 163, 187 n.3 (2006) (Scalia, J., concurring) (quoting Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 931–932 (2006)).

standards were construed in light of legislative enactments, then elites would be hard-pressed to read their own progressive attitudes towards punishment—such as, hostility to the death penalty—into the Eighth Amendment. This belief may have contributed to Justice Scalia's confidence that "contemporary standards" of decency, honestly assessed by a review of enacted laws, would frustrate the legal elite's ambition to deploy the Eighth Amendment to transform American punishment practices.

As sketched in this Article, however, Justice Scalia at times somewhat overstated his case when identifying contemporary standards. In *Roper v. Simmons*, for example, he pruned his review of the legislative enactments to bolster the conclusion that most Americans continue to regard capital punishment for seventeen-year-old offenders as morally legitimate.[405] One can also question his insistence that legislatively possible punishments, rather than sentences actually imposed by juries, better reflect contemporary attitudes; after all, laws often remain on the books after they cease to reflect popular sentiment.[406] Furthermore, no confidence was warranted that judges would limit themselves to a consideration of legislative enactments when identifying contemporary standards and would eschew any reference to their own moral intuitions. This was not Chief Justice Warren's approach in *Trop*, and Justice Scalia himself suggested that a judge, including an appellate judge, cannot abdicate his own moral judgment when imposing a legally prescribed punishment, at least if the punishment is death.[407]

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405. *See, e.g.*, *supra* text accompanying note 337.

406. For example, the Parisian law prohibiting women from wearing pants was not repealed until 2013. *See* Devorah Lauter, *Women in Paris finally allowed to wear trousers*, TELEGRAPH (Feb. 3, 2013, 3:32 PM), https://www.telegraph.co.uk/news/worldnews/europe/france/9845545/Women-in-Paris-finally-allowed-to-wear-trousers.html [http://perma.cc/77J9-NLPR]. There are examples closer to home: Delaware did not formally abolish the whipping post until 1971. *See* Harry Themal, *The end of Delaware's infamous whipping post*, DEL. ONLINE (June 30, 2017, 1:15 PM), https://www.delawareonline.com/story/opinion/columnists/harry-themal/2017/06/30/end-delawares-infamous-whipping-post/443020001/ [https://perma.cc/HQR6-B5KR]. It is a lingering question whether the decline in executions over the past decade reflects a genuine change in popular attitudes towards the death penalty or if it is simply a testament to the byzantine obstacles thrown up by legal elites.

407. In an essay written in 2002, Scalia explained that if the official Catholic position flatly opposed the death penalty, he would resign, for he could then not

The final, deepest difficulty with sake-of-argument originalism is the claim or assumption that popular sentiments about punishment have not drifted away from the views predominant in 1791, and are unlikely to continue to drift, especially in the face of the hostile elite opinion Justice Scalia identified.

One reason sake-of-argument orgininalism may have appealed to Justice Scalia, at least in his early years on the Court, was that originalism as a judicial philosophy posed substantial practical difficulties. When Justice Scalia drafted his *Harmelin* opinion, which argued that the original meaning of the Eighth Amendment does not contemplate a proportionality principle, there was a dearth of academic scholarship to draw upon, and the parties and *amici* provided no help whatsoever.[408] Justice Scalia and others have argued that originalism is a more realistic judicial enterprise today, as scholarship and briefs are apt to provide material for originalist judges.[409] Some have even suggested that historical research will coalesce around certain understandings with the advent of computer-generated analyses.[410] In the area of the Eighth Amendment, this convergence of opinion is not imminent. Although there are still scholars who adhere to Justice Scalia's (no proportionality requirement) understanding of the Eighth Amendment's original meaning, some recent research has raised doubts about this view.[411] Justice Scalia was made aware of this scholarship in briefs filed in his last decade on the Court,[412] but he never addressed it or indicated that he was open to a reconsideration of his *Harmelin* opinion, which he continued to cite for the proposition that the

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uphold, as judge, what the law requires. *See* Scalia, *supra* note 369, at 17–18 ("With the death penalty . . . I am part of the criminal-law machinery that imposes death—which extends from the indictment . . . to rejection of the last appeal.").

408. *See* SCALIA & GARNER, *supra* note 252, at 401–02.

409. *Id.* at 402; *see also* Randy E. Barnett & Evan D. Berdick, The Letter and the Spirit: A Unified Theory of Originalism 28–30 (Jan. 17, 2018) (unpublished manuscript) (on file with Georgetown Library), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3018&context=facpub [https://perma.cc/WD6Y-KHSV].

410. *See* Lee J. Strang, *How Big Data Can Increase Originalism's Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181, 1228–30 (2017).

411. Consider particularly the work of John Stinneford. *See supra* note 273.

412. *See, e.g.*, Brief of Center on the Administration of Criminal Law as Amicus Curiae Supporting Petitioners at 9–18, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621) (citing the work of Professor John Stinneford).

"proportionality" view of the Eighth Amendment has "long been discredited."[413]

Should Justice Scalia, as an avowed originalist, have been prepared to reconsider and overturn his own originalist precedent, in the light of new historical research? Professor Lee Strang has argued that judicial opinions that are framed as originalist are entitled to more respect than opinions that are unabashedly nonoriginalist.[414] Under this rule, *Harmelin*, as the good-faith articulation of the Eighth Amendment's original meaning, even if mistaken, would be entitled to deference. By contrast, *Booth v. Maryland*, as the patchwork of nonoriginalist claims about the Eighth Amendment, would not. One might provisionally speculate that this is a "rule," albeit unarticulated, that guided Justice Scalia's decision-making. He was willing to overturn *Booth*, not only because it "defied reason," but also because it "had absolutely no basis in the constitutional text, in historical practice, or in logic."[415] Likewise, this would explain why Justice Scalia was prepared to follow *Furman*, which he once suggested arguably had some basis in the constitutional text.[416] Unless a precedent was demonstrably nonoriginalist and egregiously wrongly decided, Justice Scalia was prepared to tolerate it.

Stated thus, Justice Scalia's position seems quite cautious, but even this formulation does not capture the timidity of his stance towards precedent, at least in some cases. In several opinions, Justice Scalia suggested that demonstrably nonoriginalist and wrongly decided cases *may* be entitled to deference. In *Walton*, Justice Scalia had written that although "*Woodson* and *Lockett* find no proper basis in the Constitution, they have some claim to my adherence because of the doctrine of *stare decisis*."[417] Similarly, on the foundational question of whether the Eighth Amendment embodies a proportionality

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413. Justice Scalia joined Justice Thomas's concurrence in *Glossip v. Gross*, which cited Justice Scalia's *Harmelin* for this proposition. *See* 135 S. Ct. 2726, 2751 (2015) (Thomas, J., concurring) (citing Harmelin v. Michigan, 510 U.S. 957, 966 (1991) (opinion of Scalia, J.)).

414. *See* Strang, *supra* note 382, at 1762–65.

415. Payne v. Tennessee, 501 U.S. 808, 834 (1991) (Scalia, J., concurring).

416. Walton v. Arizona, 497 U.S. 639, 670 (1990) (Scalia, J., concurring in part and concurring in the judgment) (arguing that *Furman* was "arguably supported by the text" of the Eighth Amendment).

417. *Id.* at 672.

principle, Justice Scalia held in *Harmelin* that "*Solem* [is] simply wrong. The Eighth Amendment contains no proportionality guarantee."[418] Yet a decade later in *Ewing v. California*, he added that: "I might nonetheless accept the contrary holding of *Solem v. Helm*—that the Eighth Amendment contains a narrow proportionality principle—if I felt I could intelligently apply it."[419] So perhaps the "rule" that emerges is: demonstrably nonoriginalist and egregiously wrongly decided cases are entitled to respect, provided they can be intelligently applied. Yet even this does not reflect the unarticulated rule upon which Justice Scalia operated. Recall that although a proportionality principle was impossible to "intelligently apply," in addition to being nonoriginalist and "simply wrong," Justice Scalia was nonetheless willing to apply it, at least in capital cases.[420]

Justice Scalia's reputation as an originalist, which he cultivated in many of his extra-judicial statements, was thus only partly realized in his judicial opinions. Justice Scalia presented himself as a new sort of Justice, uniquely (until Justice Thomas's arrival) devoted to originalist principles.[421] His exoteric teaching—as a principled originalist—earned him renown and notoriety, outstripping the accolades and opprobrium piled upon, for example, Chief Justice Rehnquist.[422] And yet a close reading of Justice Scalia's Eighth Amendment cases raises doubts about his deepest thinking on the matter.[423]

The deference Justice Scalia displayed in his attitude toward precedent, and his caution in deploying originalism in overturning cases he regarded as wrongly decided, perhaps point

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418. Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (opinion of Scalia, J.).

419. 538 U.S. 11, 31 (2006) (Scalia, J., concurring).

420. *Harmelin*, 501 U.S. at 994 (opinion of Scalia, J.) (arguing that under the Court's precedents, proportionality had been required only in death penalty cases: "We would leave it there, but will not extend it further.").

421. *See* Antonin Scalia, *Foreword*, 31 HARV. J.L. & PUB. POL'Y 871, 872 (2008) ("Twenty years ago, when I joined the Supreme Court, I was the only originalist among its numbers.").

422. *See* Bibas, *supra* note 87, at 1089 ("Though scholars worship theoretical purity and mock inconsistencies, courts rightly give weight to stable, practical compromises. Chief Justice Rehnquist deserves measured praise, certainly more than he has received, for guiding this process.").

423. This Article focuses on Eighth Amendment cases, but similar questions about Justice Scalia's originalism can be raised in other contexts. *See, e.g.*, Lund, *supra* note 183, at 1356 (Second Amendment); Rosenthal, *supra* note 331 (Fourth Amendment).

to a temperamental conservatism on his part. Several scholars, most notably Professor Thomas Merrill, have argued that conservatives should be wary of originalism, precisely because of its revolutionary potential to destabilize settled law and expectations.[424] According to Merrill, "[a] Court that tried to resolve [constitutional] issues solely in accordance with the text and original understanding would have much less 'stuff' to go on," which would render "the outcome less predictable."[425] Merrill adds that "precedent is more accessible to lawyers and judges than evidence of original understanding," the ascertainment of which is outside "the skill set of . . . most lawyers and judges."[426]

Whatever plausibility Merrill's argument possesses in the abstract, it has proven incorrect in the context of the Eighth Amendment. It was perhaps a dawning awareness of this reality that prompted Justice Scalia to reconsider his approach to these cases. It is not simply that the accumulating precedents are so ambiguous and conflicting that any claim that they provide predictability was rendered implausible.[427] It is that the precedents themselves—and their foundational precedent, *Trop v. Dulles*—authorized jurists to engage in inquiries for which their training rendered them at least as ill-prepared as for an historical inquiry into the legal practices and understandings that prevailed in 1789, 1791, or 1868. Reading Eighth Amendment cases over the past decade suggests that legal expertise is but a fraction of a judge's job description. Also required is a familiarity with pharmacology, criminology, statistics, and—most galling for Justice Scalia—moral philosophy.[428] The length of so many recent Eighth Amendment opinions is testament not so much to the contradictory nature of the precedents, but to the substance of those precedents, which invite reflections on

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424. See Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 273–74 (2005).

425. *Id.* at 278

426. *Id*. at 279, 281.

427. *Cf.* Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 678–79 (1995).

428. *See* Glossip v. Gross, 135 S. Ct. 2726, 2748 (2015) (Scalia, J., concurring) ("If only Aristotle, Aquinas, and Hume knew that moral philosophy could be so neatly distilled into a pocket-sized, *vade mecum* 'system of metrics.' Of course it cannot: Egregiousness is a moral judgment susceptible of few hard-and-fast rules.").

matters far and wide. And this takes us back to *Trop v. Dulles*. When Chief Justice Warren invoked "my faith" in invalidating the denationalization of Albert Trop,[429] the trajectory of the future cases should have been apparent. *Trop v. Dulles*, as conceived and as now construed by a majority of Justices, presupposes a far-reaching inquiry into the morality of punishment. That such a precedent would promote the virtues associated with stare decisis was, and ever will be, fanciful.

V. CONCLUSION: ORIGINALISM'S PROSPECTS

In his *Originalism* essay, Justice Scalia wrote:

> The vast majority of my dissents from nonoriginalist thinking (*and I hope at least some of those dissents will be majorities*) will, I am sure, be able to be framed in the terms that, even if the provision in question has an evolutionary content, there is inadequate indication that any evolution in social attitudes has occurred.[430]

Justice Scalia's hope that he would be writing Eighth Amendment majority opinions was largely disappointed. In the last decade of his life, he was in the minority in most of the major Eighth Amendment cases.[431] Indeed, over his three decades on the Court, Eighth Amendment law had evolved further and further from what he regarded as its original meaning. It is not inconceivable, Justice Scalia observed, that the Court will soon invalidate capital punishment itself.[432] His statement in *Glossip* that he was prepared to reconsider *Trop* must be read as his concession that he had failed to achieve originalist results by assuming, for the sake of argument, that the Eighth Amendment has an evolving content.[433] Not coincidentally, in an interview in 2013, Justice Scalia suggested he was prepared to

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429. *See* Trop v. Dulles, 356 U.S. 86, 101 n.33 (1958) (plurality opinion) (quoting Trop v. Dulles, 239 F.2d 527, 530 (2d. Cir. 1956) (Clark, C.J., dissenting)).

430. Scalia, *supra* note 26, at 864 (emphasis added).

431. *See, e.g.*, Hall v. Florida, 572 U.S. 701 (2014); Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2011); Kennedy v. Louisiana, 554 U.S. 407 (2008); Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002).

432. *Justice Scalia: "Wouldn't surprise me" if death penalty struck down*, CBS NEWS (Oct. 20, 2015, 9:31 PM), https://www.cbsnews.com/news/justice-scalia-wouldnt-surprise-me-if-death-penalty-struck-down/ [https://perma.cc/4SM7-9UH5].

433. *Glossip*, 135 S. Ct. at 2749 (Scalia, J., concurring).

embrace a stouter adherence to the Eighth Amendment's original meaning, even if that meant upholding a law that permitted flogging.[434]

It is hard to know what Justice Scalia intended by these pronouncements, especially the latter (regarding flogging), given its jocular, off-the-cuff context. If he was truly prepared to reverse the "abandon[ment] [of] the historical understanding of the Eighth Amendment, beginning with *Trop*,"[435] that would mean a willingness to reconsider much of the Court's Eighth Amendment jurisprudence. This would have been a substantial undertaking in 1990, when Justice Scalia wrote that *Furman* was "probably" wrong,[436] but an enormous shovel is needed to bury the mountain of precedents that exists today. If, however, Justice Scalia indeed invited reconsideration of *Trop*, he would also have been well advised to reconsider the original meaning of the Eighth Amendment he espoused in *Harmelin*. Recent research, particularly that of Professor Stinneford, might undercut Justice Scalia's confidence that the Eighth Amendment's original meaning was simply to foreclose those modes of punishment deemed barbaric in 1791. Perhaps the original meaning of the Eighth Amendment not only includes a proportionality principle, but also prohibits any punishment that is contrary to long usage, even if that punishment existed in 1791.[437] At least in the scholarship of Professor Stinneford, the Eighth Amendment's original meaning emerges as more flexible and morally nuanced than the Eighth Amendment described by Justice Scalia.

We will never know what Justice Scalia's intentions really were,[438] and as for a comprehensive rethinking of Eighth

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434. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), http://nymag.com/news/features/antonin-scalia-2013-10/ [https://perma.cc/V5PG-862U] ("[W]hat I would say now is, yes, if a state enacted a law permitting flogging, it is immensely stupid, but it is not unconstitutional.").

435. *Glossip*, 135 S. Ct. at 2749 (Scalia, J., concurring).

436. Walton v. Arizona, 497 U.S. 639, 670 (1990) (Scalia, J., concurring in part and concurring in the judgment).

437. See Stinneford, *The Original Meaning of "Cruel"*, *supra* note 273; Stinneford, *The Original Meaning of "Unusual"*, *supra* note 273.

438. Justice Scalia's final Eighth Amendment opinion perhaps suggests that he remained wedded to a more cautious approach. In *Kansas v. Carr*, 136 S. Ct. 633, 642–43 (2016), Justice Scalia (writing for the Court) held that the Eighth Amendment does not require judges in capital sentencings to instruct juries that mitigating factors need not be proven beyond a reasonable doubt. *Id.* at 642. He added

Amendment case law, that now seems extraordinarily unlikely. There is likely only one Justice (Thomas) who might have an inclination to pursue such an agenda.[439] But if we are to play a game of "what if," we might well ask whether, in 2015, Justice Scalia questioned the soundness of the Eighth Amendment jurisprudence he planned way back in 1988. Instead of sake-of-argument originalism and faint-hearted originalism, might it not have been better simply to make the case for the Amendment's original meaning? This would mean braving accusations of moral obtuseness,[440] but to such accusations Justice Scalia could have responded that his was a truly principled—and constitutional—position.[441] His final sentence in *Glossip*, which was almost his last word on the Eighth Amendment, may hint at this, when he observes that it is not he, but his opponents who "reject[] the Enlightenment."[442] Such a principled originalism, heroic to the point of being quixotic, would have failed as resoundingly as his faint-hearted and sake-of-argument originalism, but at least there would have been the benefit of "going down with guns blazing and flag flying."[443]

Justice Scalia was open to such flamboyant gestures. Most conspicuously, his stated willingness to overturn *Miranda v. Arizona*,[444] notwithstanding its entrenched nature in our legal and popular culture, illustrates an inclination to eschew incrementalism and "upset[] the apple cart" when he perceived a

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that "[i]n any event, our case law does not require capital sentencing courts 'to affirmatively inform the jury that mitigating circumstances need not be proved beyond a reasonable doubt.'" *Id.* (quoting State v. Gleason, 329 P.3d 1102, 1148 (Kan. 2014)). It would thus seem that Justice Scalia was still willing to apply, if only for the sake of argument, the capital sentencing precedents ("our case law") that he regarded as foundationally flawed.

439. It is perhaps too early to speculate about Justices Gorsuch and Kavanaugh.

440. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 587 (2005) (Stevens, J., concurring) (implying that under Scalia's reading, the Eighth Amendment "would impose no impediment to the execution of 7-year-old children today").

441. *Cf.* Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), *in* 7 COLLECTED WORKS OF ABRAHAM LINCOLN 281, 281 (Roy P. Basler et al. eds., 1953) (observing that he had taken an oath to "preserve, protect, and defend the Constitution," which trumps his "abstract" views on "moral question[s]").

442. Glossip v. Gross, 135 S. Ct. 2726, 2750 (2015) (Scalia, J., concurring).

443. *Cf.* LEO STRAUSS, NATURAL RIGHT AND HISTORY 318 (1971).

444. 384 U.S. 436 (1966); *see also* Dickerson v. United States, 530 U.S. 428, 441 (2000) (Scalia, J., dissenting) (stating that *Miranda* is a "preposterous" reading of the Constitution).

precedent, however foundational, as monstrously flawed.[445] However, the likelihood that five Justices will adopt such a heroic strategy in the context of the Eighth Amendment is an asymptotic approximation of zero. The sort of person who survives the presidential nomination and Senate confirmation processes is certain to be more prudent.[446] References to the language of the Eighth Amendment will continue to adorn judicial opinions (along with equally decorative citations to Hale and Blackstone). But the Eighth Amendment today stands for a prohibition against punishments in conflict with evolving standards of a mature society, as ascertained by legal elites. And as for the original meaning of this updated *Trop*-infused Eighth Amendment, James Madison is a less relevant guide than Earl Warren.

445. *See* Bibas, *supra* note 87, at 1089.
446. *See* Lund, *supra* note 16, at 19–20.

EXPRESSING CONSCIENCE WITH CANDOR: SAINT THOMAS MORE AND FIRST FREEDOMS IN THE LEGAL PROFESSION

MICHAEL S. MCGINNISS*

This Article explores recent challenges to lawyers' "first freedoms" under the First Amendment to the United States Constitution, especially freedom of speech, with particular attention to the ABA's 2016 adoption of Rule 8.4(g) of the Model Rules of Professional Conduct. It begins with a brief reflection on sixteenth-century England's Thomas More, patron saint of lawyers, and the meaning that his life and example may offer for lawyers today. Next, it analyzes a profoundly flawed 1996 Tennessee ethics opinion advising a lawyer who was court appointed to represent minors seeking abortions, and its troubling implications for lawyers with traditional religious and moral views relating to their practice of law. It then examines multiple aspects of the ongoing Model Rule 8.4(g) controversy, including the rule's background and deficiencies, states' reception (and widespread rejection) of it, socially conservative lawyers' justified distrust of new speech restrictions, and the impact of the United States Supreme Court's 2018 decision in *National Institute of Family & Life Advocates v. Becerra* on "professional speech" under the First Amendment. It concludes with a call for the American legal profession to embrace a vision of diversity that includes, rather than excludes, socially conservative lawyers who dissent from its currently dominant moral views, including on matters of sexual ethics.

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* Associate Professor of Law, University of North Dakota School of Law. I dedicate this Article in memory of the Honorable Justice Antonin Scalia, good and faithful servant of the United States Constitution and First Amendment freedom of speech, but God's first. His life and example have positively influenced my journey in the legal profession, and his passing in February 2016 inspired in me further self-reflection, prayerful study, and conversations that led to my entering the Catholic Church at the Easter Vigil in April 2018.

INTRODUCTION

I do none harm, I say none harm, I think none harm.
—Thomas More, in *A Man for All Seasons*[1]

It isn't difficult to keep alive, friends—just don't *make* trouble—or if you must make trouble, make the sort of trouble that's expected.
—The Common Man, in *A Man for All Seasons*[2]

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1. ROBERT BOLT, A MAN FOR ALL SEASONS: A PLAY IN TWO ACTS 160 (First Vintage International ed., Vintage Books 1990) (1960) (from the playwright's account of Thomas More's words spoken before receiving his sentence of death for "High Treason").

2. *Id.* at 162–63 (from his concluding narrative comments after More's execution).

In June 1996, the Board of Professional Responsibility of the Supreme Court of Tennessee issued an ethics opinion (the "1996 Tennessee Ethics Opinion")[3] that marked a new and troubling turning point in the already ongoing cultural movement in the legal profession to marginalize and deter its traditionalist moral dissenters. It involved a "devout Catholic" lawyer who had been court appointed to represent a client who was requesting a judicial bypass to Tennessee's statutory parental-consent requirement for minors seeking abortions.[4] In sum, the Board advised the lawyer: (1) it would be ethically improper to seek relief from the appointed representation on religious and moral grounds; and (2) it would be ethically suspect to offer counseling to the client with insights borne of the lawyer's religious and moral convictions concerning abortion, including the possible benefits of notifying her parents instead of pursuing the judicial bypass.[5]

Twenty years later, in August 2016, the House of Delegates of the American Bar Association ("ABA") adopted Rule 8.4(g) of the Model Rules of Professional Conduct (the "Model Rules"). Its provisions, which elicited strong external opposition and rapidly evolved only weeks before the vote occurred, included broad language prohibiting "discrimination" and "harassment" by lawyers in conduct "related to the practice of law."[6] The Comment to Model Rule 8.4(g) defines "discrimination" as including "verbal . . . conduct" (that is, speech) that "manifests bias or prejudice towards others" and "harassment" as including "derogatory or demeaning verbal . . . conduct" (that is, speech).[7] Many lawyers and legal academics, both before and after its adoption, recognized Model Rule 8.4(g)'s deliberately broad prohibitions on lawyers' "manifest[ing] bias or prejudice towards others" and "verbal . . . conduct" not involv-

3. Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Ethics Op. 96-F-140 (Appointed Counsel for Minor in Abortion Case) (1996) [hereinafter 1996 Tennessee Ethics Opinion], 1996 WL 34565491, https://www.tbpr.org/ethic_opinions/96-f-140 [https://perma.cc/3NCX-KX5Q].

4. *Id.* at *1, *3.

5. *Id.* at *2–4.

6. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018).

7. *Id.* r. 8.4 cmt. 3.

ing the representation of clients as effectively creating an ideological speech code for the American legal profession.[8]

This Article explores the need to sustain strong protections for lawyers in maintaining their personal integrity relating to the practice of law,[9] and examines how recent developments in the legal profession are imperiling lawyers' "first freedoms" under the First Amendment to the United States Constitution.[10] It advocates for a robust understanding of lawyers' freedom to speak (or not speak) consistently with their religious and moral convictions. Part I sets the stage by considering the example of Saint Thomas More (1478–1535), who served as Lord Chancellor of England during the tumultuous reign of King Henry VIII[11] and was canonized as a saint in the Catholic Church in 1935, four hundred years after his martyrdom.[12] Part II considers the 1996 Tennessee Ethics Opinion in detail, including academic scholarship that has criticized its narrow vision of the

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8. *See, e.g.*, RONALD D. ROTUNDA, THE ABA DECISION TO CONTROL WHAT LAWYERS SAY: SUPPORTING "DIVERSITY" BUT NOT DIVERSITY OF THOUGHT (Heritage Found., Legal Memorandum No. 191, 2016) [hereinafter ROTUNDA, SUPPORTING "DIVERSITY" BUT NOT DIVERSITY OF THOUGHT], http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf [https://perma.cc/8PBW-VEPP]; RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 8.4-2(j) (2018–2019 ed.); Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 241 (2017) [hereinafter Blackman, *A Pause for State Courts*]; George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 135 (2018); Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. LEGAL PROF. 201 (2017).

9. *See generally* Michael S. McGinniss, *The Character of Codes: Preserving Spaces for Personal Integrity in Lawyer Regulation*, 29 GEO. J. LEGAL ETHICS 559 (2016).

10. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. Although "first freedoms" traditionally refers to religious liberties under the Free Exercise Clause, the contemporary legal debates addressed in this Article illustrate how the core freedoms of religious exercise and speech are closely intertwined. For the purposes of this Article, they share "United Status" as our "first freedoms."

11. *See generally* PETER ACKROYD, THE LIFE OF THOMAS MORE (1998) (offering a comprehensive narrative of More's life from birth to death).

12. Veryl Victoria Miles, *A Legal Career for All Seasons: Remembering St. Thomas More's Vocation*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419, 420 n.3 (2006) (citing Robert F. Drinan, *Renaissance Lawyer, Renaissance Man*, 99 HARV. L. REV. 499 (1985)).

lawyer's role as one separated from moral considerations, and its implicit expectations that lawyers must consistently subordinate and set aside their religious faith in deference to the positive law of lawyering. Part III examines Model Rule 8.4(g) and its reception in state courts, the practicing bar, and legal academia. It also considers how Model Rule 8.4(g) constitutes an armed-and-ready weapon for marginalizing and deterring expression by lawyers whose traditional religious and moral convictions on matters of sexual ethics dissent from those endorsed by the organized bar and currently dominant in the American legal profession. It also explains why the rule's history and its advocates' expressed objectives for a "cultural shift" in the legal profession make its adoption a significant risk to lawyers with such traditional views. Finally, it briefly considers the 2018 United States Supreme Court decision in *National Institute of Family & Life Advocates v. Becerra*,[13] how the Court's decision reinforces Model Rule 8.4(g)'s First Amendment infirmities, and why states should reject such a rule.

I. SAINT THOMAS MORE: SILENCE FOR CONSCIENCE'S SAKE

Saint Thomas More is venerated in the Catholic Church for his martyrdom, which followed his steadfast refusal to take the Oaths of Succession and Supremacy as required by successive acts of the English Parliament during the sixteenth-century reign of King Henry VIII.[14] After years resisting the King's coercion under color of law, including long imprisonment in the Tower of London, More was convicted of treason based on perjured testimony.[15] He was first sentenced to death by eviscera-

13. 138 S. Ct. 2361 (2018).

14. ACKROYD, *supra* note 11, at 385–87. The Oath of Supremacy was intended by King Henry VIII to "negate Papal supremacy" over the Church of England. William G. Bassler, *More on More*, 41 CATH. LAW. 297, 297 & n.3 (2002) (citing ANTHONY KENNY, THOMAS MORE 91 (1983)). As Veryl Victoria Miles and others have noted, "More could have taken the oath with some legal qualification or reservation, as many Catholics of the time did in fact do. But he did not." Miles, *supra* note 12, at 423 (citing, *e.g.*, G. Roger Hudleston, *Thomas More*, *in* 14 THE CATHOLIC ENCYCLOPEDIA 689, 689–93 (Charles G. Herbermann et al. eds., 1912), http://www.newadvent.org/cathen/14689c.htm [https://perma.cc /Q3B3-SNLV]).

15. ACKROYD, *supra* note 11, at 395–400.

tion and hanging, a horrific process of prolonged torture, but the King commuted the sentence to death by beheading.[16] The King's executioner brought his axe down upon More's neck and killed him on a summer day in 1535.[17]

Why did More persist in refusing to take the Oaths? The answer begins with the words More is said to have spoken to the crowd before his beheading: "I die His Majesty's good servant, but God's first."[18] The journey that led him there commenced with More's appointment as Lord Chancellor in 1529.[19] Shortly thereafter, the King asked him to confer with certain scholars and theologians who were already pursuing the "great matter" of the King's desired annulment of his marriage to Catherine of Aragon.[20] In 1530, the King sent a petition to Pope Clement urging the grant of an annulment, with More conspicuously missing from its signatories.[21] Historian Peter Ackroyd notes that "[a]lthough [More] may have refused to sign, it is more likely that his opinions were so well known that he was not asked to put his name to the letter; but already it is possible to sense the isolation and exclusion into which he would eventually be drawn."[22] Receiving no relief, the King issued "a proclamation against the entry of any papal bulls detrimental to [his] concerns."[23] From this foray ensued a series of challenges by the King to the Pope's authority, which soon spurred More's resignation as Lord Chancellor;[24] then, More's silence in re-

16. *Id.* at 403.

17. *Id.* at 406.

18. *See id.* at 405 (noting that, according to More's son-in-law William Roper, he asked the crowd "'to bear witness with him that he should now there suffer death in and for the faith of the Holy Catholic Church' . . . ; but a contemporary account suggests that 'Only he asked the bystanders to pray for him in this world, and he would pray for them elsewhere. He then begged them earnestly to pray for the King, that it might please God to give him good counsel, protesting that he died the King's good servant but God's first.'"); *see also* A MAN FOR ALL SEASONS (Columbia Pictures 1966).

19. ACKROYD, *supra* note 11, at 313.

20. *Id.* at 313–14.

21. *Id.* at 314.

22. *Id.*

23. *Id.* at 314–15.

24. *Id.* at 315, 327–29. "More's resignation was not precisely over the marriage of Henry VIII to Catherine of Aragon. . . . For whatever reason—canonical or political—the annulment of Henry's marriage seemed impossible to More, but that was not what led to his principled resignation." Edward McGlynn Gaffney,

sponse to the Acts of Succession and Supremacy and their mandatory oaths;[25] and, finally, his martyrdom.[26]

Robert John Araujo has described More as "a scrupulous lawyer, husband, father, statesman, legislator, judge, and saint."[27] He had mastered and revered the positive law and respected the authority of the English government, but he would neither utter a falsehood for its sake nor compromise his faith convictions to comply with its orders:

> If Parliament had said that the King was God, [More] would have done nothing to interfere; however, when Parliament said the King rather than the Pope was head of the Church and commanded More to publicly declare his agreement by taking an oath that would conflict with his convictions about the respective authorities of the Church and the King, More could not do this because of conscience. For More was also subject to God's law, which said such a declaration would

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Jr., *The Principled Resignation of Thomas More*, 31 LOY. L.A. L. REV. 63, 72 (1997). Rather, "[t]he problem of conscience was on a different level, the claim of the Crown to absolute authority over the church [that is, the Oath of Supremacy]. That was for More a principle worth resigning over and even worth dying for." *Id.* at 72–73.

25. The Act of Succession (1534) "pronounced the marriage between Henry and Catherine of Aragon to be 'void and annulled' and then, in a curious but consistent extension of policy, dealt with the matter of all such 'prohibited' marriages." ACKROYD, *supra* note 11, at 356. "It was claimed that no power on earth could sanction them, and in one sentence the Act thereby destroyed the jurisdiction and authority of the Pope." *Id.* At its conclusion "came the stipulation that eventually took More to his death on the scaffold: all the king's subjects 'shall make a corporal oath' to maintain 'the whole effects and contents of this present Act.'" *Id.* Although Parliament later adopted a second Act of Succession with a new oath "remedying the defect which More had found in the first and too broadly inclusive oath," it also introduced the Act of Supremacy, "proclaiming Henry to be 'the only supreme head in earth of the Church of England, called *Anglicana Ecclesia*.'" *Id.* at 378–79. "But there followed other proposals which touched upon More directly, as surely as if the king had run upon him in a tilting yard," including the Treason Act, which "made it a capital offence to 'maliciously wish, will, or desire, by words or writing' to deprive the royal family of their 'dignity, title, or name of their royal estates', or to declare the king 'heretic, schismatic, tyrant, infidel.' To call Henry a schismatic, therefore, would be to incur the penalty of a lingering death." *Id.* at 379.

26. ACKROYD, *supra* note 11, at 360–64, 373–75, 387, 400.

27. Robert John Araujo, *Conscience, Totalitarianism, and the Positivist Mind*, 77 MISS. L.J. 571, 575 (2007).

> violate the higher law that is beyond the competence of the state.[28]

For the ancient Greek philosopher Socrates, seeking the "whole truth" and pursuing the good were what made life worth living.[29] More's conscience was likewise grounded in his uncompromising devotion to sacred and eternal Truth.[30]

Saint Thomas More's story became more popularly known when Robert Bolt's *A Man for All Seasons* premiered in London in 1960 and then in New York in 1961.[31] Bolt's vivid portrait of More as a paragon of virtue who refused to surrender his convictions—even unto death—resonated with theatergoers and readers from many walks of life, but particularly with lawyers. One of them was Antonin Scalia. At the time, Scalia had just graduated *magna cum laude* from Harvard Law School and married Radcliffe graduate Maureen McCarthy. He also had been awarded a fellowship that enabled them to travel to Europe over the next year.[32] During their visit to London, they

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28. *Id*. at 572–73.

29. *See* PLATO, SOCRATES' DEFENSE (APOLOGY) 17b–c, 38a–39a (c. 399–390 B.C.), *reprinted in* THE COLLECTED DIALOGUES OF PLATO 3, 4, 23–24 (1963) (Edith Hamilton & Huntington Cairns eds., Hugh Tredennick trans., 1961); *see also* Araujo, *supra* note 27, at 572 ("Socrates, Thomas More, Rosa Parks, each was brought before the law because of their disagreement with some rule, and each stood their ground, often in a quiet, even private way, with the force of reason and conscience reinforcing their position. . . . It was accomplished . . . through the synthesis of mind and soul working in harmony.").

30. Steven Smith explains this point well:

> . . . [F]or More, conscience was inseparably connected to truth—even, to use a modern designation, to Truth. As a matter of *meaning*, to say that something was a reason of conscience was to say that it arose from a belief about some matter of vital truth. And as a *normative* matter, the preeminent value of conscience was connected to the sacred value of truth. For better (as I suspect) or worse, that insistence on the connection between conscience and Truth would seem to distance More's conception of conscience from some of the notions that go under that name today.

Steven D. Smith, *Interrogating Thomas More: The Conundrums of Conscience*, 1 U. ST. THOMAS L.J. 580, 603 (2003).

31. *See* BOLT, *supra* note 1, at xxi. The film version, A MAN FOR ALL SEASONS (Columbia Pictures 1966), received eight Academy Award nominations and won in six categories, including Best Picture. *The 37th Annual Academy Awards*, ACADEMY OF MOTION PICTURE ARTS AND SCIENCES, https://www.oscars.org/oscars/ceremonies/1967 [https://perma.cc/AP6M-VESK].

32. Antonin Scalia, *The Christian as Cretin*, *in* SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED 107, 107 (Christopher J. Scalia & Edward Whelan eds., 2017).

saw Bolt's new play with its compelling depiction of More "combining a life of faith with a firm commitment to the rule of law."[33] According to Mrs. Scalia, More's example "made a strong impression on them and 'grew in significance to us over the years.'"[34] During his several decades as an Associate Justice of the United States Supreme Court, Justice Scalia spoke often to lawyers, judges, and law students in local chapters of the St. Thomas More Society.[35] In a 2010 speech, Justice Scalia concluded his remarks by encouraging legal professionals with traditional Christian beliefs—who may be scorned by their contemporaries as foolish or weak minded—to look to the courageous faith of Saint Thomas More as a source of inspiration:

> It is the hope of most speakers to impart wisdom. It has been my hope to impart, to those already wise in Christ, the courage to have their wisdom regarded as stupidity. Are we thought to be fools? No doubt. But, as St. Paul wrote to the Corinthians, "We are fools for Christ's sake." And are we thought to be "easily led" and childish? Well, Christ did constantly describe us as, of all things, his sheep, and said we would not get to heaven unless we became like little children. For the courage to suffer the contempt of the sophisticated world for these seeming failings of ours, we lawyers and intellectuals—who do not like to be regarded as unsophisticated—can have no greater model than the patron of this society, the great, intellectual, urbane, foolish, childish man that he was. St. Thomas More, pray for us.[36]

Blake Morant has also examined More's dilemma of conscience through the lens of conflict between a lawyer's personal moral convictions and professional expectations.[37] This conflict requires a lawyer to choose whether, "like Thomas More, she might adhere strictly to her beliefs and suffer the consequences from her failure to accommodate the sovereign's goals; alterna-

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33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 115–16; *see also* Michael S. McGinniss, *A Tribute to Justice Antonin Scalia*, 92 N.D. L. REV. 1, 10–11 (2016) (discussing the importance to Justice Scalia of his devout Catholic faith).

37. Blake D. Morant, *Lessons from Thomas More's Dilemma of Conscience: Reconciling the Clash Between a Lawyer's Beliefs and Professional Expectations*, 78 ST. JOHN'S L. REV. 965 (2004).

tively, she might take a more pragmatic stance that accommodates professional expectations without the complete abandonment of personal beliefs."[38] Although More disagreed with his client, the King, about the Acts of Succession and Supremacy, "he attempted to appease the King, and himself, through [his] code of silence."[39] Morant observes that this course of "action, though mild and designed to reduce the dissonance associated with frustrating the expectations of the King to whom he owed a duty, must have caused More some measure of dissonance. He undoubtedly suffered discomfort from his silence on such a blatant violation of his core beliefs."[40] Only when he had been convicted of treason and "the policy of silence [had] failed," did More "finally express[] publicly the illegality of the King's proclamations and ultimately act[] in accordance with his personally held beliefs."[41]

Thus, Saint Thomas More expressed his conscience about the Acts and the King's marriage with candor only when his silence under the law failed to preserve his life.[42] Although More's adherence to religious conscience when confronted by government mandates was exemplary in its courage and personal integrity, his self-imposed silence in response to legal coercion should never become the normative practice for American lawyers with traditional religious and moral views. But socially conservative lawyers are coming under increasing pressure to compartmentalize their lives and separate their religious and moral convictions from their law practices, espe-

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38. *Id.* at 969.

39. *Id.* at 1002.

40. *Id.* at 1002–03.

41. *Id.* at 1003.

42. In Bolt's play, More's speech after his conviction is powerfully rendered:

> The indictment is grounded in an Act of Parliament which is directly repugnant to the Law of God. The King in Parliament cannot bestow the Supremacy of the Church because it is a Spiritual Supremacy! And more to this the immunity of the Church is promised both in Magna Carta and the King's own Coronation Oath!
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> . . . I am the King's true subject, and pray for him and all the realm. . . . I do none harm, I say none harm, I think none harm. And if this be not enough to keep a man alive, in good faith I long not to live. . . . Nevertheless, it is not for the Supremacy that you have sought my blood—but because I would not bend to the marriage!

BOLT, *supra* note 1, at 159–60.

cially when those convictions dissent from the dominant views within the organized bar.

II. THE 1996 TENNESSEE ETHICS OPINION: COMPELLED ADVOCACY AND ADVICE AGAINST PRO-LIFE ADVICE

In the 1996 Tennessee Ethics Opinion, the Board of Professional Responsibility of the Supreme Court of Tennessee (the "Board") addressed an inquiry by a Catholic lawyer who regularly practiced in juvenile court.[43] The lawyer was appointed to represent minors requesting a judicial bypass from Tennessee's statutory parental-consent requirement for minors seeking an abortion.[44] At the time, Tennessee's rules of professional conduct for lawyers (the "Tennessee Code") were still based on the 1969 ABA Model Code of Professional Responsibility (the "Model Code"), rather than the Model Rules.[45] The Board opined that: (1) it would be ethically improper to seek relief from the appointed representation on religious and moral grounds; and (2) it would be ethically suspect to offer counseling to the minor client with insights borne of the lawyer's religious and moral convictions concerning abortion, including the possible benefits of consulting with her parents instead of pursuing the judicial bypass.[46] The Board's conclusions were profoundly flawed both as a matter of law and in their failure to justly treat deeply convicting matters of moral responsibility for Catholic lawyers.

A. Compelled Advocacy: "But Let Us at Least Refuse to Say What We Do Not Think"[47]

The lawyer informed the Board that "he is a devout Catholic and cannot, under any circumstances, advocate a point of view

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43. 1996 Tennessee Ethics Opinion, *supra* note 3, at *1, *3.

44. *Id.* at *1.

45. *Id.* at *2. *See generally* MODEL CODE OF PROF'L RESPONSIBILITY (AM. BAR ASS'N 1969).

46. 1996 Tennessee Ethics Opinion, *supra* note 3, at *2–4.

47. ALEXANDER SOLZHENITSYN, *Live Not By Lies* (1974), *in* THE SOLZHENITSYN READER: NEW AND ESSENTIAL WRITINGS, 1947–2005, at 556, 558 (Edward E. Ericson, Jr. & Daniel J. Mahoney eds., 2006) ("We are not called upon to step out onto the square and shout out the truth, to say out loud what we think—this is scary, we are not ready. But let us at least refuse to say what we *do not* think!").

ultimately resulting in what he considers to be the loss of human life."[48] The Board acknowledged that the lawyer's "religious beliefs are so compelling that [he] fear[ed] his own personal interests will subject him to conflicting interests and impair his independent professional judgment in violation of [Tennessee Code] DR 5-101(A)."[49] Because of this potential conflict, the lawyer was concerned these representations could expose him to malpractice liability and believed declining the appointments would avoid that risk.[50] Finally, the Board recognized the lawyer's "deep[-]seated, sincere belief that appointments in such cases constitute state action violative of his free exercise of religion rights guaranteed by the First Amendment to the United States Constitution."[51]

Although the Board did not categorically state that seeking to avoid such court appointments would subject the lawyer to discipline, it strongly suggested it would be unethical under the Tennessee Code.[52] First, the Board purported to resolve the malpractice liability concern by citing the Code's Disciplinary Rule ("DR") 6-102(A), stating "a lawyer should not attempt to exonerate himself from or limit his liability to his client for personal malpractice."[53] This reliance was entirely misplaced. Like

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48. 1996 Tennessee Ethics Opinion, *supra* note 3, at *3. Although the Board described the consequence of abortion in terms of the lawyer's subjective belief, it bears mention that every abortion, objectively and scientifically speaking, involves "the loss of human life." *See, e.g.*, KEITH L. MOORE ET AL., THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 11 (10th ed. 2016) ("Human development begins at fertilization . . . when a sperm fuses with an oocyte to form a single cell, the zygote. This highly specialized, *totipotent cell* . . . marks the beginning of each of us as a unique individual.").

49. 1996 Tennessee Ethics Opinion, *supra* note 3, at *3. This Tennessee Code provision was identical to its counterpart in the Model Code. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 5-101(A) (AM. BAR ASS'N 1980) ("Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."); *cf.* MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2018) ("A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer.").

50. 1996 Tennessee Ethics Opinion, *supra* note 3, at *2.

51. *Id.* at *3.

52. See id.

53. *Id.* (citing TENN. CODE OF PROF'L RESPONSIBILITY DR 6-102(A) (1995)).

its counterpart in Model Rule 1.8(h), Tennessee Code DR 6-102(A) merely restricted a lawyer in seeking from a client contractual waivers of malpractice liability.[54] It did *not* support any notion that a lawyer acted unethically by limiting law practice or selection of client matters to avoid foreseeable problems that could result in future malpractice liability. Nevertheless, the Board concluded the lawyer's concerns did "not appear to be a sufficient ground for declining such appointments."[55]

The Board's analysis focused primarily on the weight (if any) that should be given to the lawyer's religious and moral convictions. At the time, Tennessee had not adopted Model Rule 6.2, which provides:

> A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as: (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law . . . or (c) the client *or the cause* is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.[56]

The Board thus turned to a non-binding Ethical Consideration ("EC"), Tennessee Code EC 2-29, which the Board said "exhorts appointed counsel to refrain from withdrawal where a person is unable to retain counsel, except for compelling reasons."[57] As far as the Board was concerned, the lawyer's religious and moral convictions opposing abortion, though "clearly fervently held," were not reasons sufficiently "compelling" to avoid the imposition of state-compelled legal advocacy.[58] As support, it pointed to EC 2-29's examples of non-compelling reasons for relief from appointment, which included "the repugnance of the subject matter of the proceeding."[59]

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54. *See* MODEL RULES OF PROF'L CONDUCT r. 1.8(h)(1) (AM. BAR ASS'N 2018) ("A lawyer shall not . . . make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement."); *cf.* MODEL CODE OF PROF'L RESPONSIBILITY EC 6-6 (AM. BAR ASS'N 1969).

55. 1996 Tennessee Ethics Opinion, *supra* note 3, at *3.

56. MODEL RULES OF PROF'L CONDUCT r. 6.2(a), (c) (AM. BAR ASS'N 2018) (emphasis added).

57. 1996 Tennessee Ethics Opinion, *supra* note 3, at *3.

58. *Id.*

59. *Id.* (quoting TENN. CODE OF PROF'L RESPONSIBILITY EC 2-29 (1995)).

Even under the Code, the Board's approach is unconvincing for at least two reasons. First, a lawyer finding a proceeding's "subject matter" to be "repugnant" (e.g., representing a defendant charged with a particularly heinous violent crime) is distinguishable from a lawyer finding the client's *objectives* for the representation (i.e., obtaining an abortion) to be "repugnant." Second, EC 2-30 states clearly: "a lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client."[60] The Board ignored these considerations. Instead, the Board closed its analysis by citing two Tennessee Supreme Court cases allegedly casting "serious doubt" on whether the lawyer could be relieved of these appointments.[61] Both involved lawyers appointed to represent criminal defendants; and though the Board stated that the court indicated "it would have scant sympathy for an attorney who sought to avoid representation merely because the defendant's cause was unpopular, or because the crime of which he was accused was distasteful,"[62] neither of these grounds matched those asserted by the inquiring Catholic lawyer. Rather, his objections were squarely founded on his faith-based moral convictions against complicity in abortion, not on community unpopularity or distaste for a client's past actions.

Finally, the Board incorrectly relied on what it called an "instructive" 1984 Tennessee ethics opinion involving the "ethical obligations of counsel in first[-]degree murder cases."[63] The 1984 opinion concerned a criminal defendant who insisted that counsel not seek to mitigate or argue against the death penalty.[64] From this opinion, the 1996 Board extracted two ethical principles: (1) "[c]ounsel's moral beliefs and usually acceptable

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60. MODEL CODE OF PROF'L RESPONSIBILITY EC 2-30 (AM. BAR ASS'N 1969).

61. 1996 Tennessee Ethics Opinion, *supra* note 3, at *3 (citing State v. Jones, 726 S.W.2d 515, 518–19 (Tenn. 1987) and State v. Maddux, 571 S.W.2d 819 (Tenn. 1978)).

62. *Id.* (citing *Maddux*, 571 S.W.2d at 831).

63. *Id.* at *4 (citing Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Ethics Op. 84-F-73).

64. Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Ethics Op. 84-F-73 (1984) [hereinafter 1984 Tennessee Ethics Opinion], https://www.tbpr.org/ethic_opinions/84-f-73 [https://perma.cc/R5N3-JW2E] (Murder defendant insists no argument against the death penalty).

ethical standards and duties must yield to the moral beliefs and legal rights of the defendant"; and (2) "[c]ounsel is ethically obligated to follow the law and to do nothing in opposition to the client's moral and legal choices."[65] But what actually makes the 1984 opinion "instructive" is the language sandwiched between these statements and conspicuously omitted by the 1996 Board: "Counsel is not ethically required to accept the moral and legal choices of the client and has no ethical obligation, in this instance, to advocate those choices on behalf of the client."[66] So, the 1984 lawyer was properly advised to "move the court to withdraw from representation during the portion of the trial where the conflict is manifested."[67] Although the 1996 Board quoted from this sentence,[68] it clearly regarded the first two quotations as the most significant for the lawyer's circumstances. In her exhaustive critique of the Board's "corrupt, and corrupting, understanding of the lawyer's professional obligations," Teresa Stanton Collett expresses the crux of the problem:

> The distorted quotation in Opinion 96-F-140 suggests a vision of lawyering far removed from the vision contained in Opinion 84-F-73. In contrast to the earlier opinion's vision of lawyers and clients as persons of equal moral dignity, Opinion 96-F-140 suggests that lawyers are only the means to achieving clients' objectives. According to this vision, lawyers have no independent standing as moral actors. Instead they are merely the mouthpiece through which the clients' claims are presented to the court. This conversion of human beings into the moral equivalent of talking Westlaw machines is itself immoral.[69]

Even more pointedly, Collett observes: "[T]he problem is [ultimately] not with the Tennessee Board's selective quotation of authority. The problem is with the Board's linguistic sleight of hand that converted an inquiry based on assertions of justice

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65. 1996 Tennessee Ethics Opinion, *supra* note 3, at *4 (quoting 1984 Tennessee Ethics Opinion).

66. 1984 Tennessee Ethics Opinion, *supra* note 64, at *3; *see also* Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635, 644 (1997).

67. 1984 Tennessee Ethics Opinion, *supra* note 64, at *3.

68. 1996 Tennessee Ethics Opinion, *supra* note 3, at *4.

69. Collett, *supra* note 66, at 644–45 (footnotes omitted).

and objective truth to one of personal exemption or subjective beliefs."[70]

Turning briefly to the lawyer's Free Exercise Clause concerns about compelled advocacy for his client's objective to obtain an abortion, the Board opined, without explanation, that two federal cases "under analogous facts" were "pessimistic" as to whether a lawyer's rights were "unconstitutionally burdened."[71] But neither case cited by the Board actually provides any meaningful support for this dismissive conclusion.[72] After examining (1) the federal case law more relevant to lawyers[73] and professional obligations and (2) the teachings of the Catholic Church regarding cooperation with procurement of abortion,[74] Collett rightly concludes that "[t]he refusal of the Board

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70. *Id.* at 642–43; *see also* Ind. Planned Parenthood Affiliates Ass'n v. Pearson, 716 F.2d 1127, 1137 (7th Cir. 1983) (stating that "we would certainly expect an attorney who held such beliefs [that abortion is immoral] not to accept a court appointment").

71. 1996 Tennessee Ethics Opinion, *supra* note 3, at *4 (citing Mozert v. Hawkins Cty. Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987); United States v. Greene, 892 F.2d 453, 456 (6th Cir. 1989)).

72. As Collett explains, in *Mozert* "[t]here was no evidence that the conduct required of the students [that is, studying a reading series chosen by school authorities] was forbidden by their religion. The [Sixth Circuit] clearly repudiate[d] compelled speech violating the speaker's religious beliefs." Collett, *supra* note 66, at 658 (quoting and citing *Mozert*, 827 F.2d at 1070); *cf.* W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (concluding that a compelled Pledge of Allegiance by school children in violation of religious beliefs violated the Free Exercise Clause). "Similarly," Collett notes, *United States v. Greene* involved a federal court's rejection of a Free Exercise defense to a criminal charge for use and sale of a controlled substance. Collett, *supra* note 66, at 658 (citing *Greene*, 892 F.2d at 453). Because "[r]efusal to accept court-appointed representation is not criminal conduct, nor is the pro-life position of the lawyer a unique interpretation of Catholic teaching," she concludes that "the Board's attempted analogy fails." *Id.* at 659.

73. Collett, *supra* note 66, at 659–60 (citing and discussing *In re* Summers, 325 U.S. 561, 572 (1945) and Nicholson v. Bd. of Comm., 338 F. Supp. 48 (M.D. Ala. 1972)).

74. *Id.* at 660–65; *see also id.* at 664 ("Representing a girl who seeks judicial authority to obtain an abortion would be collaborating with the application of the positive law permitting procured abortion."). Collett notes "[t]his is true, notwithstanding the legal profession's statement [in Model Rule 1.2(b)] that a 'lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.'" *Id.* at 664–65 (quoting MODEL RULES OF PROF'L CONDUCT r. 1.2(b) (AM. BAR ASS'N 1995)). She asserts:

to recognize the deeply held religious beliefs of the inquiring lawyer and accept those beliefs as a 'compelling reason' to decline the appointment unconstitutionally burdens the lawyer's ability to act in accordance with his religious beliefs."[75] Overall, the Board's opinion reflects a strikingly narrow vision of the lawyer's professional role and a disturbing level of disregard for the indispensable role that religious faith plays in the lives of many lawyers.[76]

> By accepting the court appointment in judicial bypass proceedings, the lawyer would be agreeing to publicly defend the act of abortion and to make that act possible through obtaining a court order authorizing the procedure. Every conscientious Catholic lawyer must refuse such appointment to be faithful to God and Church teaching.

Id. at 665; *see also* Teresa Stanton Collett, *Speak No Evil, Seek No Evil, Do No Evil: Client Selection and Cooperation with Evil*, 66 FORDHAM L. REV. 1339, 1359 (1998) [hereinafter Collett, *Client Selection*] ("Representation that requires the lawyer to advocate the performance of evil acts, or the total disregard of religious obligations, or the irrelevance of religious beliefs, results in evil acts by the lawyer, and thus such representation cannot be accepted by the Catholic lawyer."); Larry Cunningham, *Can a Catholic Lawyer Represent a Minor Seeking a Judicial Bypass for an Abortion? A Moral and Canon Law Analysis*, 44 J. CATH. LEG. STUD. 379 (2005).

75. Collett, *supra* note 66, at 665. Expressing strong objections to the Board's effective treatment of "Pro-life Lawyers as Second-Class Citizens," *id.* at 651, Collett emphasizes that in a religiously pluralistic society with diverse views on the morality of abortion, "it is important to recognize that personal opposition to conduct that courts will not permit to be outlawed is meaningless unless individuals remain free to act upon their beliefs in conducting their affairs." *Id.* at 653. The Board "ignored this distinction" and effectively opined that "by becoming a licensed attorney the lawyer accepted the positive law as the sole measure of what conduct she would use her professional expertise to further." *Id.*

76. After critiquing the "bleaching out" concept of the lawyer's role reflected in the 1996 Tennessee Ethics Opinion, Russell Pearce and Amelia Uelmen encourage a more tolerant posture toward traditionally religious lawyers, one far more consistent with the ideal of a truly diverse and inclusive legal profession:

> The problem with the argument that personal attributes such as religion are irrelevant to the practice of law is that it runs counter to experience. Lawyers are neither fungible nor neutral. They differ in their abilities, as well as in the ways that their identities and experiences influence their conduct. The religious lawyering movement insists that we should not ignore this reality. While it acknowledges that as a community lawyers must seek to improve our system so that all people receive impartial treatment, it nonetheless insists that this must occur within a framework that respects that lawyers are not "neutral" interchangeable parts. It emphasizes that it is important for lawyers to honestly acknowledge their differences and to strive together to manage those differences in service of the shared goal of rule of law.

Although the lawyer did not specifically inquire about the Free Speech Clause of the First Amendment, the 1996 Tennessee Ethics Opinion conflicts with this constitutional restraint as well. As Collett explains, "There is substantial precedent affirming that attorneys enjoy some level of constitutional protection of their right to free speech," and this right "encompasses both the right to speak and the right to remain silent."[77] When the Board insisted the Catholic lawyer had a professional duty to accept a court appointment compelling his legal advocacy leading to an abortion, it utterly failed to respect the lawyer's First Amendment right to remain silent.[78]

At the heart of the injustice caused by the state-compelled legal advocacy favored by the Board is the principle expressed so memorably in 1943 by Justice Robert Jackson in *West Virginia State Board of Education v. Barnette*: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[79] Unlike judicial proceedings involving defenses of a client's alleged past actions, the judicial bypass procedure for minors seeking an abortion requires the lawyer to engage in advocacy to promote a client's ability to perform a future action.[80] As Collett puts it, "The inquiring lawyer has a right not to be forced to defend a *future act* as 'legal' when he believes the act is intrinsically evil."[81] And, in effect, the Board "has either adopted 'abortion

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Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 CASE W. RES. L. REV. 127, 144–45 (2004) (footnotes omitted); *see also* Robert K. Vischer, *Faith, Pluralism, and the Practice of Law*, 43 CATH. LAW. 17 (2004).

77. Collett, *supra* note 66, at 666. In *Nat'l Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), the Court has moved its precedent from providing "some level of constitutional protection," Collett, *supra* note 66, at 666, to providing strong First Amendment protection for lawyers' freedom of speech. *See infra* Part III.D.

78. *See* Collett, *supra* note 66, at 666.

79. 319 U.S. 624, 642 (1943).

80. Collett, *supra* note 66, at 666.

81. *Id.* at 667 (emphasis added). Moreover, she points out "[i]t is constitutionally irrelevant that the lawyer's advocacy may not be mistaken for the personal views of the lawyer." *Id.* (citing MODEL RULES OF PROF'L CONDUCT r. 1.2(b) (AM. BAR ASS'N 1995)); *see also* Howard Lesnick, *The Religious Lawyer in a Pluralist So-*

rights' or 'the lawyer as mouthpiece' as the orthodox position to which all lawyers must subscribe. The 'confession of faith' required by the opinion cannot withstand scrutiny under the Free Speech Clause of the First Amendment."[82]

B. Advice Against Pro-Life Advice: Your Client Has a Right to Your Silence

The 1996 Tennessee Ethics Opinion offered other advice incompatible with robust freedom of speech and conscience for lawyers with traditional religious and moral convictions. The lawyer asked whether, if he was not relieved of the compulsory judicial bypass representations of minors seeking abortions, he could at least advise the client "about alternatives and/or advise her to speak with her parents or legal guardian about the potential abortion."[83] The Board began with Tennessee Code DR 7-101(A)(3), stating a lawyer has a positive duty to "'explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.'"[84] It then suggested duties of zeal and loyalty constrain the already-conscripted lawyer to withhold any advice that might lead the minor to reconsider the planned abortion:

> Whether informing the minor about alternatives to abortion and suggesting that she discuss the potential procedure with her parents or legal guardian is ethically appropriate may depend on a case-by-case analysis. If the minor is truly mature and well-informed enough to go forward and make the

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ciety, 66 FORDHAM L. REV. 1469, 1491 (1998) (analyzing the 1996 Tennessee Ethics Opinion in light of Model Rule 1.2(b), and commenting "[s]ome find in this principle a sufficient basis to permit attorneys to deny responsibility, while others do not, but what is the justification for a rule imposing the principle on one for whom it rings hollow?").

82. Collett, *supra* note 66, at 668; *see also* Jennifer Tetenbaum Miller, Note, *Free Exercise v. Legal Ethics: Can a Religious Lawyer Discriminate in Choosing Clients?*, 13 GEO. J. LEGAL ETHICS 161, 166–67 (1999) ("The emerging trend in legal ethics unrealistically expects a person to divorce her personal religious or moral beliefs from her professional responsibilities. . . . The Tennessee Board clearly suggests that legal ethics outweigh personal considerations such as religion and a relationship with God.").

83. 1996 Tennessee Ethics Opinion, *supra* note 3, at *2.

84. *Id.* at *2 (quoting TENN. CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(3) (1995)); *cf.* MODEL RULES OF PROF'L CONDUCT r. 1.4(b) (AM. BAR ASS'N 2018) (identical language).

> decision on her own, then counsel's hesitation and advice for the client to consult with others could possibly implicate a lack of zealous representation under DR 7-101(A)(4)(a) and (c) (a lawyer shall not intentionally fail to seek the client's lawful objectives, or prejudice or damage his client during the course of the professional relationship). Counsel also has a duty of undivided loyalty to his client, and should not allow any other persons or entities to regulate, direct, compromise, control or interfere with his professional judgment. To the extent that counsel strongly recommends that his client discuss the potential abortion with her parents or with other individuals or entities which are known to oppose such a choice, compliance with Canon 5 is called into question.[85]

The Board's assessment is disturbing. First, it treats lawyers as "mouthpieces" who cannot legitimately bring moral considerations to bear on their advice to clients without unjustly intruding on client autonomy.[86] But silencing the lawyer is consistent with client "autonomy" only if autonomy merely means, as Collett states, "the client's right to do anything not forbidden by the law."[87] By hypothesizing a client who is already "well-informed" (of what relevant considerations?) and is "truly mature" (in what relevant respects?), the Board fundamentally begs the question about communication. The lawyer's duty of "undivided loyalty" entails a sincere and devoted commitment to the client's well-being in both the short and long terms.[88] The Board seemingly presupposes that if a "mature" minor client comes to the lawyer seeking a judicial bypass, abortion is necessarily in the client's best interests. On the contrary, without parental involvement, the lawyer's role in counseling the minor client assumes even greater importance. In such cases, a lawyer loyal to the client's well-being should engage in a searching and attentive dialogue, one that would properly include exploring the client's reasons for seeking the judicial bypass and her openness to considering alternative

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85. 1996 Tennessee Ethics Opinion, *supra* note 3, at *2 (internal citations omitted).

86. *See* Collett, *supra* note 66, at 644–48.

87. *Id.* at 645.

88. *See* Michael S. McGinniss, *Virtue and Advice: Socratic Perspectives on Lawyer Independence and Moral Counseling of Clients*, 1 TEX. A&M L. REV. 1, 38–45 (2013).

courses of action.[89] Even looked at in its most favorable light, the Board's advice against pro-life advice manifests what Howard Lesnick has called "a wooden and impoverished view of the lawyer's counseling function," and reflects "an inhospitality to the 'personal' norms of individual lawyers" that, in the context of a religiously pluralistic legal profession, is fairly described as "statist."[90]

At the time, Tennessee had yet to adopt Model Rule 2.1, which addresses the lawyer's role as an "Advisor" and provides, "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice."[91] The Board did, however, invoke Canon 5 of the Code,[92] which states, "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client."[93] Confronted with a self-described "devout Catholic" lawyer, it is telling that the Board did not base its non-independence theory on the lawyer's "personal interest" in opposing abortion. Rather, the Board insisted that the lawyer must "not allow *any other persons or entities*"—

89. In his article criticizing the 1996 Tennessee Ethics Opinion for devaluing religious pluralism in the legal profession, Lesnick states that because the client's objective should not be assumed to be as fixed or certain as initially expressed, the lawyer may ethically invite the client to reflect and engage in dialogue relating to the wisdom or moral rightness of proceeding with the stated objective. Lesnick, *supra* note 81, at 1493–95; *see also* Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 48 (1997) (describing Lesnick's point as being "that considerable room remains for client counseling that gives expression to the lawyer's moral and religious beliefs in a manner that invites genuine mutual exploration"). Lesnick notes the lawyer should exercise restraint and sensitivity in this dialogue, leaving open the possibility of accepting the client's objectives and respecting the client's wish to conclude the conversation. Lesnick, *supra* note 81, at 1495.

90. Lesnick, *supra* note 81, at 1471. As Lesnick puts it, the Board "sees the pluralist quality of our society as calling on the lawyer to accommodate his or her religion to the official norms of the legal profession, rather than the reverse." *Id.* This approach is consistent with what Sanford Levinson describes as the "bleaching out" of lawyers' consciences in the standard conception of the lawyer's role. *See* Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578–79 (1993) (describing the goal of the "standard version of the professional project" as "the creation, by virtue of professional education, of almost purely fungible members of the respective professional community"); *see also* McGinniss, *supra* note 9, at 559, 566–67 n.48.

91. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2018).

92. 1996 Tennessee Ethics Opinion, *supra* note 3, at *2 (citing "Canon 5");

93. MODEL CODE OF PROF'L RESPONSIBILITY Canon 5 (AM. BAR ASS'N 1980).

including, presumably, the Catholic Church—"to regulate, direct, compromise, control or interfere with his professional judgment."[94] Thus, when the Board warned the lawyer that "strong" recommendation to the client to consult with a person known to oppose abortion would be ethically suspect under Canon 5, it demeaned the lawyer's Catholic faith as a *disloyal* motive, and then treated that alleged disloyalty as a legitimate ground for silencing the lawyer from fully exploring with the client her options in a life-changing legal and moral situation.

Today's Model Rule 2.1 makes the proper course of action for a lawyer in similar circumstances all the clearer, expressly creating an affirmative duty of candor in advising a client and a discretionary authority to "refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[95] In discouraging the lawyer from offering moral counseling, the Board diminished the candor of the lawyer's prospective advice. Candor requires a lawyer to engage in genuine, frank discussion of the fundamental substantive matters involved with the client's objectives and the means to accomplish them.[96] Especially in the context of legal matters involving matters of high moral significance—which include a client's decision about whether and how to engage in a legal and medical process that leads to the death of an unborn child—a lawyer's candid advice should not be limited merely to technical matters of court procedure.[97]

In other scholarship, I have proposed the moral ideal of the "trustworthy neighbor" as a model for lawyers serving in the advising role.[98] This concept of the lawyer's responsibility in

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94. 1996 Tennessee Ethics Opinion, *supra* note 3, at *2 (emphasis added).

95. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2018).

96. *See* McGinniss, *supra* note 88, at 14–16 (discussing what makes advice "candid" for purposes of Model Rule 2.1).

97. *Cf.* MODEL RULES OF PROF'L CONDUCT r. 2.1 cmt. 2 (AM. BAR ASS'N 2018) (stating that an advising lawyer's "[p]urely technical legal advice . . . can sometimes be inadequate").

98. *See* McGinniss, *supra* note 88, at 6, 38–45; *see also id.* at 44 ("Whether following a Socratic or a Christian path, lawyers should aspire to an ethic of care that deeply values moral goodness, both within themselves and, as their words and conduct may have an influence upon them, within their 'neighbor' clients.") (footnote omitted); Michael S. McGinniss, *Advice in the Lawyer-Client Re-*

the advising relationship is one in which "[t]he lawyer loves and respects the client as a neighbor in need who should be served in a manner worthy of trust, and who possesses an essential dignity and personality deserving of the lawyer's devotion of time, energy, and counsel."[99] Whether court-appointed or otherwise, a lawyer whose conscience is engaged and who recognizes the moral stakes involved in a client's decision should have the freedom to invite conversation and share, in a thoughtful dialogue, the benefits of the lawyer's insights and experience.[100] As for the 1996 Tennessee Ethics Opinion, the lawyer simply asked if he could properly advise the client about "alternatives" to abortion or about the potential value in discussing the decision with her parents.[101] Yet the Board deemed even these modestly stated suggested topics—not even broaching the lawyer's own views on the morality of abortion—to be ethically dubious.[102] And, as Robert Vischer has ob-

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lationship, *in* THE OXFORD HANDBOOK OF ADVICE 277, 296 (Erina L. MacGeorge & Lyn M. Van Swol eds., 2018) (encouraging advising lawyers to "strive to establish relationships with their clients founded on subject-to-subject trust and care for client well-being").

99. McGinniss, *supra* note 88, at 45.

100. Lawyer-client counseling on moral considerations may originate from either party to the dialogue:

> In a lawyer's advising relationship with a client, it may be the lawyer's conscience that must first be awakened, so as to recognize and grasp the moral issue to discuss with the client. Or the recognition of the moral issue may begin with the stirring of the client's conscience, awakened to the point that the client seeks the lawyer's counsel as to how the moral issue should be addressed. However the moral conversation is initiated, for its outcome to be fruitful the advising lawyer should understand the need to help the client "recollect" the values and convictions that form the client's identity independent of the legal situation. This recollection may result in an adherence to those values and convictions, or in changes to the client's moral perspective through the process of dialogue with the lawyer and, perhaps, also with other persons the client trusts. Whatever the outcome may be, the client will have been afforded the best opportunity to make a conscious choice about how to apply moral values to the law.

Id. at 50 (footnotes omitted).

101. *See* 1996 Tennessee Ethics Opinion, *supra* 3, at *1.

102. Addressing his view of the lawyer's responsibility if the broader dialogue on the morality of abortion were to be engaged, Lesnick explains that "[t]he challenge to the attorney is to integrate strong conviction with a lively awareness that in a pluralist society even the strongest conviction is personal, and that the manner of counseling must reflect the realities of a client's vulnera-

served, urging lawyers to censor their candid expression of moral convictions (whether religiously based or otherwise) risks not only creating an unsettling "sense of personal incoherence" in the lawyer, but also inhibiting truly informed decision-making by the client.[103]

C. The Continued Importance of the 1996 Tennessee Ethics Opinion

Many years later, the 1996 Tennessee Ethics Opinion continues to receive significant attention in legal ethics circles.[104] In addition to vividly revealing how a narrow vision of the lawyer's role can be used to justify imposing on dissenting lawyers a narrow range of permitted speech and action, it provides a striking example of how malleable the language of professional conduct rules can be in the hands of state bar authorities. This apprehension is especially heightened when those rules implicate moral issues in which the opinions of many lawyers today—and, in some cases, the official positions of national or state bar associations—differ from lawyers with traditional religious and moral convictions.[105] In such cases, the lawyer may be chilled from candid expression on matters of conscience, out of real fear that such speech may be the subject of disciplinary proceedings impacting the lawyer's license to practice law.

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bilities." Lesnick, *supra* note 81, at 1496–97. "The task," he observes, "is to seek to engage *the client's* moral agency . . . ." *Id.* at 1497.

103. ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 274 (2010); *see also id.* ("Especially in cases in which the law is indeterminate, an attorney's conscience will often shape the advice she gives, and clients will be better off if the attorney's moral perspective is articulated openly and deliberately instead of being left to operate beneath the surface of the attorney-client dialogue.").

104. *Id.* at 273. Observing that "[r]esistance to [the] amoral lawyering paradigm is evidenced in part by the tension between the compulsions of conscience and the compulsions of the profession," Vischer illustrates his point by noting that "[t]he tension is unmistakable when a state ethics board, in requiring a devout Christian lawyer to represent a minor seeking an abortion without parental consent, reasons that religious beliefs are not a legitimate basis for declining a court appointment." *Id.* (citing 1996 Tennessee Ethics Opinion, *supra* note 3); *see also* RUSSELL G. PEARCE ET AL., PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH 86, 174 (3d ed. 2017) (quoting two excerpts from the 1996 Tennessee Ethics Opinion to illustrate points relating to court appointments and advising on non-legal considerations, respectively).

105. *See infra* Part III.C.1 (discussing the ABA's support for expansive abortion rights, and progressive lawyers' longstanding advocacy for broad restrictions on speech opposing abortion).

Stated simply: the 1996 Tennessee Ethics Opinion illustrates why "trust us" is a wholly inadequate response to the oft-stated concerns that 2016's Model Rule 8.4(g) is a weapon which adopting states could wield with animosity against ideologically disfavored lawyers, especially those with traditional views on matters of sexual ethics.[106]

III. MODEL RULE 8.4(G) AND THE MOVEMENT TO MARGINALIZE SOCIALLY CONSERVATIVE LAWYERS AND DETER THEIR SPEECH

Model Rule 8.4(g) provides:

> It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.[107]

The new Comments [3], [4], and [5] to Model Rule 8.4 provide, in their most pertinent parts:

> [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession

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106. "Sexual ethics" is a subtopic of bioethics addressing a broad range of issues relating to human sexuality, and which "considers standards for intervention in physical processes, rights of individuals to self-determination, ideals for human flourishing, and the importance of social context for the interpretation and regulation of sexual behavior." *Sexual Ethics*, ENCYCLOPEDIA OF BIOETHICS (2004), https://www.encyclopedia.com/science/encyclopedias-almanacs-transcripts-and-maps/sexual-ethics [https://perma.cc/6PAY-4AR5]. Sexual ethics includes issues of procreative morality, including abortion and contraception. *See id.* Sexual ethics is a topic of fundamental importance in many religious faith traditions. For example, the core Catholic doctrines on sexual ethics are expressed in detail in the Catechism, and are based on Scripture, sacred tradition, and Thomistic natural-law moral philosophy. *See, e.g.*, CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2332, 2335, 2337, 2362 (Geoffrey Chapman trans., Cassell 1994). From a Catholic perspective, sexual ethics also includes doctrine relating to the sacramental nature of marriage and the unitive and procreative purposes of conjugal sexual union in marriage. *See, e.g.*, *id.* ¶¶ 1614, 1652, 2249, 2335, 2363.

107. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018).

> and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).
>
> [4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.
>
> [5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice. . . . A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).[108]

A. Model Rule 8.4(g): Its Background and Its Deficiencies

In August 2016, the ABA House of Delegates approved Model Rule 8.4(g).[109] Its proponents hailed the absence of floor opposition prior to its passage by voice vote as indicative of broad acceptance.[110] But in reality, its adoption was strongly opposed by numerous lawyers and legal organizations in writ-

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108. *Id.* r. 8.4 cmts. 3–5.

109. Halaby & Long, *supra* note 8, at 204–05.

110. *See, e.g.*, Andrew Burger, *Attorney: Scathing criticism of new ABA harassment and discrimination rule ill-founded*, LEGAL NEWSLINE (Sept. 9, 2016), https://legalnewsline.com/stories/511004265-attorney-scathing-criticism-of-new-aba-harassment-and-discrimination-rule-ill-founded [https://perma.cc/26W3-G78F].

ten comments on its December 22, 2015 draft version;[111] in written submissions when the draft was changed in substantive ways during the final days before passage,[112] and in short pieces published by prominent legal academics such as Eugene Volokh,[113] Josh Blackman,[114] and the late Ronald Rotunda,[115] both before and immediately after the vote.

Prior to the ABA's adoption of Model Rule 8.4(g), the black-letter text of the Model Rules did not prohibit lawyers from engaging in "harassment" or "discrimination." Instead, Model Rule 8.4(d)—which prohibits lawyers from engaging in "conduct that is prejudicial to the administration of justice"—was accompanied by a former version of Comment [3], stating that the rule might be violated by "[a] lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status" *if* those words or conduct were "prejudicial to the administration of justice."[116] Thus, its disciplinary enforcement was

111. Halaby & Long, *supra* note 8, at 218–23.

112. *Id.* at 227–32.

113. *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/9E4P-5CRB]. David French, a lawyer long active in First Amendment litigation and a well-known essayist on law and politics, also penned a short piece describing and critiquing Model Rule 8.4(g) as a "speech code" for lawyers. David French, *A Speech Code for Lawyers*, NAT'L REV. (Aug. 11, 2016, 7:46 PM), https://www.nationalreview.com/2016/08/free-speech-lawyers-american-bar-association-model-rules-professional-conduct/ [https://perma.cc/Y3WL-T6AP].

114. *See* Josh Blackman, *Model Rule 8.4(g) and the First Amendment: Trust the Disciplinary Committees*, JOSH BLACKMAN'S BLOG (Nov. 21, 2016), http://joshblackman.com/blog/2016/11/21/model-rule-8-4g-and-the-first-amendment-trust-the-disciplinary-committees/ [https://perma.cc/ZE57-8PQS].

115. *See* Ron Rotunda, Opinion, *The ABA Overrules the First Amendment: The legal trade association adopts a rule to regulate lawyers' speech*, WALL ST. J. (Aug. 16, 2016), http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418 [https://perma.cc/JF6W-BNKG]. Rotunda, a renowned scholar of legal ethics and constitutional law for many decades, passed in March 2018. *See In Memoriam: Ronald Rotunda*, FEDERALIST SOC'Y (Mar. 16, 2018), https://fedsoc.org/commentary/blog-posts/in-memoriam-ronald-rotunda [https://perma.cc/PB9F-EMH7].

116. MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2015).

limited to conduct in the course of client representation and required a showing that the lawyer's behavior had an actual or potential adverse impact on the fair administration of justice in a specific legal matter.[117]

In the more than two years since Model Rule 8.4(g) was adopted, it has been subject to strong and sustained critiques from academics, practitioners, and public interest organizations in the legal profession.[118] Seven aspects of the new rule are particularly noteworthy for the risks they pose to lawyers' freedom of speech and highlight why so many commentators have recognized Model Rule 8.4(g) in its current form as an unacceptable "speech code."[119]

1. What Is "Conduct Related to the Practice of Law"?

Rather than being limited to a lawyer's conduct while engaged in client representation or otherwise practicing law, Model Rule 8.4(g) applies far more broadly to a lawyer's "conduct *related to* the practice of law."[120] Although Comment [4] offers a non-exclusive list of what this may "include[],"[121] legal commentators have pointed out that many unlisted activities lawyers perform "relate" to law practice and implicate core

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117. *See* Lindsey Keiser, Note, *Lawyers Lack Liberty: State Codifications of Comment 3 of Rule 8.4 Impinge on Lawyers' First Amendment Rights*, 28 GEO. J. LEGAL ETHICS 629, 632 (2015) ("Determining when a lawyer's conduct is prejudicial to the administration of justice is essential to determining when a lawyer's speech can be restricted.").

118. *See, e.g.*, ROTUNDA, SUPPORTING "DIVERSITY" BUT NOT DIVERSITY OF THOUGHT, *supra* note 8; ROTUNDA & DZIENKOWSKI, *supra* note 8; Blackman, *A Pause for State Courts*, *supra* note 8; Dent, *supra* note 8; Halaby & Long, *supra* note 8; Caleb C. Wolanek, Note, *Discriminatory Lawyers in a Discriminatory Bar: Rule 8.4(g) of the Model Rules of Professional Responsibility*, 40 HARV. J.L. & PUB. POL'Y 773 (2017); *cf.* Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31 (2018) (providing a generally favorable view of Model Rule 8.4(g) and its constitutionality, but acknowledging facial First Amendment overbreadth problems with the rule and comment that justify making revisions). *But cf.* Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195 (2017); Robert N. Weiner, *"Nothing to See Here": Model Rule of Professional Conduct 8.4(g) and the First Amendment*, 41 HARV. J.L. & PUB. POL'Y 125 (2018).

119. Wolanek, *supra* note 118, at 775.

120. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018) (emphasis added).

121. *Id.* r. 8.4 cmt. 4.

written and oral speech activities traditionally protected by the First Amendment (e.g., continuing legal education or legal symposium events, social events involving legal groups such as the Federalist Society or the NAACP, volunteer service on a religious organization's board of trustees, law review articles, and law school classroom discussions).[122]

2. What Are "Discrimination" and "Harassment"?

This Article emphatically takes as a given (and, in fact, vigorously supports) the principle that lawyers ought not to engage in any unlawful acts of discrimination or harassment, either in their law practices, law-related activities, or any other aspect of their daily lives. This basic premise, however, leaves two fundamental questions unresolved: (1) what conduct should the civil law deem to be "unlawful" acts of discrimination and harassment, particularly in light of critically important First Amendment freedoms of speech, religious exercise, and association?;[123] and (2) how broad a meaning ought a rule of professional conduct such as Model Rule 8.4(g) give to the terms "discrimination" and "harassment," particularly in a diverse legal profession concerned with maintaining inclusiveness for dissenting moral viewpoints? The first question raises

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122. *See* Blackman, *A Pause for State Courts*, *supra* note 8, at 246–48; Dent, *supra* note 8, at 142–43.

123. For example, anticipating the United States Supreme Court's 2018 decision in *Masterpiece Cakeshop* (discussed *infra* Part III.C.2), Ryan Anderson has pointed out critically important distinctions between same-sex and interracial marriage for purposes of enforcing anti-discrimination laws:

> Exemptions from laws banning discrimination on the basis of race run the risk of undermining the valid purposes of those laws—such as eliminating the public effects of racist bigotry—by perpetuating the myth that blacks are inferior to whites. . . . [But] [a] ruling in favor of Jack Phillips [the baker in *Masterpiece Cakeshop*] sends no message about the supposed inferiority of people who identify as gay—indeed, it sends no message about them or their sexual orientations at all. It would simply say that citizens who support the historic understanding of marriage are not bigots, and that the state may not drive them out of business or civic life. Such a ruling doesn't threaten the social status of people who identify as gay or their community's profound and still-growing political influence.

Ryan T. Anderson, *Disagreement Is Not Always Discrimination: On* Masterpiece Cakeshop *and the Analogy to Interracial Marriage*, 16 GEO. J. L. & PUB. POL'Y 123, 125 (2018). *See generally* Ryan T. Anderson & Sherif Girgis, *Against the New Puritanism*, *in* DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION 108 (2017).

significant issues of public policy that are beyond the intended scope of this Article, but the second one bears further attention and analysis.

New Comment [3] to Model Rule 8.4 defines "discrimination" as including "harmful verbal . . . conduct" (that is, speech) that "manifests bias or prejudice towards others" relating to one or more of the characteristics identified in the black-letter text.[124] The rule does not define what it means for a lawyer's speech to be "harmful" to the reader(s) or listener(s).[125] Nor does the rule require that the words be directed "towards" the reader(s) or listener(s), but rather they could violate the rule merely by being written or spoken about "others" who are not present at the time the words are received.[126] "Harassment," as defined in the Comment, "includes . . . derogatory or demeaning verbal . . . conduct" (that is, speech) relating to one or more of the same characteristics that can give rise to a violation for "discrimination."[127] Comment [3] states the "substantive law of antidiscrimination and anti-harassment statutes and case law *may guide* application of paragraph (g)."[128] Accepting such guidance is thus purely optional, and the Comment language conspicuously fails to require a showing of severity or pervasiveness—generally necessary for civil harassment claims in employment law—for a lawyer to be found guilty of Model Rule 8.4(g) "harassment."[129] Thus, a single comment relating to a person or a group (not even necessarily the reader or listener) that the lawyer knows or reasonably should know will be considered "demeaning" or "derogatory" by someone concerning

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124. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) cmt. 3 (AM. BAR ASS'N 2018).

125. The concept of "harm" alleged to have been caused by speech the reader or listener finds disagreeable or offensive has expanded in recent years, especially with respect to historically marginalized groups and in particular on college campuses. *See generally* Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 J. LEGAL EDUC. 739, 741–44 (2017); *see also* Dent, *supra* note 8, at 154–56 ("Does the Rule Require Proof of Harm?"); *infra* Part III.C.3.

126. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) cmt. 3 (AM. BAR ASS'N 2018).

127. *Id.*

128. *Id.* (emphasis added).

129. *See* Blackman, *A Pause for State Courts*, *supra* note 8, at 245 (citing Faragher v. City of Boca Raton, 524 U.S. 775, 787–88 (1998)); *see also* ROTUNDA, SUPPORTING "DIVERSITY" BUT NOT DIVERSITY OF THOUGHT, *supra* note 8, at 4 (citing Davis Next Friend LaShonda D. v. Monroe City Bd. of Educ., 526 U.S. 629, 633 (1999)).

a protected characteristic appears to be sufficient to violate the rule.[130]

3. *Mens Rea Requirement: "Knows," "Reasonably Should Know," or None at All?*

Under Model Rule 8.4(g), disciplinary authorities need not prove that the lawyer knows the speech in question constitutes "discrimination" or "harassment."[131] Rather, it is sufficient if, in the eyes of the state bar authorities reviewing the facts, the lawyer *reasonably should have known* the speech falls within the broad standards described in Comment [3] (i.e., for "discrimination," if the words and ideas they express are deemed "harmful" or "manifest bias or prejudice"; and for "harassment," if a reader or listener would deem expressed words and ideas to be "demeaning" or "derogatory"). An earlier draft of Model Rule 8.4(g)—strongly urged on the ABA Standing Committee on Ethics and Professional Responsibility by "Goal III Commission" entities within the ABA—included no mens rea requirement of any kind.[132] Only in the final weeks before

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130. "Black's Law Dictionary defines 'demeaning' as '[e]xhibiting less respect for a person or a group of people than they deserve, or causing them to feel embarrassed, ashamed, or scorned.'" Blackman, *A Pause for State Courts*, *supra* note 8, at 245 (quoting *Demeaning*, BLACK'S LAW DICTIONARY (10th ed. 2014)). "Random House defines 'derogatory' as 'tending to lessen the merit or reputation of a person or thing; disparaging; depreciatory.'" *Id.* (quoting RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 537 (2d ed. 1998)). The *Oxford Living Dictionary* defines "derogatory" as "[s]howing a disrespectful or critical attitude" *Id.* (quoting *Derogatory*, OXFORD LIVING DICTIONARIES, https://en/oxforddictionaries.com/definition/derogatory/ [https://perma.cc/U28W-PXB8] (last visited Apr. 20, 2017)).

131. *See* MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018*); id.* r. 1.0(f) (defining "knows" as "denot[ing] actual knowledge of the fact in question," which "may be inferred from the circumstances"); *cf.* MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2015) (requiring for a possible violation of Model Rule 8.4(d) that the lawyer "*knowingly* manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status") (emphasis added).

132. This emphatic advocacy for rejecting a mens rea requirement continued from multiple speakers at the February 2016 hearing before the ABA Standing Committee on Ethics and Professional Responsibility. *See* Halaby & Long, *supra* note 8, at 216–18 (reciting testimony, including ABA Section of Civil Rights and Social Justice member Robert Weiner's statement that "[m]any people who are racists or misogynists or anti-gay don't realize they are. . . . "); *see also id.* at 211–12, 218, 226 (discussing Goal III: Eliminate Bias and Enhance Diversity, and the

its adoption in August 2016, and at the urging of other groups within the ABA, was the "knows or reasonably should know" language added.[133] Legal scholarship has already criticized even this relaxed mens rea standard and proposed additional Comment amendments that would more explicitly draw lawyers' speech reflecting unconscious, or "implicit," bias within the reach of the rule.[134] And as George Dent notes, "Political correctness condemns microaggressions, which may be committed 'unconsciously,' but perhaps a lawyer 'reasonably should know' what behavior constitutes a microaggression. . . . [T]he politically correct definition of bias is continuously and rapidly expanding, so lawyers may have to update themselves constantly about what is the new taboo."[135]

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role that members of the Goal III Commission entities played in promoting Model Rule 8.4(g) and, in particular, urging "that any knowledge qualifier be deleted" and for "the ambit of covered lawyer conduct to be broad").

133. Halaby & Long, *supra* note 8, at 227–31.

134. *See* Debra Chopp, *Addressing Cultural Bias in the Legal Profession*, 41 N.Y.U. REV. L. & SOC. CHANGE 367, 402–05 (2017) (stating that she "would have supported the elimination of the word 'knowingly' from" Model Rule 8.4(g), and asserting that lawyers should be required by professional conduct standards "to refrain from manifestations of bias, whether those manifestations come from their conscious or unconscious bias"). Chopp, however, insists that her proposed supplement to Comment [3] to address "unconscious biases" has educational rather than disciplinary objectives, and responds to potential concerns about "grievance procedures for unknowingly manifesting bias" with assurances that "it is the text of the rule that is authoritative, not the commentary to the rule." *Id.* at 404–05 (citing MODEL RULES OF PROF'L CONDUCT Preamble and Scope [21] (AM. BAR. ASS'N 2016)). But these assurances ring hollow, as pairing explicit Comment language on "unconscious biases" with black-letter text supporting disciplinary action against lawyers for what they "reasonably should know" would very likely impact the interpretation and application of the rule. *Cf.* Halaby & Long, *supra* note 8, at 245 ("Even crediting the existence of implicit bias as well as corresponding concerns over its impact on the administration of justice, one recoils at the dystopian prospect of punishing a lawyer over unconscious behavior.").

135. Dent, *supra* note 8, at 144 (footnote omitted) (citing Hannah Yi, *What Exactly Is a Microaggression? Let These Examples from Hollywood Movies Explain*, QUARTZ (Sept. 22, 2016), https://qz.com/787504/what-exactly-is-a-microaggression-let-these-examples-from-hollywood-movies-explain/ [https://perma.cc/XPA8-TTXP]); *cf.* Latonia Haney Keith, *Cultural Competency in a Post-Model Rule 8.4(g) World*, 2 DUKE J. GENDER L. & POL'Y 1, 41 (2017) (advocating that Model Rule 8.4(g) should be enforced by invoking "the 'reasonably culturally competent lawyer,' a mindful, self-aware lawyer of 'reasonable prudence and [cultural] competence,'" rather than "through the lens of the 'reasonable lawyer,' which is unfortunately a homogenous being capable of infusing bias in such decisions").

4. Is Model Rule 8.4(g) a Content-Based Speech Prohibition That, on the Face of its Comment, Discriminates Based on Viewpoint?

Model Rule 8.4(g) is a content-based speech prohibition and is not viewpoint neutral. In fact, on its face (via its explanatory Comment), it discriminates against disfavored viewpoints relating to the characteristics it identifies for protection. For example, Comment [4] states "[l]awyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations."[136] As Josh Blackman notes, this "well-intentioned" language expressly "sanctions one perspective on a divisive issue—affirmative action—while punishing those who take the opposite perspective."[137] It also strengthens concerns that "discrimination" and "harassment" relating to the characteristics identified in the text of Model Rule 8.4(g) will be interpreted and enforced in an ideologically one-sided, "politically correct" manner (i.e., only to protect subgroups the state bar authorities deem worthy of protection for historical, political, or cultural reasons, rather than evenhandedly to all persons regarding that characteristic).[138] "Diversity" and "inclusion" are "left undefined" by the rule,[139] and considering the progressive advocacy by the Goal III Commission entities during its drafting history,[140] there is no basis to infer any intent or desire to safeguard inclusion in the profession of lawyers with traditional religious and moral convictions.[141]

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136. MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 4 (AM. BAR ASS'N 2018).

137. Blackman, *A Pause for State Courts*, *supra* note 8, at 259.

138. *See* ROTUNDA, SUPPORTING "DIVERSITY" BUT NOT DIVERSITY OF THOUGHT, *supra* note 8, at 7 (stating that "[t]he ABA rule is not about forbidding discrimination based on sex or marital status; it is about punishing those who say or do things that do not support the ABA's particular view of sex discrimination or marriage.").

139. *See* Halaby & Long, *supra* note 8, at 240.

140. *See supra* note 132 and accompanying text (discussing Goal III Commission entities and their influence on the drafting of Model Rule 8.4(g)).

141. *Cf.* Aviel, *supra* note 118, at 58 n.139 (suggesting that because the text of the Comment *could* be construed as including ideological diversity, there is no viewpoint discrimination in the rule).

5. Does Model Rule 8.4(g) Actually Protect Lawyers' Freedom of Client Selection, Including Declinations Based on Their Moral Objections to Client Objectives?

Despite its ostensible nod of non-limitation, Model Rule 8.4(g) offers lawyers no actual protection against charges of "discrimination" based on their *discretionary* decision to decline representation of clients, including ones whose objectives are fundamentally disagreeable to the lawyer. Although the new rule states it "does not limit the ability of a lawyer to accept, decline or withdraw from a representation *in accordance with Rule 1.16*,"[142] Model Rule 1.16 itself provides no standard for when lawyers are *permitted* to decline client representation; rather, it addresses only when lawyers *must* decline representation, or when they may or must *withdraw* from representation.[143] So Model Rule 8.4(g)'s approval for lawyers to "decline" representation "in accordance with Rule 1.16" seems, on the face of the two rules, to allow only what was already required. And, as Ronald Rotunda observed, even if this new black-letter language does protect or acknowledge *some* right of lawyers to decline representation, Comment [5] "appears to interpret this right . . . narrowly,"[144] stating a lawyer commits no violation "by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved

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142. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018) (emphasis added).

143. *Id.* r. 1.16(a), (b) (mandating when "a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client," and stating when "a lawyer may withdraw from representing a client"); *see also* ROTUNDA & DZIENKOWSKI, *supra* note 8; Dorothy Williams, Note, *Attorney Association: Balancing Autonomy and Anti-Discrimination*, 40 J. LEGAL PROF. 271 (2016); Bradley Abramson, *Gagging Attorneys: A Critical Look at the ABA "Anti-Discrimination" Rule*, JURIST (July 31, 2017, 2:17 PM), https://www.jurist.org/commentary/2017/07/bradley-abramson-aba-rule [https://perma.cc/6EK4-U877]. Lawyers' essentially unrestricted freedom in initial client selection (outside the context of court appointments or violations of other law) has not been grounded in the black-letter text of the professional conduct rules; rather, it comes from the longstanding traditions, customs, and accepted ethical practices of the legal profession. *See* Collett, *Client Selection*, *supra* note 74, at 652 n.67; Dent, *supra* note 8, at 163 n.202; Williams, *supra*, at 271 (citing CHARLES WOLFRAM, MODERN LEGAL ETHICS § 10.2.2 (1986)).

144. ROTUNDA, SUPPORTING "DIVERSITY" BUT NOT DIVERSITY OF THOUGHT, *supra* note 8, at 5.

populations in accordance with these Rules and other law."[145] Thus, if state bar authorities consider a lawyer's declining representation—including a lawyer's moral objections to the client's objectives—as "manifest[ing] bias or prejudice," they may choose to prosecute the lawyer for violating their codified Model Rule 8.4(g).[146]

The risk that Model Rule 8.4(g) will interfere with lawyers' conscience-based decisions to decline representation is heightened by the adjacent statement in Comment [5] that "[a] lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities."[147] Although this language reiterates a concept of moral non-accountability already expressed in Model Rule 1.2(b),[148] its conspicuous placement in this Comment could be construed as meaning to deprive a lawyer charged with discrimination of any defense based on avoiding complicity with client objectives that conflict with the lawyer's religious or moral convictions.[149]

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145. MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 5 (AM. BAR ASS'N 2018).

146. There is already reason for concern that states adopting Model Rule 8.4(g) will apply it broadly and strictly (albeit unpredictably) to regulate client selection decisions by lawyers. As Bradley Abramson explains, "In the Reporter's Notes appended to Vermont's new rule, the Vermont Supreme Court expressly states that 'Rule 1.16 must also be understood in light of Rule 8.4(g)' and that an attorney's client selection or withdrawal decisions 'cannot be based on discriminatory or harassing intent without violating the rule.'" Abramson, *supra* note 143. "The lesson," he concludes, "is that—contrary to the representations of the rule's proponents—a regime governed by the new Model Rule will, in fact, require attorneys to represent clients they do not want to represent, and will subject them to possible discrimination claims from anyone whose representation the attorney declines." *Id.*; *see also* Gillers, *supra* note 118, at 231–32 (conceding that the United States Conference of Catholic Bishops' concerns about religious lawyers' loss of freedom in client selection under Model Rule 8.4(g) are well founded, though not a basis for objecting to the rule, and asserting "the prospect of a successful First Amendment defense under the Free Exercise Clause for violating [the rule] may be remote").

147. MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 5 (AM. BAR ASS'N 2018).

148. *Id.* r. 1.2(b); *see* McGinniss, *supra* note 88, at 7–8 (discussing Model Rule 1.2(b) and its "principle of non-accountability").

149. *See* Bradley S. Abramson, *6 Reasons States Should Shun ABA Attorney Misconduct Rule*, LAW 360 (Sept. 6, 2016, 10:17 PM), https://www.law360.com/texas/articles/836505/6-reasons-states-should-shun-aba-attorney-misconduct-rule [https://perma.cc/TH3R-WCMM] ("[O]ne would have to be obtuse not to grasp the fact that—by preemptively depriving attorneys of the claim that representing a client will make them complicit in a client's behavior—the ABA's very purpose in adopting this rule is to foreclose attor-

In this respect, the Board's dismissive treatment of the Catholic lawyer's moral objections to abortion in the 1996 Tennessee Ethics Opinion is particularly instructive of how state bar authorities might utilize this Comment language in support of discrimination charges.[150]

6. What Does Model Rule 8.4(g) Mean by "Legitimate Advice or Advocacy," and Whose Standard of "Legitimacy" Will Be Applied?

Model Rule 8.4(g) states that it "does not preclude legitimate advice or advocacy consistent with these Rules."[151] What makes advice or advocacy "legitimate" (or not) is neither defined nor elucidated in the Comment, although some guidance about relevance and materiality to the facts or law in representation had been offered in earlier Comment drafts.[152] As Andrew Halaby and Brianna Long explain, the word "cries for definition," particularly where "the subject matter is socially, culturally, and politically sensitive."[153] Looking to the "consistent with these

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neys from being able to assert religious or moral considerations in making client selection decisions, thereby forcing attorneys to either act against their conscience or face professional discipline. No state should adopt a rule that would do that.").

150. *See supra* Part II.

151. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018). Former Comment [3] to Model Rule 8.4 stated "[l]egitimate advocacy respecting [race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status] does not violate paragraph (d)." MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2015). It also specified "[a] trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule." *Id.* This caveat about racially-discriminatory preemptory challenges remained in new Comment [5]. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018); *see* ROTUNDA, SUPPORTING "DIVERSITY" BUT NOT DIVERSITY OF THOUGHT, *supra* note 8, at 6 (observing that the rule "does not tell us what is 'legitimate' advice or advocacy," but "a racially motivated peremptory challenge apparently may be legitimate").

152. In the April 2016 draft, Comment [3] stated "[p]aragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation." Halaby & Long, *supra* note 8, at 215–16. After further revision to this Comment in July 2016, it was finally dropped in August 2016 when the ABA Standing Committee on Ethics and Professional Responsibility added the "legitimate advice and advocacy" language to the black-letter text. *Id.* at 227–32.

153. Halaby & Long, *supra* note 8, at 237–38; *see also* Michael William Fires, Note, *Regulating Conduct: A Model Rule against Discrimination and the Importance of Legitimate Advocacy*, 30 GEO. J. LEGAL ETHICS 735, 741 (2017) ("[S]ince the in-

Rules" limitation, they point to Model Rule 2.1 and its requirements that advice be "candid" and its allowing for "advice" that refers "not only to the law but to other considerations," such as moral ones.[154] Presumably, the "legitimate advice" language in Model Rule 8.4(g) protects the full-spectrum of "candid advice" required and permitted under Model Rule 2.1.[155] But the lack of definition or explanation in the rule itself, and the circularity of "consistent with these Rules" (including other parts of Model Rule 8.4(g)), makes this harbor far from safe.[156] This is especially so for lawyers with traditional religious or moral convictions, often disparaged as so-called bigotry in contemporary political and popular culture and which may be deemed illegitimate by state bar authorities.[157] Moreover, considering that Model Rule 8.4(g) covers not only speech made in the course of representing clients or practicing law, but also speech "related to the practice of law," it is not clear whether a lawyer's "advocacy" on matters of law and public policy in an individual or organizational capacity will be

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clusion of the term 'legitimate advocacy' in the original Comment 3 to Rule 8.4, scholars have not only disagreed on an appropriate definition of 'legitimate advocacy' but have also struggled to create a simple way to distinguish 'legitimate advocacy' from illegitimate advocacy.").

154. Halaby & Long, *supra* note 8, at 242–43 (quoting MODEL RULES OF PROF'L CONDUCT r. 2.1).

155. *But cf.* Claudia E. Haupt, *Antidiscrimination in the Legal Profession and the First Amendment: A Partial Defense of Model Rule 8.4(g)*, U. PA. J. CONST. L. ONLINE, Apr. 2017, at 1, 12–17 (sketching restrictive boundaries for what constitutes "professional advice" under Model Rule 8.4(g)). The only "advice" that Haupt deems "professional" is advice "based on the accepted methodology of the knowledge community, that is . . . legal doctrine," rather than on "exogenous justifications" such as "religious, political, or philosophical" beliefs of the professional, recourse to which is contrary to clients' expectations and also places lawyers "outside of the knowledge community." *Id.* at 12–13. In critiquing Haupt's narrow vision of "legitimate advice," Dent observes that she provides "no evidence that this is true of all clients," and adds "many prominent lawyers have viewed their role as not just technicians of positive law, but as wise counselors advising their clients on ethics and prudence as well as the law." Dent, *supra* note 8, at 175–76, 176 n.295. In any event, Haupt's claim certainly "underscores the uncertain meaning of 'legitimate advice or advocacy'" in Model Rule 8.4(g). *Id.* at 176.

156. *See* ROTUNDA, SUPPORTING "DIVERSITY" BUT NOT DIVERSITY OF THOUGHT, *supra* note 8, at 6–7.

157. *See id.* at 7 ("The ABA rule is . . . about punishing those who say or do things that do not support the ABA's particular view.").

safeguarded from disciplinary challenge if it is deemed morally offensive and therefore "harmful."[158]

158. *See* Blackman, *A Pause for State Courts*, *supra* note 8, at 246–47, 258; *see also* Dent, *supra* note 8, at 154 ("Even if some harm is required, the comments do not indicate what *kind* of harm qualifies."). The only state thus far to have adopted Model Rule 8.4(g), Vermont, included Reporter's Notes suggesting its intent to construe narrowly the term "legitimate . . . advocacy":

> Rule 8.4(g) permits "legitimate advice or advocacy" consistent with the rules. Essentially, as new Comment [5] suggests, this language calls on the lawyer not to forget that even the client whose views or conduct would violate legal prohibitions against discrimination or harassment applicable to him or her may deserve representation under Rules 6.1 and 6.2. As Rule 1.2 makes clear, representation does not constitute endorsement of a client's views and may include efforts to assist the client to avoid unlawful activity. *The effect of Rule 8.4(g) is to prohibit the lawyer from expressing views as his own that would violate that rule.*

Order Promulgating Amendments to the Vermont Rules of Professional Conduct, slip op. at 3 (Vt. July 14, 2017), https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4%28g%29.pdf [https://perma.cc/L9SD-CM7N] (emphasis added). Not only does this Reporter's Note indicate Vermont deems expression of "views" as violating its Rule 8.4(g), it also appears to remove any legitimacy-based safe harbor for lawyers who express (i.e., advocate for) their "own" views on moral questions relating to the law.

7. Why Was the Exclusion for "Conduct . . . Protected by the First Amendment" Removed from the New Comment, and What Does this Deliberate Silence Betoken[159] for its Intended Application to (and Chilling Effects on) Lawyers' Speech?

Although Model Rule 8.4(g) creates an unprecedentedly broad range of speech subjecting lawyers to disciplinary action, the final version of its Comment dropped earlier draft language assuring writers and speakers on matters relating to the law that the rule "does not apply to conduct . . . protected by the First Amendment."[160] The December 2015 report accompanying that earlier draft language "ma[d]e clear that a lawyer does retain a 'private sphere' where personal opinion, freedom of association, religious expression, and political speech is protected by the First Amendment."[161] As Josh Blackman notes, the history behind its omission from the final version of the Comment suggests a "deliberate effort" to de-emphasize lawyers'

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159. In honor of this Article's protagonist, Saint Thomas More, "betoken" alludes to prosecutor Thomas Cromwell's argument that More was guilty of treason notwithstanding his silence:

> CROMWELL: Now, Sir Thomas, you stand upon your silence.
>
> MORE: I do.
>
> CROMWELL: But, Gentleman of the Jury, there are many kinds of silence. Consider first the silence of a man when he is dead. Let us say we go into the room where he is lying; and let us say it is in the dead of night—there's nothing like darkness for sharpening the ear; and we listen. What do we hear? Silence. What does it betoken, this silence? Nothing. This is silence, pure and simple. But consider another case. Suppose I were to draw a dagger from my sleeve and make to kill the prisoner with it, and suppose their lordships there, instead of crying out for me to stop or crying out for help to stop me, maintained their silence. That *would* betoken! It would betoken a willingness that I should do it, and under the law they would be guilty with me. So silence can, according to circumstances, speak.

BOLT, *supra* note 1, at 151.

160. Halaby & Long, *supra* note 8, at 215.

161. STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, AM. BAR ASS'N, DRAFT PROPOSAL TO AMEND MODEL RULE 8.4, at 5 (2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.pdf [https://perma.cc/US3Z-F9BJ]. The committee considered this language to be "a useful clarification" that "would appropriately address" some of the "possible First Amendment challenges" that could arise when "state courts adopted similar black letter provisions." *Id.*

First Amendment rights.[162] In any case, neither Model Rule 8.4(g), the new Comment language, nor the final ratified report contains even a passing mention of the First Amendment and the need to guard against overreaching disciplinary enforcement.[163] This development also reinforced the strong distrust its opponents already felt about the ultimate objectives for such a purposefully expansive rule and deepened their concerns about its potential abuse in targeting lawyers expressing disfavored traditional religious and moral viewpoints.[164]

B. States' Reception (and Widespread Rejection) of Model Rule 8.4(g)

In the more than two years since the ABA House of Delegates approved Model Rule 8.4(g) and the new Comment language, only one state, Vermont, has adopted it substantially as written.[165] A continually growing number of other state courts

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162. *See* Blackman, *A Pause for State Courts*, *supra* note 8, at 248–50. He describes testimony at the committee's February 2016 hearing urging the removal of the "First Amendment" language "because it 'take[s] away' from the purpose of the rule." *Id.* at 249 (alteration in original) (quoting Am. Bar Ass'n House of Delegates, Tr. of Proceedings at 43 (Feb. 7, 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.authcheckdam.pdf [https://perma.cc/WNZ3-BA4Y]).

163. *See* Blackman, *A Pause for State Courts*, *supra* note 8, at 250.

164. *See, e.g.*, Dent, *supra* note 8, at 178 ("Perhaps proponents of Rule 8.4(g) do not intend to comply with First Amendment precedent; perhaps they intend to initiate a 'cultural shift' in the meaning of the First Amendment and of the role of free speech in our society.").

165. Order Promulgating Amendments to the Vermont Rules of Professional Conduct, slip op. at 3 (Vt. July 14, 2017), https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4(g).pdf [https://perma.cc/Z8AU-8KHU]. The Vermont Supreme Court, in fact, made the rule's restrictions on lawyers even greater, adding language to Comment [4] to emphasize its clear intent to prohibit lawyers from making an otherwise *discretionary withdrawal* from representation: "The optional grounds for withdrawal set out in Rule 1.16(b) must also be understood in light of Rule 8.4(g). They cannot be based on discriminatory or harassing intent without violating that rule." *Id.* It further explained that, under the mandatory withdrawal provision of Rule 1.16(a), "a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g)." *Id.*; *see also* Andrew Strickler, *Vermont's Anti-Bias Rule Vote an Outlier in Heated Debate*, LAW 360 (Aug. 14, 2017), https://www.law360.com/articles/953530/vermont-s-anti-bias-rule-vote-an-outlier-in-heated-debate [https://perma.cc/LRK9-93WD].

and bar association committees have considered whether to adopt Model Rule 8.4(g) and have declined to do so.[166] The circumstances involved and the reasons for these declinations have been varied, but common themes have also emerged.[167]

Before August 2016, twenty-three states and the District of Columbia had already adopted black-letter rules of professional conduct addressing issues relating to bias in the legal profession.[168] For example, in December 2016, the Illinois State Bar Association recommended that its Supreme Court retain existing rules prohibiting lawyers from engaging in "discrimination" violating established civil law standards and only after a civil claim has been successfully adjudicated against the lawyer.[169] Model Rule 8.4(g) has been considered either by petition or bar association rules committee review in many other states, including Nevada (where those proceedings concluded with-

166. *See* Am. Bar Ass'n Ctr. for Prof. Responsibility, Pol'y Implementation Comm., *Jurisdictional Adoption of Rule 8.4(g) of the ABA Model Rules of Professional Conduct*, AM. BAR ASS'N (Sept. 19, 2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adopt_8_4_g.authcheckdam.pdf [https://perma.cc/T3KD-4DFB].

167. *See* David L. Hudson Jr., *States split on new ABA Model Rule limiting harassing or discriminatory conduct*, A.B.A. J. (Oct. 2017), http://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct/ [https://perma.cc/MU8J-PNTC].

168. *Comparison of State Black-Letter Rules to Model Rule 8.4(g)*, CHRISTIAN LEGAL SOC'Y, https://www.christianlegalsociety.org/pdfs/1004.pdf [https://perma.cc/J6PG-6LSC] (last visited Dec. 3, 2018); *see also* MODEL RULES OF PROF'L CONDUCT r. 8.4 app. B (AM. BAR ASS'N, Discussion Draft July 2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf [https://perma.cc/VA89-4UPQ] (cataloging anti-bias provisions in state rules of professional conduct).

169. *See* ILL. RULES OF PROF'L CONDUCT r. 8.4(d), (j) (2018), http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm#8.4 [https://perma.cc/2K7K-F68B]; Mark S. Mathewson, *ISBA Assembly OKs futures report, approves UBE and collaborative law proposals*, ILL. ST. BAR ASS'N: ILL. LAW. NOW (Dec. 15, 2016), https://www.isba.org/iln/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals [https://perma.cc/59W3-2YG7]. The Court requested and received comments from the public, and as of July 2018 the issue remained pending. *See ABA Model Rule 8.4(g) Efforts in Illinois*, CHRISTIAN LEGAL SOC'Y, https://www.christianlegalsociety.org/aba-model-rule-illinois [https://perma.cc/YKV8-VK2R] (last visited Dec. 3, 2018).

out changes to existing rules)[170] and Maine (which rejected Model Rule 8.4(g) in favor of a far narrower rule).[171]

The most dramatic intragovernmental conflict thus far occurred in Montana. When, despite vocal and vigorous opposition, the Montana Supreme Court initiated and continued a notice and comment process on Model Rule 8.4(g), the Montana Legislature passed a joint resolution in April 2017 resolving that the proposed rule, if adopted, would violate the Constitutions of the United States (First Amendment) and Montana (separation of powers and exceeding judicial authority "to regulate the speech and conduct of attorneys").[172] Moreover, the attorneys general of Texas (December 2016), South Carolina (May 2017), Louisiana (September 2017), and Tennessee (March 2018) each issued a detailed legal opinion concluding that Model Rule 8.4(g) would violate the First Amendment if adopted by their courts.[173] In Texas, that was the end of the sto-

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170. Order in the Matter of Amendments to Rule of Prof'l Conduct 8.4, ADKT-0526 (Nev. Sept. 25, 2017), https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf [https://perma.cc/6UPK-B9GU].

171. Order Issuing Proposed Amendment to the Me. Rules of Prof'l Conduct (Me. Nov. 30, 2017), http://courts.maine.gov/rules_adminorders/rules/proposed/mr_prof_conduct_proposed_amend_2017-11-30.pdf [https://perma.cc/BV88-484B] (adding new Maine Rule 8.4(g) prohibiting a lawyer from "engag[ing] in unlawful harassment or unlawful discrimination"; also explaining that "Maine has considered, but not adopted, the ABA Model Rule 8.4(g)" and that "Maine's version makes a statement to all attorneys that the profession does not tolerate unlawful harassment or unlawful discrimination"). *See generally A Misguided Proposed Ethics Rule Change: ABA Model Rule 8.4(g) and the States*, CHRISTIAN LEGAL SOC'Y: CTR. FOR L. & RELIGIOUS FREEDOM, https://www.clsreligiousfreedom.org/resources/aba-model-rule-84g-and-states [https://perma.cc/XXS8-AFU5] (last visited July 30, 2018). For an excellent summary of arguments made in opposition to Model Rule 8.4(g) in response to state supreme courts' requests for comments, see Christian Legal Soc'y, Comment Letter Opposing Adoption of Model Rule 8.4(g) (May 3, 2018), https://www.clsnet.org/document.doc?id=1126 [https://perma.cc/8NZH-NG9U].

172. S.J. Res. 15, 65th Leg. (Mont. 2017), http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf [https://perma.cc/9DRA-JSRG].

173. ABA Model Rule of Professional Conduct 8.4(g) and LSBA proposed Rule 8.4(g) violate the First and Fourteenth Amendments of the United States Constitution, La. Att'y Gen. Op. 17-0114 (Sept. 8, 2017), https://www.ag.state.la.us/Opinions [https://perma.cc/9TWR-8GY9] (select "Search Released Opinions"; then enter "17-0114"); S.C. Att'y Gen. Op. Letter to Hon. John R. McCravy III, S.C. House of Representatives (May 1, 2017), http://www.scag.gov/wp-content/uploads/2017/05/McCravy-J.-OS10143-

ry, and the state retained its existing anti-bias rule.[174] Subsequently, the Supreme Courts of South Carolina (June 2017)[175] and Tennessee (April 2018)[176] issued orders rejecting Model Rule 8.4(g).[177]

In some jurisdictions, Model Rule 8.4(g) has been rejected for reasons that combined preference for an existing state rule and great concerns about First Amendment problems and potential chilling effects on lawyers' speech. For example, in September 2017, North Dakota's Joint Committee on Attorney Standards

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FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf [https://perma.cc/ED72-3UGM]; American Bar Association's New Model Rule of Professional Conduct 8.4(g), Tenn. Att'y Gen. Op. 18-11 (Mar. 16, 2018), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2018/op18-11.pdf [https://perma.cc/DZY2-YG23]; Whether adoption of the American Bar Association's Model Rule of Professional Conduct 8.4(g) would constitute violation of an attorney's statutory or constitutional rights (RQ-0128-KP), Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016), https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf [https://perma.cc/M248-HKGG].

174. *See* TEXAS DISCIPLINARY RULES OF PROF'L CONDUCT r. 5.08 (2018), https://www.texasbar.com/AM/Template.cfm?Section=Home&ContentID=27271&Template=/CM/ContentDisplay.cfm [https://perma.cc/U429-8VG9].

175. Order Declining to Incorporate Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct, No. 2017-000498 (S.C. June 20, 2017), http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01 [https://perma.cc/5WFV-65PS].

176. Order Denying Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g), No. ADM2017-02244 (Apr. 23, 2018), https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf [https://perma.cc/6HBN-7TAA]; *see also* Mindy Rattan, *Tennessee Again Rejects Anti-Discrimination Ethics Rule*, BLOOMBERG LAW (Apr. 27, 2018), https://www.bna.com/tennessee-again-rejects-n57982091727/ [https://perma.cc/EG95-X7PA].

177. The Supreme Courts of Arizona (August 2018) and Idaho (September 2018) also have issued orders rejecting Model Rule 8.4(g). *See* Kim Colby, *Two More State Supreme Courts Reject ABA Model Rule 8.4(g)*, FEDERALIST SOC'Y (Sept. 17, 2018), https://fedsoc.org/commentary/blog-posts/two-more-state-supreme-courts-reject-aba-model-rule-8-4-g [https://perma.cc/63Y9-ANK6]. Following its attorney general's opinion, Louisiana's State Bar Association Committee on the Rules of Professional Conduct voted not to proceed with either Model Rule 8.4(g) or an alternative rule draft proposed by its subcommittee. *See LSBA Rules Committee Votes Not to Proceed Further with Subcommittee Recommendations Re: ABA Model Rule 8.4(g)*, LA. ST. BAR ASS'N (Oct. 30, 2017), https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892 [https://perma.cc/74SP-Z3TH].

recommended against the adoption of Model Rule 8.4(g)[178] in preference for its Supreme Court's existing black-letter rule prohibiting "conduct that is prejudicial to the administration of justice."[179] In North Dakota's rule, such conduct includes to "knowingly manifest through words or conduct in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation, against parties, witnesses, counsel, or others, except when those words or conduct are legitimate advocacy because [one of those characteristics] is an issue in the proceeding."[180] In addition, North Dakota's Committee members stated serious concerns that Model Rule 8.4(g) is "overbroad, vague, and imposes viewpoint discrimination" and "may have a chilling effect on free discourse by lawyers with respect to controversial topics or unpopular views," and expressed "uncertainty with how the phrase 'conduct relat[ed] to the practice of law' would be interpreted."[181]

C. Justified Distrust of Speech Restrictions: "Cultural Shift" in the Legal Profession against Socially Conservative Viewpoints

In his leading 2017 article on Model Rule 8.4(g) and the First Amendment, Josh Blackman recounts a story that illustrates the clash of perspectives on whether the risks that the new rule poses to lawyers' freedom of speech are real and worthy of concern:

> During the 2016 Federalist Society National Lawyers Convention, Professors Eugene Volokh and Deborah Rhode debated how the new rule [8.4(g)] interacted with the First

178. Letter from Hon. Dann E. Greenwood, Chair, Joint Comm. on Att'y Standards, to Hon. Gerald E. VandeWalle, Chief Justice, N.D. Sup. Ct. (Dec. 14, 2017) [hereinafter N.D. Att'y Standards Letter], https://perma.cc/3FCP-B55J.

179. N.D. RULE OF PROF'L CONDUCT r. 8.4(f) (2018), http://www.ndcourts.gov/rules/conduct/frameset.htm [https://perma.cc/6LDY-ZU5B].

180. *Id.*

181. N.D. Att'y Standards Letter, *supra* note 178; *see also* Meeting Minutes, Joint Comm. on Att'y Standards (Sept. 15, 2017), http://www.ndcourts.gov/court/committees/Jt_ASC/MinutesSept2017.pdf [https://perma.cc/HYA5-A5EC]; Meeting Minutes, Joint Comm. on Att'y Standards (Mar. 24, 2017), http://www.ndcourts.gov/court/committees/Jt_ASC/MinutesMarch2017.pdf [https://perma.cc/55DG-APSZ].

> Amendment. . . . Professor Volokh worried that complaints could be filed against a speaker at a CLE event who critiques the Supreme Court's decision in *Obergefell v. es*.[182] . . . Volokh stressed that what the drafters of the rule "are getting is exactly what they are intending. They are intending to suppress particular views in these kinds of debates."
>
> Professor Rhode was not particularly concerned with the potential for abuse. From her experiences, disciplinary committees "don't have enough resources to go after people who steal from their clients' trust fund accounts." She found "wildly out of touch with reality" the "notion that they are going to start policing social conferences and go after people who make claims about their own views about" religion or sexual orientation. . . . She concluded her remarks, *"We're a profession that knows better than that." Rhode paused. "I would hope."*
>
> Moments later, [moderator] Judge [Jennifer] Walker Elrod asked whether Professor Rhode's position "would depend on a trust . . . that the organizations would not be going after people that they don't like, such as . . . conservatives." She asked, "We would have to just trust them?" The Federalist Society luncheon, packed with right-of-center lawyers, laughed aloud. Professor Rhode interjected that Rule 8.4(g) did not depend on trusting the disciplinary crowds alone. "And the Courts!" she added. "My [G]od, I never thought I'd be saying this at a Federalist Society conference, the Rule of Law people, it's still out there!" *Professor Rhode concluded, "I don't think we'd see a lot of toleration for those aberrant complaints." In other words, trust the bar such that the rules would not be abused.*[183]

Blackman elaborates on the Volokh/Rhode debate and reaches a well-justified conclusion:

> During her remarks at the Federalist Society conference, Professor Rhode admitted that she viewed Rule 8.4(g) as "a largely symbolic gesture," and that "the reason why proponents wanted it in the Code was as a matter of educating the next generation of lawyers as well as a few practitioners in

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182. 135 S. Ct. 2584 (2015).

183. Blackman, *A Pause for State Courts*, *supra* note 8, at 261 (final two ellipses in original) (emphases added) (footnotes omitted).

> this one about *other* values besides First Amendment expression." Her answer is quite revealing. Even before Rule 8.4(g) was adopted, attorneys who engaged in sexual harassment and other forms of discrimination were already subject to liability under federal, state, and local employment law, which extend beyond the actual workplace. . . .
>
> What Rule 8.4(g) does accomplish is "educating the next generation of lawyers" about what sorts of speech are permitted, and what sorts of speech are not. . . . At bottom, this rule, and its expansion of censorship to social activities with only the most tenuous connection with the delivery of legal services, is not about education. It is about reeducation.[184]

Other legal ethics scholars, such as Stephen Gillers, have echoed Rhode's sanguinity in response to arguments against Model Rule 8.4(g) for contravening First Amendment freedoms and values.[185] One 2018 article by lawyer Robert Weiner has gone so far as to assert in its title, and insist in its analysis, that there is "*Nothing to See Here*" for those who value the letter and spirit of the First Amendment.[186] In a 2018 article providing a comprehensive First Amendment Free Speech Clause study of Model Rule 8.4(g), however, Rebecca Aviel identifies an overbreadth problem stemming from its expansive Comment language on "harassment."[187] She advises reinstating an earlier

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184. *Id.* at 264–65.

185. Similar to Rhode, Gillers insists that "[e]xperience teaches us that the kind of biased or harassing speech that will attract the attention of disciplinary counsel will not enjoy First Amendment protection." Gillers, *supra* note 118, at 235. Yet in this same article, he uses broad language to describe his view of the scope of sanctionable violations under Model Rule 8.4(g) that would purportedly withstand First Amendment scrutiny by the courts. *See id.* at 237 ("No lawyer has a First Amendment right to *demean* another lawyer (or anyone involved in the legal process).") (emphasis added). Although he does not "foreclose the possibility of improvement" in its drafting, *id.* at 238, Gillers concludes that the rule is not overbroad or vague despite its use of general, sweeping terms such as "demeaning" and "derogatory" to describe what kind of "harassment" will be prosecutable. That Gillers provides just one extreme example—i.e., "if one were to seek to discipline a lawyer who said 'ladies first' when opening a door for a woman"—as his step too far for prosecution under the First Amendment provides little reassurance about his view of the rule's proper scope and potential enforcement. *Id.* at 237; *see also* Dent, *supra* note 8, at 20 ("Gillers lists some examples that he says would not violate the rule, but these are so innocuous as to give little reassurance about the scope of the rule.").

186. *See* Weiner, *supra* note 118, at 125.

187. *See* Aviel, *supra* note 118, at 38.

draft's black-letter rule requirement that neither "discrimination" nor "harassment" is a violation unless it is "against a person."[188] But in other respects, Aviel concludes that the rule is facially constitutional and insisted that lawyers, rather than objecting to its adoption as an infringement of their freedoms, should simply defend themselves against abuses of the rule by asserting constitutional violations on an as-applied basis.[189] Her arguments on First Amendment Free Speech Clause issues involving Model Rule 8.4(g) are distinctive insofar as she "engages in the close textual analysis that is necessary to assess whether Rule 8.4(g) is overbroad."[190] But ultimately her assurances that the rule is only a modest revision away from constitutional security, and her insistence that its reach into the "illusive private sphere" is "neither unprecedented nor particularly troubling against the existing backdrop of lawyer regulation," offer little comfort for socially conservative lawyers.[191]

In any case, the powerful distrust exhibited by many lawyers and scholars about the scope of the agenda for—and what could go wrong with—Model Rule 8.4(g) has remained deep

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188. *See id.* at 58.

189. *See id.* at 74; *cf.* Dent, *supra* note 8, at 178 ("This is not how the First Amendment works. Those subject to speech restrictions are entitled to know *in advance* what the boundaries are; they cannot be forced into case-by-case Russian roulette in which a wrong guess about the scope of a rule can destroy one's career.").

190. Aviel, *supra* note 118, at 45. Although Gillers exhibits little concern with accommodating the consciences of lawyers with traditional religious and moral views relating to the law, Aviel at least recognizes the genuine risks that the overbreadth problems with Model Rule 8.4(g) could pose. *Compare* Gillers, *supra* note 118, at 232 *with* Aviel, *supra* note 118, at 56.

191. *See* Aviel, *supra* note 118, at 63, 74. Recent developments in American legal advocacy and the culture of the legal profession also reflect it would be unwise for socially conservative lawyers to support Model Rule 8.4(g) on the optimistic assumption that all state bar authorities, state courts, and federal courts will always rigorously adhere to the most speech-protective precedents of the United States Supreme Court, and, moreover, that those precedents will never be weakened by any subsequent Court decision on the First Amendment (including by tomorrow's Justices, who may well be drawn from the ranks of today's anti-free-speech legal activists). *See infra* Part III.C.3 (Rising Opposition to Free Speech on College Campuses and in Law Schools); *see also* Dent, *supra* note 8, at 179 ("The speech code imposed by 8.4(g) may not be the end goal but merely one more step in the campaign to end free speech and to substitute a standard of partisan political correctness for what any American is allowed to say.").

and persistent. Why have organizations such as the United States Conference of Catholic Bishops[192] and the Christian Legal Society[193] written in opposition to the breadth of the new rule, not to mention a cascade of individual lawyers submitting comments first to the ABA's Standing Committee on Ethics and Professional Responsibility,[194] and then to state supreme courts around the country?[195] To understand why, it is necessary to consider how the rule's development, adoption, and attempted implementation in the states has occurred alongside the legal profession's efforts in other areas to marginalize social conservatives, including lawyers holding and expressing traditional religious and moral views on matters of sexual ethics.

In the December 2015 report accompanying the only draft version of Model Rule 8.4(g) for which opportunities for public comment and a hearing were offered, the ABA Standing Committee on Ethics and Professional Responsibility quoted with approval an earlier supportive comment—on an analogous proposal for the ABA Young Lawyers Division Assembly—that it had received from the Oregon New Lawyers division: "There is a need for a *cultural shift* in understanding the inherent integrity of people regardless of their race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability, to be captured in the

192. *See* United States Conference of Catholic Bishops, Comment Letter on Proposed Amendment to Model Rule 8.4 (Mar. 10, 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/moses_3_11_16.authcheckdam.pdf [https://perma.cc/KKS4-KJQZ].

193. *See, e.g.*, Christian Legal Soc'y, Comment Letter on Proposed Rule 8.4(g) and Comment 3 (Mar. 10, 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/nammo_3_10_16.authcheckdam.pdf [https://perma.cc/Y8Q2-KSF9].

194. *See Model Rule 8.4 Comments*, AM. BAR ASS'N (July 12, 2016), https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments/ [https://perma.cc/6HSZ-59GU].

195. *See, e.g.*, Rattan, *supra* note 176 (noting that the proposed Rule 8.4(g) in Tennessee "generated voluminous comments from law professors, practitioners, and religious groups" before its rejection by the Tennessee Supreme Court).

rules of professional conduct."[196] The concept of promoting and increasing civility and respectfulness in lawyers' interactions with others is not only entirely uncontroversial, but also entirely deserving of enthusiastic support and promotion, especially with respect to persons who have historically been marginalized in the legal profession. For example, for lawyers who are faithful Catholics, the intrinsic value and dignity of all human beings—born and unborn—is a foundational principle of the moral law,[197] and this understanding should impact each communication they have with others in their personal and professional lives. But asserting "cultural shift" within the legal profession as a broader goal for Model Rule 8.4(g) has raised social conservatives' suspicions that, if adopted by the states, it could be employed to discipline lawyers for (1) expressing viewpoints on law and morality that are disfavored by state bar authorities and courts, or (2) declining client representations for religious and moral reasons that may be deemed to reflect adversely on their "fitness" for the practice of law.[198]

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196. STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, *supra* note 161, at 2 (emphasis added) (quoting a proposal from the Oregon New Lawyers Division).

197. *See* CATECHISM OF THE CATHOLIC CHURCH, *supra* note 106, ¶ 1700 ("The dignity of the human person is rooted in his creation in the image and likeness of God."); *id.* ¶ 1978 ("The natural law is a participation in God's wisdom and goodness by man formed in the image of his Creator. It expresses the dignity of the human person and forms the basis of his fundamental rights and duties."); *see also id.* ¶ 2270 ("Human life must be respected and protected absolutely from the moment of conception.").

198. *Cf.* MODEL RULES OF PROF'L CONDUCT r. 8.4(b), (c) (AM. BAR ASS'N 2018) (providing that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on lawyer's honesty, trustworthiness or fitness as a lawyer" or to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"). Aviel defends the scope of Model Rule 8.4(g) by pointing to these two rules, both of which apply to lawyers' behavior outside of law practice. Aviel, *supra* note 118, at 64–67. For Model Rule 8.4(b), however, there is a check on the discretion of state bar authorities' "fitness" analysis because the underlying conduct must constitute an actual crime (i.e., be unlawful), a requirement that does not exist under Model Rule 8.4(g). As for Model Rule 8.4(c), Aviel is right that the rule "simply assumes" lawyers' deceptions—in practicing law or otherwise—raise professional "fitness" concerns. *Id.* at 64. However, because honesty/dishonesty is an ideologically-neutral character trait (unlike the socially and politically charged issues Model Rule 8.4(g) implicates), Model Rule 8.4(c) presents far less risk of selective prosecution based on viewpoint.

The anxiety among socially conservative lawyers has been increasingly acute as growing numbers of lawyers and academics have been promoting a wave of intolerance for viewpoint diversity and religious liberty. In its 2015 decision in *Obergefell v. Hodges*, the United States Supreme Court concluded that the Constitution requires states to issue licenses for same-sex civil marriages and recognize them under the law equally with opposite-sex civil marriages.[199] At the time of the decision, high-profile litigation was already well underway against business owners, such as photographers, bakers, and florists, for declining on religious grounds to provide artistically expressive services for same-sex weddings.[200] Then, in May 2016, with the U.S. presidential election approaching and surely anticipating Democrat Hillary Rodham Clinton would prevail over Republican Donald J. Trump, law professor Mark Tushnet advocated that liberals adopt a scorched-earth approach to vanquishing moral traditionalists in the courts:

> *The culture wars are over; they lost, we won*. . . . For liberals, the question now is how to deal with the losers in the culture wars. . . . Trying to be nice to the losers didn't work well after the Civil War, nor after *Brown* [*v. Board of Education*[201]]. (And taking a hard line seemed to work reasonably well in Germany and Japan after 1945.) . . . When specific battles in the culture wars were being fought, it might have made sense to try to be accommodating after a local victory, because other related fights were going on, and a hard line might have stiffened the opposition in those fights. But the war's over, and we won.[202]

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199. 135 S. Ct. 2584, 2607 (2015).

200. *See, e.g.*, Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015) (bakers), *cert. denied sub nom.* Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *rev'd*, 138 S. Ct. 1719 (2018); Elane Photography, LLC v. Willock, No. CV-2008-06632, 2009 WL 8747805 (N.M. Dist. Ct. Dec. 11, 2009) (photographers), *aff'd*, 284 P.3d 428 (N.M. Ct. App. 2012), *aff'd*, 309 P.3d 53 (N.M. 2013); State v. Arlene's Flowers, Inc., 2015 WL 720213 (Wash. Super. Ct. Feb. 18, 2015) (florists), *aff'd*, 389 P.3d 543 (Wash. 2017), *cert. granted & judgment vacated*, 138 S. Ct. 2671 (2018).

201. 347 U.S. 483 (1954).

202. Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BLOGSPOT: BALKINIZATION (May 6, 2016), https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html [https://perma.cc/4NQW-8HLF].

After President Trump's election in November 2016, Randy Barnett responded to Tushnet's provocative declaration of legal Armageddon against socially conservative Americans, whom Tushnet called "the losers" after years of ideological "lawfare" and whom he demeaned as deplorable enemies comparable to the Confederacy, the Jim Crow South, Nazi Germany, and the expansionist Japanese Empire in World War II:[203]

> While Tushnet attributes the origination of the "culture war" metaphor to [Justice Scalia's dissent in *Romer v. ans*[204]], Scalia was only candidly acknowledging and labeling an already existing "state of war," not declaring a new one. And in stark contrast with Tushnet, Scalia was faulting judges for taking sides in the culture war taking place outside the courts. Contrary to Scalia, then, Tushnet wants the courts to ram his side of the culture war down the throats of any recalcitrant Americans he calls "losers." But the Trump victory represents a repudiation of Tushnet's claim that the culture war has already been won by the Left. The "losers" have struck back.[205]

Pronouncements such as Tushnet's, when combined with aggressive litigation in civil rights commissions and the courts,[206] reinforced fears among socially conservative lawyers

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203. *Id.*

204. 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) ("I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.").

205. Randy Barnett, *Abandoning Defensive Crouch Conservative Constitutionalism*, WASH. POST: VOLOKH CONSPIRACY (Dec. 12, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/12/abandoning-defensive-crouch-conservative-constitutionalism [https://perma.cc/4JLL-4FE2]; *see also id.* ("To be clear, I strongly support the fundamental liberties and equal rights of all, including LGBT. But I also support the liberty of those with different moral and religious views.").

206. *See, e.g.*, Zubik v. Burwell, 136 S. Ct. 1557, 1559 (2016) (religious freedom litigation based on Obama Department of Health and Human Services regulations mandating that religiously affiliated institutions, including the Little Sisters of the Poor and Christian colleges and universities, act to make insurance coverage for contraceptives available to their employees or provide a form stating their objections on religious grounds); *see also* MARY EBERSTADT, IT'S DANGEROUS TO BELIEVE: RELIGIOUS FREEDOM AND ITS ENEMIES 93 (2016) (describing the Obama Administration's aggressive litigation to enforce its contraceptive regulatory mandates against the Little Sisters of the Poor and "make [them] knuckle under to whatever is demanded in the sexual revolution's name").

that dominant forces in the American bar were willing to use their authority through the courts to exact conformity or silence as the price of their continued licensure and inclusion in the legal profession.[207] For the sake of progressives' desired "cultural shift," diverse expression and exercise of conscience by socially conservative moral dissenters could be chilled, at best, and retaliated against, at worst. And Model Rule 8.4(g)—with the ardent resolution from Goal III Commission entities that its restrictions must be broad and that a narrowly tailored approach was unacceptable[208]—became emblematic of that larger cultural effort to marginalize and deter conscientious objectors on matters relating to the law and sexual ethics.

The backdrop of elements that combined to feed and sustain the strong resistance to the adoption of Model Rule 8.4(g) is multifaceted, and includes: (1) the ABA's support for extensive abortion rights under the law, and progressive lawyers' longstanding advocacy for broad restrictions on speech opposing abortion; (2) recent advocacy of speech restriction and compulsion relating to same-sex marriage, including a state judicial conduct commission's hyper-aggressive efforts to remove from the bench a Wyoming municipal judge and part-time magistrate; and (3) rising opposition to free speech on college campuses and, increasingly, even in law schools.

1. The ABA's Support for Expansive Abortion Rights, and Progressive Lawyers' Longstanding Advocacy for Broad Restrictions on Speech Opposing Abortion

For decades, the ABA as an organization has been far from neutral on the issue of American law on abortion rights and

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207. *See, e.g.*, Ryan T. Anderson, *Harvard Law Professor Says Treat Conservative Christians Like Nazis*, DAILY SIGNAL (May 9, 2016), https://www.dailysignal.com/2016/05/09/harvard-law-professor-says-treat-conservative-christians-like-nazis [https://perma.cc/GWN7-AHSG]; *see also* Anderson & Girgis, *supra* note 123, at 205 (observing "[t]he hardening of a *consensus* against compromise" on issues such as religious accommodations relating to same-sex marriage, and opining that the reason for these aggressive strategies is "less to empower some than to encumber others: to delegitimize those convictions and actions that it is gratuitous to crush").

208. *See* Halaby & Long, *supra* note 8, at 216–18, 226.

related public policy.[209] In fact, it has a long history of advocacy in support of expansive abortion rights under the law. In 1972, one year before the United States Supreme Court decided *Roe v. Wade*,[210] the ABA supported states' adoption of the Uniform Abortion Act, which would have placed no limitations on abortion during the first twenty weeks of pregnancy.[211] At the mid-year meeting in 1990, the ABA House of Delegates adopted and then, after receiving vociferous objections and mass resignations of members, promptly rescinded a resolution expressing the ABA's opposition to any law that "interferes" with the decision to obtain an abortion for any reason "at any time before the fetus is capable of independent life."[212] But in 1992, in the aftermath of *Planned Parenthood of Southeastern Pennsylvania v. Casey*[213] and leading up to the U.S. presidential election,[214] the ABA House of Delegates, by a vote of 276–168, adopted a resolution reflecting the organization's position on abortion law that tracked the broad language of a "Freedom of Choice Act" then pending before Congress.[215] ABA President Talbot

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209. *See, e.g.*, David M. Leonard, Note, *The American Bar Association: An Appearance of Propriety*, 16 HARV. J.L. & PUB. POL'Y 537, 548, 551–55 (1993).

210. 410 U.S. 113 (1973).

211. Leonard, *supra* note 209, at 548. For details on the Uniform Abortion Act, see *Roe*, 410 U.S. at 146–47 n.40.

212. Leonard, *supra* note 209, at 551–52.

213. 505 U.S. 833 (1992).

214. *See* Leonard, *supra* note 209, at 550. At the 1992 ABA Annual Meeting, Hillary Rodham Clinton was invited to be the keynote speaker at a luncheon honoring Anita Hill. *Id.* Published accounts reflect little effort to disguise the political partisanship involved:

> Although Vice President Quayle had requested the opportunity to speak, he was denied an invitation. Philadelphia attorney Jerome Shestack, a former aide to Senator Joseph Biden and a member of the powerful ABA Board of Governors, claimed that Vice President Quayle would have been invited if he were "a person of personal stature or legal ability, but there wasn't anything of enlightenment that he could contribute, and the members already know how to spell." This condescending attitude speaks for itself.

Id. (footnote omitted).

215. *Id.* at 552. The text of the resolution stated:

> BE IT RESOLVED, That the American Bar Association opposes state or federal legislation which restricts the right of a woman to choose to terminate a pregnancy (i) before fetal viability; or (ii) thereafter, if such termination is necessary to protect the life or health of the woman.

D'Alemberte and other speakers sought to defend the organization's break from its years of neutrality on this contentious issue by favorably comparing the securing of broad legal rights for abortion to the 1950s and 1960s battles for civil rights laws combating racial discrimination.[216] The deeply offensive implied message—that lawyers who wished to secure protections and justice under the law for unborn humans were the moral equivalent of Jim Crow-era opponents to civil rights for African-Americans—provided no reason for pro-life and other socially conservative lawyers to mitigate their strong apprehensions about the direction that the ABA was taking as the "national representative of the legal profession."[217] Attorney General William Barr spoke for many when, soon before the annual meeting where the House of Delegates was to vote on the resolution, he wrote a letter to ABA President D'Alemberte with these words:

> It is difficult to understand why the ABA should feel compelled to take a position on this divisive political issue. As a professional association, the ABA is an important voice in the consideration of policies that affect the work of America's lawyers. By adopting the resolution and thereby endorsing one side of this debate, the ABA will endanger the perception that it is an impartial and objective professional association. It seems to me that this perception of impartiality and political neutrality is essential if the ABA is to fulfill the various roles and functions it seeks to perform on behalf of the bar.[218]

> BE IT FURTHER RESOLVED, That the American Bar Association supports state and federal legislation which protects the right of a woman to choose to terminate a pregnancy (i) before fetal viability; or (ii) thereafter, if such termination is necessary to protect the life or health of the woman.

Id. (quoting AM. BAR ASS'N, SUMMARY OF ACTION TAKEN BY THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION 56 (1992)); *see also* Don J. DeBenedictis, *ABA Supports Abortion Rights*, A.B.A. J., Oct. 1992, at 32, 32; Mark Hansen, *Abortion Rights Before ABA House: Opponents Promise A Fight To Retain Neutrality Position Adopted In 1990*, A.B.A. J., Aug. 1992, at 22, 22.

216. DeBenedictis, *supra* note 215.

217. *ABA Mission and Goals*, AM. BAR ASS'N (June 11, 2018), https://www.americanbar.org/about_the_aba/aba-mission-goals.html [https://perma.cc/E5LL-VBKY].

218. Leonard, *supra* note 209, at 555 (quoting Letter from William Barr, U.S. Attorney General, to Talbot D'Alemberte, ABA President (Aug. 7, 1992)).

In the years that followed, although the ABA refrained from direct involvement as amicus curiae in the Supreme Court in cases involving abortion or First Amendment cases on speech restrictions relating to pro-life advocacy,[219] its steadfast opposition to even the most basic humanitarian measures to protect unborn children has never been in doubt. And the 1990-1992 campaign within the ABA to ensconce abortion rights as a featured policy of the organization left scars that were exposed when the movement to adopt Model Rule 8.4(g) was undertaken almost a quarter-century later. In essence, when the ABA advocates for creating a "cultural shift" in the legal profession using rules of professional conduct enforceable by disciplinary action, it approaches that conversation with its credibility among socially conservative lawyers already long and profoundly damaged.[220] This sorely depleted trust is a price the ABA has paid for its ideologically one-sided activism on matters of law and public policy. "Trust us and our fairness and restraint" are words no longer heeded; "conform or else" is the message received.

Moreover, there are no reasonable assurances that pro-life speech and advocacy will remain safe in the long run from bar authorities and courts in states that adopt Model Rule 8.4(g). The rule's overbroad account of what "discrimination" and "harassment" include—that is, derogatory or biased speech—will open the door selectively to prosecute lawyers who express opposition to abortion or abortion rights in contexts that are "related to the practice of law" yet deemed somehow "illegitimate." Aside from the often-heard (and entirely wrongful

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219. *See Amicus Curiae Briefs*, AM. BAR ASS'N, https://www.americanbar.org/groups/committees/amicus.html [https://perma.cc/4X52-HVHQ] (last visited Dec. 3, 2018). *But cf.* Ben Sasse, *Group That Rates Trump's Judicial Nominees Has History of Liberal Advocacy*, DAILY SIGNAL (Nov. 17, 2017), https://www.dailysignal.com/2017/11/17/sasse-to-aba-the-american-bar-association-is-not-neutral [https://perma.cc/K9J9-8M8C] (providing examples of the ABA's amicus curiae briefs on contentious constitutional questions consistently taking what "can only be described as left-of-center positions").

220. *See, e.g.*, Amy E. Swearer, *The ABA is Against You and Other Things No One Tells Conservative or Christian Law Students*, FEDERALIST SOC'Y (Feb. 14, 2018), https://fedsoc.org/commentary/blog-posts/the-aba-is-against-you-and-other-things-no-one-tells-conservative-or-christian-law-students [https://perma.cc/6PXH-RVZV].

and unjust) accusations that pro-life advocates are hostile or, at best, indifferent to the interests and well-being of women, there are hints to be found in the history of abortion litigation as to how such a disciplinary charge might proceed. The United States Supreme Court's 1993 case of *Bray v. Alexandria Women's Health Clinic*[221] involved abortion clinics and supporting organizations that sued Operation Rescue and various individuals for physically obstructing women's access to the clinics.[222] Thus, *Bray* was not a speech or pro-life advocacy case. What makes the case relevant to Model Rule 8.4(g) is the argument the plaintiffs urged the Court to accept: that the defendants were liable under the federal Civil Rights Act of 1871 (commonly referred to as the "Ku Klux Klan Act") *because their goal of preventing abortion* constituted an "invidiously discriminatory animus" on the basis of sex.[223] Writing for the 5–4 majority, Justice Scalia emphatically rejected this contention:

> Whether one agrees or disagrees with the goal of preventing abortion, that goal in itself . . . does not remotely qualify for such harsh description, and for such derogatory association with racism. To the contrary, we have said that "a value judgment favoring childbirth over abortion" is proper and reasonable enough to be implemented by the allocation of public funds, and Congress itself has, with our approval, discriminated against abortion in its provision of financial support for medical procedures. This is not the stuff out of which . . . "invidiously discriminatory animus" is created.[224]

Nevertheless, it is unsettling that the plaintiffs succeeded in persuading the Eastern District of Virginia, the Fourth Circuit Court of Appeals, and three Supreme Court Justices that the plaintiffs had satisfied the requirement of showing the defendants' conduct reflected "invidiously discriminatory animus" against women *because of* their sex, and the record supporting this finding was based on the defendants' goal of preventing abortion.[225] The closeness of the outcome in *Bray* reflects just

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221. 506 U.S. 263 (1993).

222. *Id*. at 266.

223. *Id.* at 267–79.

224. *Id*. at 274 (internal citations omitted).

225. *See id.* at 307, 322–26 (Stevens, J., joined by Blackmun, J., dissenting); *id.* at 345, 347–52 (O'Connor, J., joined by Blackmun, J., dissenting); Nat'l Org. for

how readily state bar authorities could, if so disposed, conclude that lawyers who express disfavored viewpoints opposing abortion or abortion rights in contexts "related to the practice of law" have "manifest[ed] bias or prejudice" on the basis of sex and violated Model Rule 8.4(g).[226] Expressing such viewpoints before a court might reluctantly be deemed "legitimate advocacy" so that pro-life parties may have representation of counsel; but, as the 1996 Tennessee Ethics Opinion foreshadowed, conversations with clients or colleagues might not be protected as "legitimate advocacy or advice."[227] The prospects for selective prosecution and abuse of the disciplinary process should not be discounted, particularly when "cultural shift" is a stated objective for the rule.[228]

The Court's precedents in the area of free speech challenges to pro-life advocacy in the vicinity of abortion clinics illustrate this concern about disparate treatment. Justice Scalia often pointed to the ways in which the Court's abortion jurisprudence had distorted its rulings in other related areas, and especially with freedom of speech.[229] In cases such as *McCullen v. Coakley*,[230] *Hill v. Colorado*,[231] and *Madsen v. Women's Health Cen-*

Women v. Operation Rescue, 914 F.2d 582, 585 (4th Cir. 1990); Nat'l Org. for Women v. Operation Rescue, 766 F. Supp. 1483, 1492–93 (E.D. Va. 1989); *see* also *Bray*, 506 U.S. at 272 n.4 (Justice Scalia, for the majority, responding to Justice Stevens's and Justice O'Connor's dissents on this issue). Justice O'Connor's dissent also considered the defendants' "use of unlawful means" to achieve their goal of preventing abortion as being relevant to the class-based animus/motivation issue. *Id.* at 351 (O'Connor, J., dissenting).

226. *See* Dent, *supra* note 8, at 152 (noting that "opposition to abortion is often characterized as discrimination against women and might be claimed to violate" Model Rule 8.4(g)) (citing Twiss Butler, *Abortion Law: "Unique Problem for Women" or Sex Discrimination?*, 4 YALE J.L. & FEMINISM 133, 145 (1991)).

227. *See* MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018) ("This paragraph does not preclude legitimate advice or advocacy consistent with these Rules."); *see also supra* Part II (discussing the 1996 Tennessee Ethics Opinion, *supra* note 3).

228. *See* ROTUNDA & DZIENKOWSKI, *supra* note 8 (observing that "[d]iscretion . . . may lead to abuse of discretion, with disciplinary authorities going after lawyers who espouse unpopular ideas").

229. *See generally* Timothy Zick, *Justice Scalia and Abortion Speech*, 15 FIRST AMEND. L. REV. 288, 291–98 (2017).

230. 134 S. Ct. 2518, 2541 (2014) (Scalia, J., concurring) ("Today's opinion carries forward this Court's practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents. There is

ter, Inc.,[232] Justice Scalia detailed how the Court's tendency to be biased against pro-life advocacy and in favor of abortion impacted its review of state or local laws restricting speech. In his *Hill* dissent, he memorably concluded:

> What is before us . . . is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the "ad hoc nullification machine" that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice. Having deprived abortion opponents of the political right to persuade the electorate that abortion should be restricted by law, the Court today continues and expands its assault upon their individual right to persuade women contemplating abortion that what they are doing is wrong. Because, like the rest of our abortion jurisprudence, today's decision is in stark contradiction of the constitutional principles we apply in all other contexts, I dissent.[233]

Although the Court's most recent First Amendment decisions suggest at least some reason for greater optimism about future abortion-related speech cases,[234] it would be extremely unwise for pro-life lawyers to assume that their ability to express their conscience with candor will remain safe in the

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an entirely separate, abridged edition of the First Amendment applicable to speech against abortion.")

231. 530 U.S. 703, 741 (2000) (Scalia, J., dissenting).

232. 512 U.S. 753, 785 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part) ("The entire injunction in this case departs so far from the established course of our jurisprudence that in any other context it would have been regarded as a candidate for summary reversal. But the context here is abortion. . . . Today the ad hoc nullification machine claims its latest, greatest, and most surprising victim: the First Amendment.")

233. *Hill*, 530 U.S. at 741–42 (Scalia, J., dissenting) (internal citation omitted). In *McCullen*, the most recent of these cases and the last on which he wrote, Justice Scalia concurred in the Court's judgment that a Massachusetts criminal statute creating a 35-foot "buffer zone" for public spaces around abortion clinics was facially unconstitutional under the Free Speech Clause of the First Amendment, but he vigorously objected to the majority's opinion that the statute was neither content-based nor viewpoint discriminatory against pro-life speech. 134 S. Ct. at 2541–49 (Scalia, J., concurring); *see also id.* at 2549 (Alito, J., concurring) ("As the Court recognizes, if the Massachusetts law discriminates on the basis of viewpoint, it is unconstitutional, and I believe the law clearly discriminates on this ground." (internal citation omitted)).

234. *See* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018), discussed *infra* Part III.D.

American legal profession. The lack of protections for expressing pro-life viewpoints in fellow Western nations such as England[235] and France[236] illustrates the need for constant vigilance in defending First Amendment freedoms and values against persistent and increasingly forceful challenges.[237] Provincial bar authorities in Canada (the Law Society of Ontario) have already leapt beyond Model Rule 8.4(g)-style speech restrictions and into the realm of compelled speech.[238] In December 2016, the governing authorities for the Law Society of Ontario approved a requirement that every bar licensee adopt and abide

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235. *See, e.g.*, *High Court Upholds Ban on Praying Outside Abortion Clinic*, CATH. HERALD (July 2, 2018), http://catholicherald.co.uk/news/2018/07/02/high-court-upholds-ban-on-praying-outside-abortion-clinic [https://perma.cc/FZM2-5UFK]. An effort by New York's former Attorney General Eric Schneiderman to prosecute peaceful sidewalk counselors and prayer vigil participants outside an abortion clinic in New York City was recently dismissed for lack of evidence of "intent to harass, annoy, or alarm" women entering the clinic. Jonathan S. Tobin, *An Inconvenient Amendment*, NAT'L REV. (July 24, 2018, 6:30 AM), https://www.nationalreview.com/2018/07/new-york-abortion-protest-case-lefts-free-speech-double-standard [https://perma.cc/V9F8-3W2F]. This deficient record existed despite "a year's worth of surveillance" directed by Schneiderman at the clinic, with tactics including "a camera outside the site, sen[ding] in decoys who could serve as bait for those looking to harass or intimidate women seeking abortions, and hid[ing] microphones on the women's escorts." *Id.* The court's ruling was nevertheless decried by the *New York Times* as another example of conservatives "weaponizing" the First Amendment. *See id.* (citing Jeffery C. Mays, *Anti-Abortion Protestors at Queens Clinic Do Not Harass Patients, Judge Rules*, N.Y. TIMES (July 22, 2018), https://www.nytimes.com/2018/07/22/nyregion/anti-abortion-protesters-queens-clinic.html [https://nyti.ms/2O4B9t4]).

236. *See, e.g.*, Alexandra DeSanctis, *In France, a Defeat for Free Speech and the Right to Life*, NAT'L REV. (Dec. 9, 2016, 9:29 PM), https://www.nationalreview.com/2016/12/abortion-france-parliament-law-criminalize-pro-life-advocacy-internet/ [https://perma.cc/DB2Z-QTQ2].

237. The relentless and increasing efforts to weaken conscience protections in the American medical profession offer troubling indications of the path the American legal profession could take in preventing "discrimination" by lawyers. *See, e.g.*, E. Christian Brugger, *Whose Conscience? What Protections? Conscience Provisions in Healthcare and Elsewhere*, PUB. DISCOURSE (May 30, 2018), http://www.thepublicdiscourse.com/2018/05/21432/ [https://perma.cc/FY5P/TLUU]. *See generally* ROBERT P. GEORGE, CONSCIENCE AND ITS ENEMIES: CONFRONTING THE DOGMAS OF LIBERAL SECULARISM 155–64 (2013).

238. *See* Arthur J. Cockfield, *Limiting Lawyer Liberty: How the Statement of Principles Coerces Speech* (Queen's Law Research Paper Series, Paper No. 2018-100, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3141561 [https://perma.cc/KF5W-X34M].

by a mandatory "Statement of Principles," asserting agreement with specific ideas relating to "equality, diversity, and inclusion," and state they are committing themselves to "promote equality, diversity, and inclusion generally, and in their behavior towards colleagues, employees, clients and the public."[239] Similarly to Model Rule 8.4(g), the opposition to such mandates stems not from a lack of general agreement that equality, diversity, and inclusion are vitally important in the legal profession. They most certainly are. Rather, the opposition stems from fundamental principles of freedom and liberty and a fully justified resistance to compelled conformity. Lawyers must be free to hold and express diverse points of views about the law and morality. Government-imposed restrictions and mandates jeopardize the rights of moral dissenters to themselves be included as equal members of the legal profession without being screened out through admissions processes, identified for exclusion through an annual "test" (such as Ontario's "Statement of Principles"), or silenced by rules of professional conduct that create opportunities for selective prosecution and imposition of sanctions (Model Rule 8.4(g)).

2. Recent Advocacy of Speech Restrictions and Compulsions Relating to Same-Sex Marriage

In its June 2018 decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[240] the United States Supreme Court held the Colorado Civil Rights Commission violated custom wedding cake baker Jack Phillips's rights under the First Amendment Free Exercise Clause, because its "consideration of this case was inconsistent with the State's obligation of religious neutrality."[241] The record reflected that "based on his sincere religious beliefs and convictions,"[242] Phillips had declined a request to create a custom-designed wedding cake for celebration of a same-sex marriage.[243] The record also showed that

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239. *See id.* at 2.

240. 138 S. Ct. 1723 (2018).

241. *Id.* at 1723.

242. *Id.*

243. *See id.* at 1740 (Thomas, J., concurring) (explaining that although "the parties dispute whether Phillips refused to create a custom wedding cake for the individual respondents, or whether he refused to sell them any wedding

the Commission had exhibited "clear and impermissible hostility toward the sincere religious beliefs that motivated his objection,"[244] based on (1) several disparaging statements made by commissioners relating to Phillips's religious faith and (2) "the difference in treatment between Phillips's case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission."[245] Although the Court's majority opinion did not reach Phillips's argument that application of Colorado public-accommodations law to compel his artistic expression violated his rights under the Free Speech Clause, Justice Thomas's concurrence (joined by Justice Gorsuch) made a compelling argument that it did:

> This Court is not an authority on matters of conscience, and its decisions can (and often should) be criticized. The First Amendment gives individuals the right to disagree about

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cake (including a premade one)," the Colorado Court of Appeals had already "resolved this factual dispute in Phillips' favor" by describing "his conduct as a refusal to 'design and create a cake to celebrate [a] same-sex wedding'" (quoting Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 276 (Colo. App. 2015))).

244. *Id.* at 1729 (majority opinion). For example, the Court pointed to a statement on the record by one of the commissioners explicitly denigrating Phillips's religious faith:

> To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.

Id.

245. *Id*. at 1730 (observing that "on at least three other occasions" the Colorado Civil Rights Division "had considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text"; and "[e]ach time, the Division found that the baker acted lawfully in refusing service" because "the requested cake included 'wording and images [the baker] deemed derogatory.'"); *see also* John C. Eastman, *Why The Masterpiece Ruling Is Truly a Major Win For Religious Liberty*, FEDERALIST (June 7, 2018), http://thefederalist.com/2018/06/07/masterpiece-ruling-truly-major-win-religious-liberty [https://perma.cc/F5B4/WJGN]; Sherif Girgis, *Filling in the Blank Left in the Masterpiece Ruling: Why Gorsuch and Thomas Are Right*, PUB. DISCOURSE (June 14, 2018), http://www.thepublicdiscourse.com/2018/06/21831/ [https://perma.cc/BVA4/2V6Y].

> the correctness of *Obergefell* and the morality of same-sex marriage. *Obergefell* itself emphasized that the traditional understanding of marriage "long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." If Phillips' continued adherence to that understanding makes him a minority after *Obergefell*, that is all the more reason to insist that his speech be protected.[246]

As *Masterpiece Cakeshop* was proceeding through the court system, another significant case was being prosecuted in Wyoming, this one against a municipal judge and part-time magistrate, Ruth Neely, who in a telephone interview initiated by a local reporter, expressed her religiously based objection to officiating a same-sex marriage if this was requested of her.[247] The prosecutor for the Wyoming Commission on Judicial Conduct and Ethics charged her with multiple violations of the Wyoming Code of Judicial Conduct ("Wyoming Code") and sought her removal from the bench.[248] In March 2017, in a 3–2 decision, the Wyoming Supreme Court concluded that Judge Neely had violated Wyoming Code Rules 1.2,[249] 2.2,[250] and 2.3(B)[251] simply

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246. *Masterpiece Cakeshop*, 138 S. Ct. at 1747 (Thomas, J., concurring) (internal citations omitted). *See generally* Steven Smith, *Why the Government Shouldn't Force Bakers—Or Anyone—to Express Support for Same-Sex Marriage*, PUB. DISCOURSE (Oct. 25, 2017), http://www.thepublicdiscourse.com/2017/10/20215/ [https://perma.cc/ A266/A23P].

247. *In re* Neely, 390 P.3d 728 (Wyo. 2017), *cert. denied*, 138 U.S. 639 (2018). The reporter who had contacted Judge Neely and taken her statements "offered to not publish the story if Judge Neely would state a willingness to perform same-sex marriages," but "Judge Neely declined." *Id.* at 755 (Kautz, J., dissenting). Judge Neely was well-known in her small community of Pinedale, Wyoming as a devout Christian and member of the Lutheran Church, Missouri Synod, a conservative Protestant denomination. Rod Dreher, *Wyoming Goliath vs. Small-Town Judge*, AM. CONSERVATIVE (May 10, 2016, 4:23 PM), http://www.theamericanconservative.com/dreher/wyoming-goliath-ruth-neely-judge-lgbt/ [https://perma.cc/YPL2/8WPK].

248. *In re Neely*, 390 P.3d at 747–51.

249. Wyoming Code Rule 1.2 tracks the ABA Model Code of Judicial Conduct ("Model Code"), and provides: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." WYO. CODE JUDICIAL CONDUCT r. 1.2 (2018).

250. Wyoming Code Rule 2.2 tracks the Model Code, and provides: "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." WYO. CODE JUDICIAL CONDUCT r. 2.2 (2018).

251. Wyoming Code Rule 2.3 tracks the Model Code, and provides:

by "*announcing* that her religious beliefs prevent her from officiating same-sex marriages."[252] The court imposed a public censure, rejecting the Commission's extreme recommendation that Judge Neely should be removed from the bench (the judicial equivalent of lawyers' disbarment).[253] The majority rejected Judge Neely's arguments that the Commission's prosecution violated her rights under the Free Speech and Free Exercise Clauses of the First Amendment and their counterparts under the Wyoming Constitution,[254] including the state's strong prohibition against imposing religious tests for public office.[255] In a "respectful[], but vigorous[] dissent," two justices framed the issues quite differently from the majority, maintaining that "[c]ontrary to the position asserted by the majority opinion, this case *is* about religious beliefs and same[-]sex marriage."[256] This case would, in fact, "determine whether there is a religious test for who may serve as a judge in Wyoming" and "whether a judge may be precluded from one of the functions

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> (B) 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.

WYO. CODE OF JUDICIAL CONDUCT r. 2.3(B) (2018).

252. *In re Neely*, 390 P.3d at 735, 741 (emphasis added).

253. *See id.* at 752–53.

254. U.S. CONST. amend. I; WYO. CONST. art. I, §§ 18, 20.

255. Wyoming's ban on religious tests "is significantly broader than the similar provision in the United States Constitution—'but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.'" *In re Neely*, 390 P.3d at 742 (quoting U.S. CONST. art. VI, cl. 3). The Wyoming Constitution provides, in part:

> . . . The free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this state, and *no person shall be rendered incompetent to hold any office of trust or profit, or to serve as a witness or juror, because of his opinion on any matter of religious belief whatever*; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state.

WYO. CONST. art. 1, § 18 (emphasis added). *See generally* Kimberlee Wood Colby, *Resuscitating Intolerance through Religious Tests for Judges*, 7 J. CHRISTIAN LEGAL THOUGHT 27 (2017) (discussing the *Neely* case).

256. *In re Neely*, 390 P.3d at 753 (Kautz, J., dissenting).

of office not for her actions, but for her statements about her religious views."[257] Gerard Bradley captures quite well the heart of the Commission's attack on Judge Neely's traditional religious and moral convictions:

> The Commission admitted . . . that it would remove Judge Neely because of her "statements" expressing her religious opinion about marriage. This is to say that she would be removed for possessing, or at least for being known to possess, the religious belief of her church that marriage is a relationship which by its natural orientation towards procreation is limited to unions of a man and a woman. In other words, Judge Neely is unfit because she is a Lutheran.[258]

The dissent made a detailed and highly persuasive case for why Judge Neely had violated none of the charged Wyoming Code Rules, and why the sanctions against her violated the cited provisions of the federal and state constitutions.[259] Most relevant to Model Rule 8.4(g), the dissent emphatically refuted the charge that Judge Neely violated Wyoming Code Rule 2.3(B) when she allegedly, "in the performance of judicial duties, by words or conduct manifested bias or prejudice on the basis of . . . sexual orientation."[260] As the dissent correctly explained, "Judge Neely's religious belief about who may be married has no relationship to her view of the worth of any individual or class of individuals. The overwhelming evidence in the record indicates that Judge Neely does not hold any bias or prejudice

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257. *Id.* at 753–54.

258. Gerard V. Bradley, *Today's Challenges to Religious Liberty in Historical Perspective*, 21 TEX. REV. L. & POL'Y 341, 369 (2017) (footnotes omitted). As Bradley further explains:

> Judge Neely did not dispute that the law recognizes same-sex marriage. In fact, the Commission distorted the obvious meaning of these provisions [i.e., Rule 1.2 and 2.2]—which is that a judge must perform with integrity all the duties which she undertakes to perform—to mean instead that no judge may ever seek to recuse herself from performing a duty because of a conflict in conscience (at least where the judge holds a conscientious view of which the Commission disapproves). But no rule of judicial conduct in Wyoming—or anywhere else, for that matter—requires every judge to perform every task that comes across the transom.

Id. at 369 n.146.

259. *In re Neely*, 390 P.3d at 753–69 (Kautz, J., dissenting).

260. WYO. CODE JUDICIAL CONDUCT r. 2.3(B) (2018).

against any person or class of persons."[261] Although "[t]he majority opinion hinges on its conclusions that Judge Neely's statements would cause reasonable persons to question her impartiality, and would conclude she exhibited bias and prejudice toward homosexuals," the dissent observed that "[t]hose are not conclusions that would be reached by a reasonable person apprised of the appropriate facts."[262]

On the Free Exercise and Free Speech Clause issues, the dissent's analysis is directly applicable to lawyers who wish to decline client representations based on moral objections to the client's objectives (prerogatives placed at risk under Model Rule 8.4(g)). Although the State of Wyoming "has a compelling interest in assuring that every person is treated equally and that judges do not display bias or prejudice," the dissent noted "[t]his interest comes into play when a judge demonstrates actual bias or prejudice."[263] But the record did not support any such finding about Judge Neely: "To assure that judges do not display bias or partiality, our rules permit a judge to assign a particular case to another judge. That is just what Judge Neely proposed to do."[264]

In concluding, the dissent sounded a call for the legal profession and the judiciary to respect diversity and inclusion for members who hold dissenting views on matters of law and morality, particularly on religiously based convictions concerning sexual ethics:

> In our pluralistic society, the law should not be used to coerce ideological conformity. Rather, on deeply contested moral issues, the law should "create a society in which both

261. *In re Neely*, 390 P.3d at 762 (Kautz, J., dissenting).

262. *Id.* at 762–63.

263. *Id.* at 767.

264. *Id.* at 767 (internal citations omitted); *see also id.* at 769 ("The strict scrutiny/compelling state interest analysis discussed above for Judge Neely's right to free exercise of religion applies equally to her right of free speech."); *id.* at 767 ("Apparently some individuals might find it offensive that Judge Neely said she would decline to personally perform a same-sex marriage and instead would refer them to someone else. There is no compelling state interest in shielding individuals from taking such an offense.").

> sides can live their own values."[265] That is precisely how Wyoming has approached the matter since its founding.
>
> The *Obergefell* decision affirms this approach for the issue of same[-]sex marriage. It emphasized that the constitutional problem arose not from the multiplicity of good faith views about marriage, but from the enshrining of a single view into law which excluded those who did not accept it as "outlaw[s]" and "outcast[s]." Unfortunately, the majority opinion does just that for Judge Neely and others who share her views. Caring, competent, respected, and impartial individuals like Judge Neely should not be excluded from full participation in the judiciary. Judge Neely's friends who actually obtained a same[-]sex marriage recognized this and observed that it is "obscene" to impose discipline in this case.[266]

In January 2018, the United States Supreme Court denied a petition for writ of certiorari filed by Judge Neely to appeal her public censure by the Wyoming Supreme Court.[267] Judge

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265. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 877 (2014).

266. *In re Neely*, 390 P.3d at 769 (Kautz, J., dissenting) (internal citations omitted). Grave public concerns about progressives seeking to impose religious tests for public office have also been raised in the context of confirmation hearings before the United States Congress, including most prominently in the September 2017 Senate Judiciary Committee confirmation hearing for Amy Coney Barrett, a devout Catholic, to be appointed as a federal judge on the Seventh Circuit Court of Appeals. *See* Emma Green, *Should a Judge's Nomination Be Derailed by Her Faith?*, ATLANTIC (Sept. 8, 2017), https://www.theatlantic.com/politics/archive/2017/09/catholics-senate-amy-barrett/539124/ [https://perma.cc/PB5M-6XES]; Noah Feldman, *Feinstein's Anti-Catholic Questions Are an Outrage*, BLOOMBERG (Sept. 11, 2017, 12:22 PM), https://www.bloomberg.com/view/articles/2017-09-11/feinstein-s-anti-catholic-questions-are-an-outrage [https://perma.cc/ZJ5P-VK8D]. They also came to the forefront during the June 2017 Senate Budget Committee confirmation hearing for Russell Vought, an evangelical Protestant, to be appointed as Deputy Director of the White House Office of Management and Budget. *See* Johnny Rex Buckles, *Unashamed of the Gospel of Jesus Christ: On Public Policy and Public Service by Evangelicals*, 41 HARV. J.L. & PUB. POL'Y 813, 815–21 (2018); *see also* Emma Green, *Bernie Sanders's Religious Test for Christians in Public Office*, ATLANTIC (June 8, 2017), https://www.theatlantic.com/politics/archive/2017/06/bernie-sanders-chris-van-hollen-russell-vought/529614/ [https://perma.cc/ZY6Y-LJSE]; John Daniel Davidson, *Bernie Sanders Doesn't Think Christians Are Fit for Public Office*, FEDERALIST (June 9, 2017), http://thefederalist.com/2017/06/09/bernie-sanders-doesnt-think-christians-fit-public-office/ [https://perma.cc/8P9X-4U4G].

267. Neely v. Wyo. Comm'n on Judicial Conduct & Ethics, 138 S. Ct. 639 (2018).

Neely's counsel had argued the Court should, "at a minimum, hold [the] petition pending resolution of *Masterpiece Cakeshop*, No. 16-111, which raises related First Amendment issues";[268] and based on the Court's reasoning in its June 2018 decision in that case,[269] Judge Neely's case for vacating her sanction would have been even stronger. For example, the record contained evidence of animus and hostility to Judge Neely's religious faith and convictions similar in nature to the animus and hostility involved in *Masterpiece Cakeshop*.[270] Moreover, analogously to Colorado's preferential treatment of custom-design bakers who refused to make cakes with religious messages they found offensive,[271] the *Neely* record reflected that Wyoming would allow magistrates to decline officiating for marriages for any secular reason or no reason at all, but sanctioned Judge Neely

268. Petition for a Writ of Certiorari at 39, Neely v. Wyo. Comm'n on Jud. Conduct & Ethics, 138 U.S. 639 (2018) (No. 17-196), 2017 WL 7689870 [hereinafter *Neely* Petition for Certiorari].

269. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

270. *See* Amicus Brief of The Becket Fund for Religious Liberty in Support of the Honorable Ruth Neely's Petition Objecting to the Commission's Recommendations at 17, *In re* Neely 390 P.3d 728 (Wyo. 2017) (No. J-16-0001), https://s3.amazonaws.com/becketpdf/Becket-Fund_Judge-Neely-Amicus-Brief_Signed.pdf [https://perma.cc/S565-W75S] (noting that "the Commission's prosecutor—who acts on behalf of the Commission— . . . condemned Judge Neely's religious beliefs as 'every bit as repugnant as I found the Mormon Church's position on black people,'" and "recommended sanctioning her $40,000 because of what he called her 'holy war'"). Moreover, Judge Neely was originally charged with a separate judicial misconduct violation simply because she obtained the pro bono legal assistance of Alliance Defending Freedom, "a faith-based legal organization that shares her beliefs about marriage." *See Neely* Petition for Certiorari, *supra* note 268, at 28. The Commission later "admitted its overreach on this point by 'conced[ing] Judge Neely's motion to dismiss'" this charge. *Id.* at 28 n.11; *see also* Jonathan G. Lange, *Dissent Will Not Be Tolerated: What the Case of a Wyoming Judge Means for All of Us*, PUB. DISCOURSE (Aug. 30, 2016), http://www.thepublicdiscourse.com/2016/08/17733/ [https://perma.cc/862Q-9X4f] (noting that Judge Neely's church, the Lutheran Church, Missouri Synod, "was called 'repugnant' in open court" and that the prosecutor filed additional charges against Judge Neely "for 'affiliating with a discriminatory organization'" when "Alliance Defending Freedom asked to represent her").

271. *See Masterpiece Cakeshop*, 138 S. Ct. at 1730–32.

merely for announcing her religiously based objections for doing so.[272]

The *Neely* case is a troubling landmark for many reasons, as recounted so well by the Wyoming Supreme Court's dissenting justices. But regarding Model Rule 8.4(g), there is a particularly vital moral to the story: socially conservative lawyers should take no comfort from assurances that state bar authorities with limited resources will not prosecute them for "manifest[ing] bias or prejudice" in expressing disfavored traditional viewpoints on matters of sexual ethics, or that either those authorities or the courts will respect their freedoms under the First Amendment or their state constitutions. The Commission deemed Judge Neely, with no disciplinary record and an undisputed sterling reputation in her community, to be "unfit" for the judiciary solely for her out-of-court statements borne of religious conviction. And even after receiving the Court's sharp rebuke of its manifested hostility to Jack Phillips's traditional religious and moral beliefs in *Masterpiece Cakeshop*, the Colorado Civil Rights Commission quickly approved new charges against him: this time, the Commission alleged antidiscrimination law violations because Phillips had declined on religious grounds to make a custom cake designed for the customer's stated purpose of celebrating gender identity transition.[273]

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272. *See In re Neely*, 390 P.3d at 756–57 (Kautz, J., dissenting); *see also* Colby, *supra* note 255, at 28.

273. *See* Verified Complaint Ex. A, Masterpiece Cakeshop Inc. v. Elenis, (D. Colo. Aug. 14, 2018) (C.A. No. 2074-WYD) [hereinafter *Masterpiece Cakeshop* Phillips Complaint], https://www.courthousenews.com/wp-content/uploads/2018/08/Masterpiece-Cakeshop-II-COMPLAINT.pdf [https://perma.cc/ 3NMK-6PL7]. The Commission's determination of probable cause for new charges against Phillips came only twenty-four days after the Court's decision in *Masterpiece Cakeshop*. *Id.* Ex. A at 4. In response, Alliance Defending Freedom again came to Phillips's aid, this time by filing a lawsuit in the United States District Court for the District of Colorado asserting violations of his constitutional rights to free exercise of religion, freedom of speech, due process, and equal protection. *Id.* at 39–47; *see also* David French, *Colorado Defies the Supreme Court, Renews Persecution of a Christian Baker*, NAT'L REV. (Aug. 15, 2018, 3:19 PM), https://www.nationalreview.com/2018/08/colorado-civil-rights-commission-jack-phillips-case/ [https://perma.cc/9LFX-967L]. In the complaint, Phillips alleges he "declined to create [the requested] cake with [a] blue and pink design because it would have celebrated messages contrary to his religious belief that sex—the status of being male or female—is given by God, is biologically determined, is not determined by perception or feelings, and cannot be chosen or changed." *Masterpiece Cakeshop* Phillips Complaint, *supra*, at 4. He also

There is no reason to believe these will be isolated cases, or that progressives will refrain from using the disciplinary process to make cautionary examples of selectively chosen lawyers who, like small-town municipal judge and part-time magistrate Ruth Neely and custom-cake baker Jack Phillips, they regard as moral villains deserving of professional destruction.[274] "Trust us" or "just litigate as-applied abuses" should no longer be accepted as adequate assurances, if they ever would have been, and creating such a sword of Damocles for the bar to hold over lawyers' heads like the axe of Saint Thomas More's executioner becomes even more clearly perilous.[275]

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alleges his belief that "the same Colorado lawyer" who called his shop and requested a cake to "visually depict and celebrate a gender transition" made other custom-cake requests he had received targeting him for his traditional religious beliefs in the year the Court was hearing his case. *Id.* These had included requests for "cakes celebrating Satan, featuring Satanic symbols, depicting sexually explicit materials, and promoting marijuana use." *Id.*; *see also* Rod Dreher, *The Persecution of Jack Phillips*, AM. CONSERVATIVE (Aug. 15, 2018, 6:25 PM), https://www.theamericanconservative.com/dreher/the-persecution-of-jack-phillips/?print=1 [https://perma.cc/4E9S-YWYP].

274. Writing in 2013, Robert George predicted the widespread assurances of tolerance and respectful accommodation for "the traditional view of marriage as a conjugal union" would prove themselves tactical rather than principled and enduring. GEORGE, *supra* note 237, at 142–46; *see also id.* at 144 ("[A]dvocates of redefinition [of marriage] are increasingly open in saying that they do not see disputes about sex and marriage as honest disagreements among reasonable people of goodwill. They are, rather, battles between the forces of reason, enlightenment, and equality, on one side, and those of ignorance, bigotry, and discrimination, on the other.").

275. Further validating the concern about the direction the United States is heading is the Supreme Court of Canada's 2018 decision that the law societies of Ontario and British Columbia could lawfully deny accreditation to a law school formed at Trinity Western University, solely because its students enter into a required Christian-faith-based community covenant to refrain from engaging in sexual activity outside of heterosexual marriage. *See* Trinity W. Univ. v. Law Soc'y of Upper Canada, 2018 SCC 33 (Can. June 15, 2018), https://scc-csc.lexum.com/scc-csc/scc-csc/en/17141/1/document.do [https://perma.cc/AF56-NJ9V]. A 7–2 majority of the court held that denying accreditation was a "proportionate" and "reasonable" limitation on religious freedoms that upheld, rather than violated, the values of the Canadian Charter of Rights and Freedoms. *Id.* ¶ 3. In the court's view, principles of equality and inclusion required denying students the choice to study the law at a religiously-affiliated educational institution committed to traditional moral doctrines and accompanying expectations of student conduct relating to sexual ethics. It is easy to foresee where such an exclusionary attitude toward social conservatives could lead in the United States in the years ahead, especially in light of the ABA's adoption of Model Rule 8.4(g) as a professional standard in a rule in which "fitness" fea-

3. Rising Opposition to Free Speech on College Campuses and in Law Schools

In April 2016, I presented to the students of the University of North Dakota School of Law remarks entitled *A Tribute to Justice Antonin Scalia*.[276] Inspired by Justice Scalia's jurisprudence on our First Amendment freedom of speech, and well aware of the ongoing debate over the draft Model Rule 8.4(g), I offered these comments:

> Around the country, it has become all too common to encounter not only students, but also faculty and school administrators, promoting policies of increasing campus censorship (whether *de jure* or *de facto*) of ideas or speakers they disfavor. It has also become all too common to hear about intimidating tactics and suppression of the speech of those whose opinions are contrary to the general will of the campus academic subculture and the viewpoints it may prefer. In our national political culture, it has become too common for figures who lead emerging majorities or similarly powerful factions to pronounce that the time for debate is over, and that those who have opposed them must either be silent or suffer retribution for their speech. . . . Whether the prevailing ideas are liberal or conservative, left or right, the urges and actions to silence disagreement about ideas are absolutely wrong, and terribly contrary to our founding constitutional principles and our American traditions.[277]

Since then, and particularly in the aftermath of the 2016 U.S. presidential election, opposition to free speech on college campuses and even in law schools has continued to escalate. The

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tures prominently. *See generally* Derek Ross, *Trinity Western and the Endangerment of Religious Pluralism in Canada*, PUB. DISCOURSE (July 22, 2018), http://www.thepublicdiscourse.com/2018/07/22222/ [https://perma.cc/X5NM-XKSH].

276. McGinniss, *supra* note 36, at 1.

277. *Id.* at 15–16 (footnotes omitted); *see also* Charles Krauthammer, Opinion, *Thought police on patrol*, WASH. POST (Apr. 10, 2014), https://www.washingtonpost.com/opinions/charles-krauthammer-thought-police-on-patrol/2014/04/10/2608a8b2-c0df-11e3-b195-dd0c1174052c_story.html?utm_term=.5d6d20ae9cde [https://perma.cc/KA6A-MYUG] ("What's at play is sheer ideological prejudice—and the enforcement of the new totalitarian norm that declares, unilaterally, certain issues to be closed. Closed to debate. Open only to intimidated acquiescence."); EBERSTADT, *supra* note 206, at 44–69 (chapter entitled "Acclaiming 'Diversity' vs. Hounding the Heretics").

challenges have included "no-platform" social justice advocates, who engage in efforts to prevent visiting speakers from being heard through disinvitation campaigns, or by using blockades or extreme noise (or both),[278] and violent anti-free-speech groups such as Antifa, who threaten and physically attack others at the events.[279] In the 2017–2018 academic year, there were at least two nationally-reported "no-platform" disruptions at American law schools: (1) American Enterprise Institute scholar Christina Hoff Sommers's guest speaking event at Lewis & Clark[280] and (2) South Texas law professor Josh Blackman's event at CUNY (ironically, on the importance of free speech).[281] The ideologically based justifications law students offered for "no-platforming" Sommers and Blackman echoed concepts from Model Rule 8.4(g) and its Comment language: they claimed the hosting and very presence at their law schools of speakers whose opinions on law-related questions were seen by some students as offensive and degrading (*cf.* "demeaning" and "derogatory") would have an adverse (even "violent") impact on those students (*cf.* "harmful").[282] In a later

278. *See, e.g.*, Jonathan V. Last, *Charles Murray and the Middlebury Mob*, WEEKLY STANDARD (Mar. 9, 2017, 5:46 PM), https://www.weeklystandard.com/charles-murray-and-the-middlebury-mob/article/2007134 [https://perma.cc/8TBV-TRB2].

279. *See, e.g.*, Javier Panzar & Alene Tchekmedyian, *9 arrested as protesters gather at UC Berkeley for talk by conservative speaker Ben Shapiro*, L.A. TIMES (Sept. 15, 2017, 7:35 AM), http://www.latimes.com/local/california/la-me-berkeley-protest-shapiro-20170914-htmlstory.html# [https://perma.cc/YDR5-5P7J].

280. *See* Nicole Neily, *The Speech Police Go to Law School—And Fail to Learn Anything*, THE HILL (Mar. 8, 2018 10:33 PM EST), http://thehill.com/opinion/civil-rights/377551-the-speech-police-go-to-law-school-and-fail-to-learn-anything [https://perma.cc/LS2T-LNMG].

281. Josh Blackman, *Students at CUNY Law Protested and Heckled my Lecture about Free Speech on Campus*, NAT'L REV. (Apr. 12, 2018, 12:27 PM), https://www.nationalreview.com/2018/04/students-at-cuny-law-protested-and-heckled-my-lecture-about-free-speech-on-campus/ [https://perma.cc/6MWM-YE8X]; Robby Soave, *CUNY Students Tried to Shout Down Josh Blackman. Here's Why They Failed.*, REASON (Apr. 12, 2018, 5:01 PM), https://reason.com/blog/2018/04/12/cuny-josh-blackman-students-speech [https://perma.cc/ 6B6C-3GYV].

282. *See* Neily, *supra* note 280 (students objecting to Sommers wrote: "Free speech is certainly an important tenet to a free healthy society, but that freedom stops when it has a negative and violent impact on other individuals."); Soave, *supra* note 281 ("The student activists believed the airing of an opinion with which they disagreed was tantamount to physical violence against marginal-

interview, Blackman remarked that these law students will be among those enforcing Model Rule 8.4(g) in a few years, and "'if you give these kids a loaded weapon, they'll use it to discipline people who speak things they don't like.'"[283] In an era when surveys are reflecting diminishing support for First Amendment freedom of speech among younger generations,[284] the risk of future selective prosecutions and abuses of an overbroad black-letter rule of professional conduct such as Model Rule 8.4(g) becomes all the greater.[285]

D. "Professional Speech" and Model Rule 8.4(g): National Institute of Family & Life Advocates v. Becerra

In June 2018, in *National Institute of Family & Life Advocates v. Becerra* ("*NIFLA*"), the United States Supreme Court held that the petitioners, who had requested a preliminary injunction against enforcement of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act ("FACT Act"), were likely to succeed on the merits of their claim under the First Amendment's Free Speech Clause.[286] As Justice Thomas's opinion for the Court's 5–4 majority summarized the requirements of the FACT Act, "[l]icensed clinics [that

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ized communities."); *cf.* Dent, *supra* note 8, at 154–56 (discussing the broad potential meaning of "harmful" under Model Rule 8.4(g)).

283. Rattan, *supra* note 176.

284. *See* David French, *A New Campus Survey Reveals Just How Students Are 'Unlearning Liberty,'* NAT'L REV. (Mar. 13, 2018, 3:32 PM), https://www.nationalreview.com/2018/03/a-new-campus-survey-reveals-just-how-students-are-unlearning-liberty/ [https://perma.cc/NEZ2-BVWP].

285. Law schools must also do much more to promote respect for First Amendment freedoms and resist the powerful tides of ideological conformity and progressive "political correctness." *Cf.* Martin J. Salvucci, *Political Correctness at Stanford Law*, NAT'L REV. (May 25, 2018), https://www.nationalreview.com/2018/05/stanford-law-school-political-correctness-intolerance-conservative-views/ [https://perma.cc/WNH6-TV24]. These efforts should include strongly encouraging and supporting intellectual and viewpoint diversity among faculty and students alike. *See* Randy Barnett, *Our Letter to the American Association of Law Schools*, WASH. POST: VOLOKH CONSPIRACY (Feb. 25, 2017, 11:32 AM), https://reason.com/volokh/2017/02/25/our-letter-to-the-association [https://perma.cc/7F2D-VYEQ] (noting a "growing awareness that conservative and libertarian scholars are grossly underrepresented in American colleges and universities and that this imbalance results from political discrimination"). *See generally* George W. Dent, Jr., *Toward Improved Intellectual Diversity in Law Schools*, 37 HARV. J.L. & PUB. POL'Y 165 (2014).

286. 138 S. Ct. 2361, 2378 (2018).

primarily serve pregnant women] must notify [those] women that California provides free or low-cost services, including abortions, and give them a phone number to call," and "[u]nlicensed clinics must notify women that California has not licensed the clinics to provide medical services."[287] Although the Court noted "serious concerns that both the licensed and unlicensed notices discriminate based on viewpoint," it did not need to reach that issue "[b]ecause the notices are unconstitutional either way."[288]

In a powerful concurring opinion, Justice Kennedy underscored the "serious constitutional concern" about the "apparent viewpoint discrimination" in the case:

> This law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression. For here the State requires primarily pro-life pregnancy centers to promote the State's own preferred message advertising abortions. This compels individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these. . . .
>
> The California Legislature included in its official history the congratulatory statement that the Act was part of California's legacy of "forward thinking." But it is not forward thinking to force individuals to "be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable." It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties.[289]

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287. *Id.* at 2368.

288. *Id.* at 2370 n.2.

289. *Id.* at 2379 (Kennedy, J., joined by Roberts, C.J., and Alito and Gorsuch, JJ., concurring) (internal citations omitted).

The aspect of *NIFLA* that connects most specifically to the Model Rule 8.4(g) controversy is how Justice Thomas's opinion responded to the Ninth Circuit's asserted justification for lenient First Amendment review of the notice requirements—i.e., that they were merely "professional speech" that "involves personalized services and requires a professional license from the state."[290] Treating "professional speech" as a "separate category of speech that is subject to different rules," the Court said, "gives the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement."[291] The Court specifically identified "lawyers" as one of several categories of state-licensed individuals over whom the government may not exercise such "unfettered power" to regulate speech.[292] The Court identified two limited exceptions: "some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech'"[293] and "professional conduct, even though that conduct incidentally involves speech."[294] Only the latter of these directly relates to Model Rule 8.4(g). And because the broad range of "verbal . . . conduct" that the rule purports to prohibit is not "conduct" that "incidentally involves speech," but is instead *speech that incidentally involves professional conduct* (especially when such speech is merely "*related to* the practice of law"), it provides states with no escape from heightened scrutiny for content-based rules.[295] The Court then elaborated on its broader concerns about the government imposing speech requirements or restraints under the guise of professional regulation:

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290. *Id.* at 2375 (majority opinion); *see also* Josh Blackman, *The Constitutionality of Rule 8.4(g) after* NIFLA v. Becerra, JOSH BLACKMAN'S BLOG (July 13, 2018), http://joshblackman.com/blog/2018/07/13/the-constitutionality-of-rule-8-4g-after-nifla-v-becerra/ [https://perma.cc/XLX9-7YUX].

291. *NIFLA*, 138 S. Ct. at 2365, 2375.

292. *Id.* at 2375.

293 *Id.* at 2372 (citing Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985)).

294. *Id.*

295. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018) (emphasis added); *cf.* Blackman, *supra* note 290 (discussing his comments submitted to the Pennsylvania Supreme Court on its Disciplinary Board's proposed variation of Model Rule 8.4(g)).

> Outside of these two contexts, the Court's precedents have long protected the First Amendment rights of professionals. The Court has applied strict scrutiny to content-based laws regulating the noncommercial speech of lawyers,[296] professional fundraisers, and organizations providing specialized advice on international law. . . . [I]n the context of professional speech, . . . content-based regulation poses the . . . "risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." When the government polices the content of professional speech, it can fail to "'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'" Professional speech is also a difficult category to define with precision. If States could choose the protection that speech receives simply by requiring a license, they would have a powerful tool to impose "invidious discrimination of disfavored subjects."[297]

The Court's emphatic rejection of the notion that "professional speech" is a separate category from private speech and intrinsically more susceptible to increased content-based regulation badly undercuts such defenses offered for Model Rule 8.4(g).[298] In combination with its other highly free-speech-protective opinion issued in the same month, *Janus v. American Federation of State, County, & Municipal Employees*,[299] the Court's ruling sends a strong signal to state supreme courts that they must fully respect lawyers' First Amendment freedoms. To ensure this occurs and that state bar authorities will exercise similar restraint, particularly concerning lawyers with views unpopular with their dominant peer groups in the legal profession, those courts should continue to reject Model Rule 8.4(g).[300]

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296. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015).

297. 138 S. Ct. at 2366 (internal citations omitted) (quoting Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 641 (1994); McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014); Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423 n. 19 (1993)).

298. *See, e.g.*, Haupt, *supra* note 155, at 12–17 and discussion *supra* note 155.

299. 138 S. Ct. 2248 (2018) (holding that Illinois' union agency-fee scheme violated the Free Speech Clause of the First Amendment of nonmembers by compelling them to subsidize private speech on matters of substantial public concern).

300. The outcomes in *NIFLA* and *Janus* have fueled contentions by progressives that conservatives have "weaponized" the First Amendment. *See, e.g.*, Ad-

IV. CONCLUSION

Model Rule 8.4(g)'s proponents consistently defend it as both a necessary tool and an important symbol in the organized bar's continuing efforts to promote and increase its diversity and inclusion.[301] These are surely very worthy objectives, but the fairness and justice of their pursuit have suffered from the widespread ideological myopia about what it truly means to have a diverse and inclusive profession. It does not mean silencing or chilling diverse viewpoints on controversial moral issues on the basis that such expression manifests "bias or prejudice," is "demeaning" or "derogatory" because disagreement is deemed offensive, or is considered intrinsically "harmful" or as reflecting adversely on the "fitness" of the speaker. It does mean embracing a vision of diversity that includes, rather than excludes, socially conservative lawyers who dissent from the dominant moral views of the American legal profession, including on matters of sexual ethics.[302] The impulses within the legal profession to coerce viewpoint conformity and marginalize and deter dissenters, evidenced in the 1996 Tennessee Ethics Opinion and then further animated and expanded in Model Rule 8.4(g), should be resisted by members of the bench and bar who cherish liberty. The zealous energy of progressive ac-

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am Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html?login=email&auth=login-email [https://nyti.ms/2ID0Wov]; *see also* Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2219 (2018) (answering the question "No," based on "the American context, with all the historical, sociological, and philosophical baggage that comes with the modern, American free speech right," considering desired "progressive" results). But shielding dissenters from government compulsions relating to speech is, in fact, a fully justified defensive strategy well in keeping with our American traditions, and serves to protect both social conservatives and progressives in times when their views are popularly disfavored. *See, e.g.*, Ryan T. Anderson, *Shields, Not Swords*, NAT'L AFFAIRS, Spring 2018, at 74.

301. *See, e.g.*, Keith, *supra* note 135, at 2, 17–22.

302. *See* Wolanek, *supra* note 118, at 789 ("If the ABA is committed to institutional diversity, it will not encourage jurisdictions to formally discipline those who disagree with certain moral judgments."); *see also id.* (noting that if Model Rule 8.4(g) "[e]xcludes (in the name of diversity) those with unpopular views, the legal profession ironically experiences a *decrease* in diversity," which "affects non-lawyers because it makes it difficult for 'biased' citizens to find like-minded attorneys.").

tivism should be redirected away from authoritarian efforts to silence and exclude traditionalist moral dissenters through campus and professional speech codes, and toward civil and tolerant efforts to persuade others of their views on law and social justice.

The long-term preservation of our first freedoms in the American legal profession will require a new and sustained commitment to what John Inazu has called "confident pluralism."[303] This ideal draws upon strong premises of both *inclusion* ("[a]iming for basic membership in the political community to those within our boundaries") *and dissent* (asserting "[w]e must be able to reject the norms established by the broader political community within our own lives and voluntary groups").[304] Although "the precise contours of inclusion and dissent are contested," and these disagreements "strain[] our modest unity," Inazu insists negotiating this challenging path is a worthy effort in our ideologically-divided culture: "Confident pluralism argues that we can, and we must, learn to live with each other in spite of our deep differences. It requires a tolerance for dissent, a skepticism of government orthodoxy, and a willingness to endure strange and even offensive ways of life."[305] Faced with these conflicts, lawyers should find encouragement from Saint Thomas More, both from his moral courage when faced with compulsions the government brought to bear upon his conscience, and from his lifelong commitment to the law and the recourses to justice it provides. As Thomas Shaffer once wrote:

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303. JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE (2016).

304. *Id.* at 26, 30. As Inazu notes, "One reason for the inclusion premise is that confident pluralism depends upon both a willingness *and* an ability to partner toward the possibility of mutual coexistence." *Id.* at 26. He also observes "[t]his value of dissent entails risk because it strengthens a genuine pluralism against majoritarian demands for consensus." *Id.* at 30.

305. *Id.* at 125; *see also* STEPHEN L. CARTER, THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY 16 (1998) ("It is as though we have forgotten the advice of James Madison in Federalist No. 10, that 'the first object of government' is to protect our ability to reach different conclusions, because the alternative is to create a society in which every citizen holds 'the same opinions, the same passions, and the same interests.'").

> More's hope that he could use the law to save himself, his family, and his country was foreshadowed in his book *Utopia*. There is a debate there between Raphael, who does not believe that a good man can serve princes, and More, who says that good men can serve princes: "You cannot pluck up [wrongheaded opinions] by the root," More says, "Don't give up the ship in a storm because you cannot direct the winds . . . . [W]hat you cannot turn to good, you . . . make as little bad as you can."[306]

Today's lawyers with traditional religious and moral convictions should not "give up the ship" because they "cannot direct the winds" of cultural change or because the dominant forces of the organized bar may seek to marginalize or even exclude them. Like More, they should persevere and remain "the King's good servant, but God's first." Unlike More, they should be free to express their consciences with candor.

306. Thomas L. Shaffer, *More's Skill*, 9 WIDENER J. PUB. L. 295, 301 (2000) (quoting THOMAS MORE, UTOPIA 36 (George M. Logan & Robert M. Adams eds., Cambridge Univ. Press 1989) (1516)).

REFORMING AMERICAN MEDICAL LICENSURE

KEVIN DAYARATNA, PH.D.;* PAUL J. LARKIN, JR.;**
JOHN O'SHEA, M.D.***

INTRODUCTION: THE NEED TO RECONSIDER A VARIETY OF OCCUPATIONAL LICENSING LAWS

Occupational licensing requirements have existed in the United States since colonial times.[1] For most of our history, the number of workers subject to licensing requirements was quite small, approximately five percent.[2] That number, however, has steadily increased since the 1950s. Today, approximately thirty percent of all workers are subject to such a requirement, with

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* Kevin Dayaratna is a Senior Statistician and Research Programmer in the Center for Data Analysis, of the Institute for Economic Freedom, The Heritage Foundation; Ph.D. University of Maryland, 2014; M.A. University of Maryland, 2011; M.S. University of Maryland, 2008; B.A. University of California, Berkeley, 2005.

** Paul J. Larkin, Jr., is the John, Barbara, and Victoria Rumpel Senior Legal Research Fellow of the Institute for Constitutional Government, The Heritage Foundation; M.P.P. George Washington University, 2012; J.D. Stanford Law School, 1980; B.A. Washington & Lee University, 1977.

*** John O'Shea is a Senior Fellow in the Center for Health Policy Studies, of the Institute for Family, Community, and Opportunity, The Heritage Foundation; M.D. Universidad Autonoma de Guadalajara, 1979; M.P.A. Harvard Kennedy School, 2006; M.A. University of Pennsylvania, 2002. The views expressed in this Article are the authors' own and should not be construed as representing any official position of The Heritage Foundation. The authors thank Norbert Michel, Mitchell Siegel, Sarina Singh, Marie Fishpaw, John G. Malcolm, David Inserra, Robert Emmet Moffit, and Nina Shaffer for helpful comments on an earlier version of this Article. Any errors are ours.

1. *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 20–22 (3d ed. 2008); S. DAVID YOUNG, THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA 9–14 (1987); Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890–1910: A Legal and Social Study*, 53 CAL. L. REV. 487, 494–501 (1965).

2. *See* MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 1 (2006).

service industry professionals most likely to be regulated by licensing requirements.[3]

Those requirements have recently come under sharp and repeated criticisms from a variety of commentators in professional journals and the media. Scholars in economics,[4] law,[5] and public

3. *See* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1096 (2014).

4. *See, e.g.*, DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 687–88 (4th ed. 2004); W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST 382 (4th ed. 2005); Asheesh Agarwal, *Protectionism as a Rational Basis?: The Impact on E-Commerce in the Funeral Industry*, 3 J.L. ECON. & POL'Y 189 (2007); Alex Maurizi, *Occupational Licensing and the Public Interest*, 82 J. POL. ECON. 399 (1974); Simon Rottenberg, *The Economics of Occupational Licensing*, *in* ASPECTS OF LABOR ECONOMICS 3, 18 (Nat'l Bureau of Econ. Research ed., 1962); Alan B. Krueger, *Do You Need a License to Earn a Living? You Might Be Surprised at the Answer*, N.Y. TIMES (Mar. 2, 2006), http://www.nytimes.com/2006/03/02/business/yourmoney/02scene.html [https://nyti.ms/2mwMHKJ]; Ryan Nunn, *The Future of Occupational Licensing Reform*, BROOKINGS INST. (Jan. 30, 2017), https://www.brookings.edu/opinions/the-future-of-occupational-licensing-reform/ [https://perma.cc/764U-598U]. Professor Morris Kleiner has been a particularly outspoken critic of occupational licensing schemes. *See, e.g.*, KLEINER, *supra* note 2; MORRIS M. KLEINER, THE HAMILTON PROJECT, REFORMING OCCUPATIONAL LICENSING POLICIES (2015); Morris M. Kleiner, *Enhancing Quality or Restricting Competition: The Case of Licensing Public School Teachers*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 1 (2011); Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSP. 189 (2000); Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. S173 (2013); Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. INDUS. REL. 676 (2010); Morris M. Kleiner & Robert T. Kudrle, *Does Regulation Affect Economic Outcomes? The Case of Dentistry*, 43 J.L. & ECON. 547 (2000); Janna E. Johnson & Morris M. Kleiner, *Is Occupational Licensing a Barrier to Interstate Migration?* (Nat'l Bureau of Econ. Research, Working Paper No. 24107, 2017), http://www.nber.org/papers/w24107.pdf [https://perma.cc/4SGD-CMVF].

5. *See, e.g.*, BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (2d ed. 2006); Rebecca Haw Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards Up Close*, 105 CAL. L. REV. 1567 (2017); Paul Avelar & Keith Diggs, *Economic Liberty and the Arizona Constitution: A Survey of Forgotten History*, 49 ARIZ. ST. L.J. 355, 383 (2017); John Blevins, *License to Uber: Using Administrative Law to Fix Occupational Licensing*, 64 UCLA L. REV. 844 (2017); Edlin & Haw, *supra* note 3; James W. Ely, Jr., *The Constitution and Economic Liberty*, 35 HARV. J.L. & PUB. POL'Y 35 (2012); Adam W. Kersey, *Ticket to Ride: Standardizing Licensure Portability for Military Spouses*, 218 MIL. L. REV. 115 (2013); Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL'Y 209 (2016); Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 N.Y.U. J.L. & LIBERTY 1055 (2014); Clark M. Neily III, *Coaxing the Courts Back to Their Truth-Seeking Role in Economic Liberty Cases*, *in* ECONOMIC LIBERTY AND THE CONSTITUTION: AN INTRODUCTION 25, 27–31 (Paul J. Larkin, Jr. ed., Heritage Found. Special Report No. 157, 2014) http://www.heritage.org/the-constitution/report/economic-liberty-and-the-

policy[6] have criticized occupational licensing requirements as ordinarily being little more than legalized cartels,[7] noted for their

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constitution-introduction [https://perma.cc/NDU6-6PA5]; W. Sherman Rogers, *Occupational Licensing: Quality Control or Enterprise Killer? Problems that Arise When People Must Get the Government's Permission to Work*, 10 J. BUS. ENTREPRENEURSHIP & L. 145 (2017); David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78 (2017); Roger V. Abbott, Note, *Is Economic Protectionism a Legitimate Governmental Interest Under Rational Basis Review?*, 62 CATH. U.L. REV. 475 (2013); Alexandra L. Klein, Note, *The Freedom to Pursue a Common Calling: Applying Intermediate Scrutiny to Occupational Licensing Statutes*, 73 WASH. & LEE L. REV. 411 (2015); Joseph Sanderson, Note, *Don't Bury the Competition: The Growth of Occupational Licensing and a Toolbox for Reform*, 31 YALE J. ON REG. 455 (2014).

6. *See, e.g.*, DANA BERLINER ET AL., FEDERALIST SOC'Y, REG. TRANSPARENCY PROJECT, OCCUPATIONAL LICENSING RUN WILD (2017), https://regproject.org/wp-content/uploads/RTP-State-Local-Working-Group-Paper-Occupational-Licensing.pdf [https://perma.cc/FPQ6-P3UZ]; DICK M. CARPENTER II ET AL., INST. FOR JUST., LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING (2d ed. 2017), https://ij.org/report/license-work-2/ [https://perma.cc/5XQW-SCVV]; JAMES C. COOPER ET AL., FEDERALIST SOC'Y, REG. TRANSPARENCY PROJECT, STATE LICENSING BOARDS, ANTITRUST, AND INNOVATION (2017), https://regproject.org/wp-content/uploads/RTP-Antitrust-Consumer-Protection-Working-Group-Paper-Occupational-Licensing.pdf [https://perma.cc/LFJ4-F8NV]; SARAH CURRY, PLATTE INST. FOR ECON. RES., 2017 OCCUPATIONAL LICENSING REVIEW (2017), https://www.platteinstitute.org/library/doclib/2017-Occupational-Licensing-Review.pdf [https://perma.cc/2RCU-DKBU]; DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT (2011); TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW (2010); DANE STANGLER, PROGRESSIVE POL'Y INST., OCCUPATIONAL LICENSING: HOW A NEW GUILD MENTALITY THWARTS INNOVATION (2012), http://progressivepolicy.org/wp-content/uploads/2012/04/03.2012-Stangler_Occupational-Licensing_How-A-New-Guild-Mentality-Thwarts-Innovation1.pdf [https://perma.cc/34KA-6FMY]; ADAM B. SUMMERS, REASON FOUND., OCCUPATIONAL LICENSING: RANKING THE STATES AND EXPLORING ALTERNATIVES (2007), https://reason.org/wp-content/uploads/files/762c8fe96431b6fa5e27ca64eaa1818b.pdf [https://perma.cc/RZN9-HR8W]; Timothy Sandefur, *State "Competitor's Veto" Laws and the Right to Earn a Living: Some Paths to Federal Reform*, 38 HARV. J.L. & PUB. POL'Y 1009 (2015).

7. Contemporary denunciations of occupational licensing rules have their origins in the criticisms levied by experts long ago. *See, e.g.*, Allen v. Tooley, (1614) 80 Eng. Rep. 1055 (K.B.); Darcy v. Allen (The Case of Monopolies), (1603) 77 Eng. Rep. 1260 (Q.B.); 1 WILLIAM BLACKSTONE, COMMENTARIES *428; EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 47 (1642); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 137–60 (1962); WALTER GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 105–51 (1956); ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 118–29 (Edwin Cannan ed., Random House 1937) (1776); Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). Today's critics, however, are far more numerous than yesterday's.

proclivity to reduce supply and raise prices without producing any corresponding increase in quality.[8] Officials in the legislative,[9] executive,[10] and judicial[11] branches have responded to

8. *See, e.g.*, Larkin, *supra* note 5, at 222–24 (discussing alleged benefits and costs of occupational licensure); *see also, e.g.*, *id.* at 235–37 ("Occupational licensing requirements have been criticized on several grounds. The most common has been that they hijack state power for the benefit of a few. They limit the number of service providers, thereby allowing the members of a given trade to avoid competition and raise prices, without supplying the corresponding service quality improvement promised to consumers. . . . The effect of licensing is to create a cartel that supplies its members with economic rents on an ongoing basis because entry restrictions operate like a 'hidden subsidy' to licensees. . . . Licensing requirements give licensees a 'premium' of four to thirty-five percent above the competitive price." (internal citations omitted)).

9. *See, e.g.*, PAUL J. LARKIN, JR., RECONSIDERING OCCUPATIONAL LICENSING IN VIRGINIA (Heritage Found., Legal Memorandum No. 227, 2018); Editorial Board, *A Model for Licensing Reform*, WALL ST. J. (Apr. 3, 2018), https://www.wsj.com/articles/a-model-for-licensing-reform-1522795235 [https://perma.cc/994M-6KZC] (discussing licensing reforms in Nebraska). Earlier this year, Kansas, Nebraska, and Tennessee revised their occupational licensing schemes to eliminate or ameliorate some licensing disqualifications imposed on offenders after their release. *See, e.g.*, *Kansas most recent state to revise occupational licensing law*, COLLATERAL CONSEQUENCES RESOURCE CTR. (May 11, 2018), http://ccresourcecenter.org /2018/05/11/kansas-the-most-recent-state-to-revise-its-occupational-licensing-law/ [https://perma.cc/E7LE-MMZA]; *Two more states regulate consideration of conviction in occupational licensing*, COLLATERAL CONSEQUENCES RESOURCE CTR. (Apr. 25, 2018), http://ccresourcecenter.org/2018/04/25/two-more-states-regulate-conviction-in-occupational-licensing/ [https://perma.cc/XD4X-YTPJ]. Congress has not enacted licensing reform, but there are members who are interested in doing so. *See, e.g.*, Alternatives to Licensing that Lower Obstacles to Work Act (ALLOW Act) of 2016, S. 3158, 114th Cong. § 2 (2016); PAUL J. LARKIN, JR., A POSITIVE STEP TOWARD OCCUPATIONAL LICENSING REFORM: THE ALLOW ACT (Heritage Found., Legal Memorandum No. 212, 2017) (discussing the ALLOW Act).

10. *See, e.g.*, *Occupational Licensing: Regulation and Competition: Hearing Before Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. (2017) (prepared statement of Maureen K. Ohlhausen, Acting Chairman of the Federal Trade Commission), https://www.ftc.gov/system/files/documents/public_statements/1253073/house_testimony_licensing_and_rbi_act_sept_2017_vote.pdf [https://perma.cc/6TP2-ONMZ]; WILLIAM BLUMENTHAL, FED. TRADE COMM'N, BACKGROUND MATERIALS: A PRIMER ON THE APPLICATION OF ANTITRUST LAWS TO THE PROFESSIONS IN THE UNITED STATES (2006), https://www.ftc.gov/sites/default/files/documents/public_statements/primer-application-antitrust-law-professions-united-states/20060929cbablumenthalmaterials_0.pdf [http://perma.cc/GV9M-SASB] (background materials accompanying remarks before the Canadian Bar Ass'n); CAROLYN COX & SUSAN FOSTER, BUREAU OF ECON., FED. TRADE COMM'N, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION 21–27, 40 (1990), www.ramblemuse.com/articles/cox_foster.pdf [https://perma.cc/UEJ3-R4FE]; DEP'T

these criticisms by gradually starting to re-examine the merits of various occupational licensing requirements. The bulk of the discussion has focused on occupations such as barbering, cos-

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OF THE TREASURY OFFICE OF ECON. POLICY ET AL., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf [https://perma.cc/4Z6G-7T5P]; FED. TRADE COMM'N, ECONOMIC LIBERTY (2018), https://www.ftc.gov/policy/advocacy/economic-liberty [https://perma.cc/3YP3-2YN9]; OCCUPATIONAL LICENSING TASK FORCE & OKLA. DEP'T OF LABOR, OCCUPATIONAL LICENSING TASK FORCE REPORT: A STUDY OF OCCUPATIONAL LICENSING IN OKLAHOMA (2018), https://www.ok.gov/odol/documents/FINAL%20Report.pdf [https://perma.cc/S28P-DY9N]; *see also* Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 170 (2005) (Muris was the Chairman of the Federal Trade Commission (FTC) from 2001–04). The Federal Trade Commission has a long history of opposing occupational licensing requirements. *See generally* Letter from Tara Isa Koslov, Acting Dir. Office of Policy Planning, Fed. Trade Comm'n, et al., to Laura Ebke, Neb. State Senator 2–3 nn. 4–41 (Jan. 17, 2018) (regarding Nebraska Occupational Board Reform Act), https://www.ftc.gov/system/files/documents/ advocacy_documents/federal-trade-commission-staff-comment-nebraska-state-senate-regarding-nebraska-lb299-occupational/v180004_ftc_staff_comment_to_nebraska_state_senate_re_lb_299_jan-18.pdf [perma.cc/9U59-6CGN].

11. *See, e.g.*, N.C. St. Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015) (holding that a state board could be sued under the federal antitrust laws for an order prohibiting non-dentists from providing teeth whitening products or services); Edwards v. District of Columbia, 755 F.3d 996 (D.C. Cir. 2014) (holding a tour guide licensing requirement unconstitutional); St. Joseph Abbey v. Castille, 700 F.3d 154 (5th Cir. 2012) (holding a state law prohibiting the sale of caskets by anyone other than a licensed funeral director unconstitutional); Merrifield v. Lockyer, 547 F.3d 978 (9th Cir. 2008) (holding that a state pesticide licensing control scheme violated the Equal Protection Clause because it arbitrarily included non-pesticide, mechanical pest control devices); Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002) (same); Brantley v. Kuntz, 98 F. Supp. 3d 884 (W.D. Tex. 2015) (holding that it was irrational to require schools that teach only hair braiding to have facilities to teach barbering as well); Bruner v. Zawacki, 997 F. Supp. 2d 691 (E.D. Ky. 2014) (holding that regulations that allowed existing residential moving companies to protest and effectively veto the entrance of competitors into the industry were unconstitutional); Clayton v. Steinagel, 885 F. Supp. 2d 1212 (D. Utah 2012) (concluding that it was irrational to require a natural hair braider to first obtain a cosmetology license); Cornwell v. Hamilton, 80 F. Supp. 2d 1101 (S.D. Cal. 1999) (holding that the State could not force the plaintiff to take a 1600-hour cosmetology course to practice African hair braiding); Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69 (Tex. 2015) (holding a Texas state law requiring "commercial eyebrow threaders"—viz., people who use cotton twine wrapped around their fingers to remove loose eyebrow hair—to complete 750 hours of instruction in chemistry, anatomy, physiology, electricity, nutrition, and "color psychology" violated the state constitution).

metology, floristry, taxi drivers, interior design, and the like.[12] Less attention has been paid to the health care professions. This Article seeks to address that deficiency.

America currently has a lack of qualified physicians to meet the needs of a growing—and aging—population.[13] That shortage is a serious problem, and it is attributable in part to the current medical licensure process.[14] Fortunately, the shortage of qualified physicians in the United States is a problem that can be addressed through policy. Reforms to medical licensure can have a material impact on access to care.[15] Although there are certainly other worthwhile reforms to address the paucity of medical providers,[16] this Article proposes two possible reforms

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12. *See, e.g.*, Dick Carpenter & Lisa Knepper, *Do Barbers Really Need a License?*, WALL ST. J. (May 10, 2012), http://www.wsj.com/articles/SB10001424052702304451104577389691765508790 [https://perma.cc/VJ2R-XAT5]; Editorial Bd., *A license to be a florist? How occupational rules can be a burden on workers*, WASH. POST (Aug. 6, 2015), https://www.washingtonpost.com /opinions/a-license-to-be-a-florist-how-occupational-rules-can-be-a-burden-on-workers/2015/08/06/212ad5b6-3abb-11e5-9c2d-ed991d848c48_story.html?utm_term=.c9b6a563e95c [https://perma.cc/BDE2-J3DM]; Jacob Goldstein, *So You Think You Can Be a Hair Braider?*, N.Y. TIMES MAG. (June 17, 2012), https://www.nytimes.com/2012/06/17/magazine/so-you-think-you-can-be-a-hair-braider.html [https://nyti.ms/Lm66UT]; Eduardo Porter, *Job Licenses in the Spotlight as Uber Rises*, N.Y. TIMES (Jan. 27, 2015), http://www.nytimes.com/2015 /01/28/business/economy/ubers-success-casts-doubt-on-many-job-licenses.html? [https://nyti.ms/1ysVyr6]; Sophie Quinton, *States Don't Understand African Hair Braiding. That Hurts These Small-Business Owners*, NAT'L J. (Oct. 2, 2014), http://www.theatlantic.com/politics/archive/2014/10/states-dont-understand-african-hair-braiding-that-hurts-these-small-business-owners/431361/ [https://perma.cc/X26H-KC3E]; Stephanie Simon, *A License to Shampoo: Jobs Needing State Approval Rise*, WALL ST. J. (Feb. 7, 2011), https://www.wsj.com /articles/SB10001424052748703445904576118030935929752 [https://perma.cc/SG5Y-ZJJ2]; George F. Will, *Supreme Court has a chance to bring liberty to teeth whitening*, WASH. POST (Oct. 10, 2014), http://www.washingtonpost.com/opinions/george-will-supreme-court-has-a-chance-to-promote-cleaner-competition/2014/10/10/13a3a2c0-4fd8-11e4-babe-e91da079cb8a_story.html?hpid=z7 [https://perma.cc/JE2T-GQ2Z]; *see also* Larkin, *supra* note 5, at 216–18 (listing various occupations subject to licensure).

13. *See infra* Part I.

14. *See infra* Part II.

15. *See infra* Part IV.

16. *See generally, e.g.*, KEVIN D. DAYARATNA & JOHN O'SHEA, ADDRESSING THE PHYSICIAN SHORTAGE BY TAKING ADVANTAGE OF AN UNTAPPED MEDICAL RESOURCE 4 (Heritage Found., Backgrounder No. 3221, 2017),

that could ameliorate the current shortage of physicians: (1) states should streamline entry for experienced physicians from abroad, and (2) states should have provisional licensing for medical school graduates who do not find a residency position after graduation.

This Article makes those arguments as follows. Parts I and II describe the current shortfall of physicians in the United States and the sources from which physicians come. Part III describes the current system of American medical licensure and how that system produces an inadequate number of licensed physicians. Part IV discusses the question of whether the current medical training and licensing process is appropriate. It concludes that, although necessary, the current system can be modified and improved. Part V offers some remedies that maintain the necessary features of medical licensing but ensure that a larger number of qualified medical school graduates are available to participate in patient care to help alleviate the current physician shortfall.

I. THE CURRENT SHORTAGE OF PHYSICIANS

Access to medical care has been a problem, especially in rural areas, for decades.[17] Although nearly 20 percent of the

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https://www.heritage.org/sites/default/files/2017-06/BG3221_0.pdf [https://perma.cc/KV7C-Q7ZM]; JOHN S. O'SHEA, REFORMING GRADUATE MEDICAL EDUCATION IN THE U.S. 3 (Heritage Found., Backgrounder No. 2983, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/BG2983.pdf [https://perma.cc/FC5C-MRY9]; Jeffrey S. Flier & Jared M. Rhoads, *The US Health Provider Workforce: Determinants and Potential Paths to Enhancement* (Mercatus Working Paper Series, 2018), https://www.mercatus.org/publications/us-health-provider-workforce [https://perma.cc/ZN24-QXZS].

17. *See* Howard K. Rabinowitz et al., *Increasing the Supply of Women Physicians in Rural Areas: Outcomes of a Medical School Rural Program*, 24 J. AM. BD. OF FAMILY MED. 740, 740 (2011), http://www.jabfm.org/content/24/6/740.full [https://perma.cc/F6TH-UBA4]; Howard K. Rabinowitz et al., *A Program to Increase the Number of Family Physicians in Rural and Underserved Areas: Impact After 22 Years*, 281 JAMA 255, 255 (1999), http://jamanetwork.com/journals/jama/fullarticle/188379 [https:// perma.cc/73Z6-5AAB]; John R. Wheat et al., *Medical Education to Improve Rural Population Health: A Chain of Evidence From Alabama*, 31 J. RURAL

American population lives in rural areas, fewer than 10 percent of primary care providers practice in such areas.[18] In fact, as of 2016, the U.S. Department of Health and Human Services designated more than 6,000 areas of the country, population groups, or health care facilities as having a shortage of primary care physicians.[19] Unfortunately, this problem is only going to worsen over the next decade. The Association of American Medical Colleges (AAMC) projects a nationwide shortage of between 40,800 and 104,900 physicians in both primary and specialty care throughout the country by 2030.[20] Appendix A illustrates the shortage that we are facing.

The reason for this shortfall is that the demand for physician services is expected to grow faster than the supply. Americans are aging. The number of Americans aged 65 and older is forecasted to grow by more than half (55 percent) from 2015 to 2030.[21] Without a comparable increase in the number of practicing physicians, there will be inadequate access to necessary health care services throughout many areas of the country regardless of what medical coverage and payment structure the nation ultimately adopts.[22] The states, which are responsible for

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HEALTH 354, 355 (2015), http://onlinelibrary.wiley.com/doi/10.1111/jrh.12113/epdf [http:// perma.cc/79QR-CKHC].

18. *See* Joshua Ewing & Kara Nett Hinkley, *Meeting the Primary Care Needs of Rural America: Examining the Role of Non-Physician Providers,* NAT'L CONF. STATE LEGIS. (Apr. 2013), http://www.ncsl.org/documents/health/RuralBrief313.pdf [https://perma.cc/2MXF-9YPN]; *Rural Practice, Keeping Physicians In*, AAFP POLICIES (Feb. 26, 2015), http://www.aafp.org/about/policies/all/rural-practice-paper.html [https://perma.cc /V62T-48NM].

19. *HRSA Fact Sheet: FY 2016 – Nation*, U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH RES. & SERVS. ADMIN. (2016), https://data.hrsa.gov/data/fact-sheets [http://perma.cc/AMD9-WXWF] (select Geographic Area "Nation" & Fiscal Year "FY 2016" and follow "View Fact Sheet PDF" hyperlink).

20. *See* TIM DALL ET AL., THE COMPLEXITIES OF PHYSICIAN SUPPLY AND DEMAND 2017 UPDATE: PROJECTIONS FROM 2015 TO 2030, at 3 (2017), https://aamc-black.global.ssl.fastly.net/production/media/filer_public/a5/c3/a5c3d565-14ec-48fb-974b-99fafaeecb00/aamc_projections_update_2017.pdf [https://perma.cc/YQE2-6KYR].

21. *Id.* at 16.

22. *See id.*

licensing physicians, should take the lead in meeting the needs of the population in (at least) two ways. First, the states should streamline the processes whereby qualified and experienced doctors from foreign countries can practice medicine in this country. Second, the states should allow American medical schools graduates who are not members of a residency program to receive provisional licensure to practice under the supervision of a licensed physician.[23]

This impending physician shortage is a pressing problem that needs to be addressed immediately. Understanding the nature of the problem requires a detailed discussion of the evolution of the education and training of physicians in America.

II. THE CURRENT SOURCE OF PHYSICIANS

In order to become a practicing physician, prospective doctors are required to graduate from an accredited medical school. The Liaison Commission on Medical Education, an entity co-sponsored by the American Medical Association and the Association of American Medical Colleges, accredits American medical schools.[24] Foreign medical school graduates must receive certification from the Educational Commission of Foreign

23. Another option would be to allow physician assistants to engage in the same medical practices as physicians, but that revision would require redefining the scope of practice rather than increasing the number of physician practitioners. That issue is beyond the scope of this Article.

24. The American Association of Colleges of Osteopathic Medicine (AACOM) accredits Colleges of Osteopathic Medicine. *See* AM. ASS'N OF COLLEGES OF OSTEOPATHIC MED. (2018), http://www.aacom.org/become-a-doctor/us-coms [https://perma.cc/T5XX-VDNZ]. Some states have one board to regulate both allopathic and osteopathic medicine. *See, e.g.*, VA. CODE ANN. §§ 54.1-2400, 54.1-2400.01:1.A & .B, 54.1-2930 to 54.1-2932 (2018); *Virginia Board of Medicine: Professions Regulated by the Board*, VA. DEP'T OF HEALTH PROFESSIONS, https://www.dhp.virginia.gov/medicine/medicine_occupations.htm [https://perma.cc/9N6N-SALY] (last visited Oct. 3, 2018); *cf.* D'Amico v. Bd. of Med. Exam'rs, 520 P.2d 10, 27 (Cal. 1974) (holding that the federal and state constitutions require that graduates of osteopathic schools must be eligible to apply to become physicians); Osteopathic Physicians & Surgeons of Cal. v. Cal. Med. Ass'n, 36 Cal. Rptr. 641 (Ct. App. 1964) (describing the history of conflict between allopathic and osteopathic medicine).

Medical Graduates (ECFMG) to enter a residency program.[25] The ECFMG requires that foreign graduates have graduated from an institution listed in the World Dictionary of Medical Schools and have passed the first two steps of the United States Medical Licensing Exams (USMLE).[26] Graduates of an accredited residency-training program can then pursue additional GME training via fellowships to prepare them further to practice in particular subspecialties (e.g., pediatric heart surgery).[27]

Postgraduate medical training already existed for well over the course of the last century. Initially, however, much of this training was offered informally via short courses, apprenticeships, or brief periods of study in Europe.[28] Until the 1960s, American hospitals handled the costs of GME directly. Beginning in 1965, however, the federal government became formally involved in postgraduate medical training by making GME funding a required component of Medicare spending.[29] Other government agencies, such as Medicaid, the Veterans Administration, and the Health Resources and Services Administration (HRSA) also provide financial support for GME, but to a much lesser extent.[30]

In the first three decades following the implementation of Medicare, government spending on GME grew at an alarming

25. Graduating from an accredited medical school is a prerequisite for obtaining graduate medical education training and practicing under provisional licensure in Missouri, Kansas, Arkansas, and Utah. For further discussion of provisional licensure, see DAYARATNA & O'SHEA, *supra* note 16, at 4.

26. *Requirements for Certification*, EDUC. COMM'N FOR FOREIGN MED. GRADUATES (Sept. 13, 2018), http://www.ecfmg.org/certification/requirements-for-certification.html [https://perma.cc/9NPE-ZNG4].

27. *Specialty and Subspecialty Certificates*, AM. BOARD MED. SPECIALTIES, https://www.abms.org/member-boards/specialty-subspecialty-certificates [https://perma.cc/S4WC-DCXK].

28. John S. O'Shea, *Becoming a Surgeon in the Early 20th Century: Parallels to the Present*, 65 J. SURGICAL EDUC. 236, 237–39 (2008).

29. O'SHEA, *supra* note 16, at 3.

30. *See id*. at 3–4.

rate.[31] As a result, when President Bill Clinton signed into law the Balanced Budget Act of 1997,[32] it included a provision that capped the number of Medicare-funded residency slots at 1996 levels, a cap that has remained in place for the last two decades.[33] Today, taxpayers contribute more than $10 billion per year to GME funding, over $9 billion of which comes from Medicare.[34] Health Research and Services Administration (HRSA) funding constituted slightly under $300 million in taxpayer funds, and the Veterans Administration spends in between $1.4 and $1.5 billion per year. Private sources also supply an unspecified amount of GME funding.[35]

Each September, senior medical students, as well as some medical school graduates, apply for GME training positions through the National Residency Matching Program (NRMP).[36] Postgraduate training can last from three to seven years and training programs receive accreditation from a nonprofit organization known as the Accreditation Council for Graduate Medical Education (ACGME). The curricula are structured according to guidelines from ABMS member groups for each

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31. *See* ELAYNE J. HEISLER ET AL., CONG. RESEARCH SERV., FEDERAL SUPPORT FOR GRADUATE MEDICAL EDUCATION: AN OVERVIEW 6–10 (2016), https://fas.org/sgp/crs/misc/R44376.pdf [https://perma.cc/8S2E-WWYG].

32. Pub. L. No. 105-33, 111 Stat. 251 (1997).

33. *See* O'SHEA, *supra* note 16, at 3.

34. *See* CONG. BUDGET OFFICE, OPTIONS FOR REDUCING THE DEFICIT: 2017 TO 2026, at 257 (2016), https://www.cbo.gov/system/files?file=2018-09/52142-budgetoptions2.pdf [https://perma.cc/8PT6-DJZU].

35. *See id.*; *see also* HEALTH RES. & SERVS. ADMIN., DEP'T HEALTH & HUMAN SERVS., FISCAL YEAR 2017 JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEE 37, 186–93 (2017), https://www.hrsa.gov/sites/default/files/about/budget/budgetjustification2017.pdf [https://perma.cc/AH4L-EUJZ]; Renee Butkus et al., *Financing U.S. Graduate Medical Education: A Policy Position Paper of the Alliance for Academic Internal Medicine and the American College of Physicians*, 165 ANNALS INTERNAL MED. 134, 134–37 (2016).

36. *See* Anna Maria Barry-Jester, *Another 34,000 People Are About To Put Their Future In The Hands Of An Algorithm*, FIVETHIRTYEIGHT (Feb. 9, 2015), https://fivethirtyeight.com/features/another-34000-people-are-about-to-put-their-future-in-the-hands-of-an-algorithm [https://perma.cc/27U9-S22E].

specialty.[37] After completing a residency training program, graduates are eligible to sit for the board certification examination specific to their chosen specialty and written by the associated ABMS member group.[38]

III. THE CURRENT SYSTEM OF MEDICAL LICENSURE

The postgraduate requirements to receive a medical license vary by state. All states require some graduate training, from one to three years, in addition to completion of the final step of the USMLE before granting a license.[39] That license enables the trainee to practice medicine in the state in which it is issued.[40] Even though board certification is technically a voluntary process and completing a residency training program is not always a requirement for medical licensure, it is usually in the trainee's interest to do so. Graduation from an ACGME accredited program is a prerequisite for board certification and a physician who is not board certified might find it very difficult, if not impossible, to obtain hospital staff privileges, affordable malpractice insurance, or reimbursement from insurance companies.[41]

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37. *See id.*; *see also About Us*, ACCREDITATION COUNCIL GRADUATE MED. EDUC., https://www.acgme.org/About-Us/Overview [https://perma.cc/Q69C-2ESR] (last visited Oct. 1, 2018).

38. *See* Barry-Jester, *supra* note 36.

39. *See, e.g.*, *State-Specific Requirements for Initial Medical Licensure*, FED'N STATE MED. BDS. (2017), https://www.fsmb.org/step-3/state-licensure [https://perma.cc/NM9L-UQ6x].

40. *See id.*

41. Although each hospital medical staff is free to establish its own bylaws, many require board certification to maintain privileges. *See* Elaine Cox, *Board Certification for Doctors: What Does it Really Mean?*, U.S. NEWS WORLD REP. (Apr. 26, 2017), https://health.usnews.com/health-care/for-better/articles/2017-04-26/board-certification-for-doctors-what-does-it-really-mean [https://perma.cc/ZK3X-YCZB]; *see also Physician Recruitment 101: Board Certification and Eligibility*, PINNACLE HEALTH GRP. (June 18, 2012), http://www.phg.com/2012/06/physician-recruitment-101-board-certification-and-eligibility [https://perma.cc/ZLY2-XM4E]. A number of factors can affect the cost of medical malpractice insurance, such as state medical liability laws and the physician's specialty. Board certified physicians, however, often pay less than their uncertified counterparts do. *See, e.g.*, *How*

Two major nongovernment entities, ACGME and ABMS, occupy key positions in the educational accreditation, licensure, and certification of doctors in this country.[42] Those organizations are technically private entities. Nonetheless, because residency programs accredited by the ACGME are structured according to criteria determined by the ABMS member boards, and all state licensing boards require at least some participation in these programs before granting a medical license, those organizations effectively monopolize the only pathway to physician licensure and certification in America.

The current domestic postgraduate physician training and licensing processes have a negative effect on access to care for a variety of reasons.

A. There Is an Insufficient Number of Training Positions

The number of medical graduates matching into a first-year residency position has increased over the last decade and half from 18,354 in 2001 to 29,040 in 2018.[43] Due to an insufficient number of residency training positions, however, the number of American and foreign medical school graduates in the United States who did not obtain a first-year residency position has also steadily grown over this same period, from 5,627 in 2001 to 8,063 in 2018.[44] The graph at Appendix B illustrates that prob-

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Can a Physician or Surgeon Reduce His Medical Malpractice Insurance Premium?, GRACEY-BACKER, INC., http://www.graceybacker.com/how-can-a-physician-or-surgeon-reduce-his-medical-malpractice-insurance-premium/ [https://perma.cc/568S-EPUQ] (last visited Nov. 27, 2018).

42. The Bureau of Osteopathic Specialists and the Council on Osteopathic Postdoctoral Training—both funded by the American Osteopathic Association—perform similar functions for Doctors of Osteopathy. *See* AM. ASS'N CS. OSTEOPATHIC MED., *supra* note 24.

43. *Compare* NAT'L RESIDENCY MATCHING PROGRAM, RESULTS AND DATA: 2018 MAIN RESIDENCY MATCH 15 (2018), http://www.nrmp.org/wp-content/uploads/2018/04/Main-Match-Result-and-Data-2018.pdf [https://perma.cc/3AUZ-ZZ9r], *with* NAT'L RESIDENCY MATCHING PROGRAM, RESULTS AND DATA: 2001 MATCH 5 (2001), https://mk0nrmpcikgb8jxyd19h.kinstacdn.com/wp-content/uploads/2013/08/resultsanddata2001.pdf [https://perma.cc/L873-DHFY].

44. *See* RESULTS AND DATA: 2018 MAIN RESIDENCY MATCH, *supra* note 43, at 5, 15.

lem. Despite the current shortage of physicians in many regions of the nation, those medical school graduates cannot participate in patient care in any meaningful capacity. Unable to find employment in their chosen field, they are often relegated to working in other professions, including driving taxis and selling sunglasses.[45]

B. There Are Geographic Disparities in the Availability of Qualified Physicians

GME funding results in geographic disparities of the supply of physicians across the country. For example, a 2014 study found that New York has 77 Medicare-funded residents per 100,000 population members, while California and Florida each have 19 and 14 residents, respectively.[46] Worse still, Arkansas has just 3 Medicare-funded residents per 100,000 people.[47] Because evidence shows that physicians are more likely than not to practice in the region where they have been trained, the unequal distribution of resident placement means some areas of the country are more prone to physician access problems than others.[48]

C. There Is a Failure to Understand and Respond to Patient Demand

The current GME system also fails to properly assess the needs of the physician workforce. With government funding going directly to teaching hospitals, the money inevitably is spent on the insular institutional needs of the hospital rather than the health care needs of the population as a whole.[49] This arrangement makes it difficult to meet the evolving needs of the population, such as increasing the supply of primary care

45. *See id.* at 2–3.

46. *See* O'SHEA, *supra* note 16, at 5.

47. *See id.* at 11.

48. *See Why Rural America Doesn't Attract Doctors*, ADVISORY BD. (Sept. 2, 2014), https://www.advisory.com/daily-briefing/2014/09/02/why-rural-america-doesnt-attract-doctors [https://perma.cc/6PXX-92LM].

49. *See* O'SHEA, *supra* note 16, at 11.

physicians and general surgeons for rural areas or training more pediatric neurosurgeons and trauma specialists.[50]

D. The Current Training Model Excludes Many Foreign Doctors

Lastly, the current training model excludes many foreign doctors, both recent graduates and some with considerable experience. In order to obtain a medical license, any doctor, whether educated in the United States or abroad, must complete one to three years of residency training depending on the state, as well as pass all three steps of the USMLE.[51] Statistics indicate that many residency programs have traditionally accepted few, if any, foreign graduates.[52] These restrictions, although not government policy, indirectly constrain the supply of medical doctors in the United States.[53]

In sum, the current postgraduate medical training and licensing process does not produce the appropriate number and composition of medical practitioners for the U.S. population. As discussed earlier, this situation will become increasingly dire in the coming years for both demand- and supply-side reasons. The American population will continue to age and demand more geriatric care, while members of the aging phy-

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50. *See id*. at 12.

51. *See Chart of Physician Licensing Requirements by State*, SISKIND SUSSER PC (2014), http://visalaw.wpengine.com/wp-content/uploads/Physician-Licensing-Requirements-1st-version.pdf [https://perma.cc/MK34-NL5G].

52. *International Medical Graduates (IMGs) and the US Residency Match*, MATCH A RESIDENT, https://www.matcharesident.com/imgs-and-residency [https://perma.cc/F55B-8B42] (last visited Sept. 25, 2018).

53. An additional issue is whether residency program requirements are biased against community hospitals. On the one hand, it could be argued that ACGME requirements are more favorable to urban academic hospitals than to rural community facilities. Moreover, to the extent that residency program graduates prefer to work in nearby areas, more will remain in large cities than in sparsely populated regions. On the other hand, medical school practical training programs include a substantial amount of time for students to perform a rotation in a community hospital and in outpatient settings as part of the training experience. There are also a number of community hospitals that do serve as primary training institutions. Accordingly, there are reasonable arguments to be made for either side of this issue.

sician workforce will continue to retire or leave the practice of medicine and not be replenished at a sufficient rate to satisfy the increased demand for care.

IV. DO OVERLY RESTRICTIVE MEDICAL LICENSURE LAWS ACTUALLY PROTECT PATIENTS?

With significantly fewer residency positions than candidates applying, the process for obtaining a medical license in this country has become extremely difficult and competitive. Supporters of the current system would argue, however, that such restrictive processes are necessary to protect patients from harm.[54]

The argument goes as follows. States have the authority to legislate to protect the public against injury, a power known as the "police power."[55] One incident of that power is the authority to regulate the practice of medicine by setting qualifications to diagnose disease, prescribe medication, or perform surgery.[56] In 1889, the Supreme Court of the United States upheld a state law requiring a person to obtain a certificate of graduation from a reputable medical school, prove that he had practiced medicine in the state for ten years, or pass a qualifying examination to practice medicine in the state.[57] The Court reasoned that the practice of medicine required specialized education and training that the average person does not possess.[58] Since then, the courts have consistently recognized that states have a strong interest in limiting who may practice medicine.[59]

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54. Associated Press, *Skip residency? State efforts to ease doctor shortage face criticism*, MOD. HEALTHCARE (Dec. 13, 2015), http://www.modernhealthcare.com/article/20151213/NEWS/151219951 [https://perma.cc/MX5G-78ZF].

55. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) (noting that the state has authority to adopt reasonable regulations of life, liberty, and property "as will protect the public health and the public safety").

56. *See Chart of Physician Licensing Requirements by State*, *supra* note 51.

57. *See* Dent v. West Virginia, 129 U.S. 114, 115 (1889).

58. *See id*. at 122.

59. *See* Larkin, *supra* note 5, at 209, 278–79 & n.332.

Research over the last several decades, however, has illustrated that overly restrictive licensure laws can be counterproductive. For example, a study published by Chris Paul in the *Southern Economic Journal* argued that physician licensure is primarily the result of organized physicians manipulating the political system to limit entry and raise salaries with no statistically significant impact on quality of care.[60] Two decades later, Chris Conover of Duke University estimated medical licensure to cost Americans $6.5 billion, resulting in $4.7 billion in increased income for health care providers.[61] Other research has suggested that physician licensure laws are often overly stringent, constrict patient choice, limit innovation, and raise costs while offering no meaningful improvements to quality.[62] In some cases, patients may even forgo medical treatment when access to care is exceptionally difficult to find.[63] In an extreme example of the unintended consequences of restrictive professional licensing, a Michigan man gave himself a root canal to avoid having to pay for one at a dentist's office.[64] Those studies and occurrences are consistent with the views of commentators who have analyzed the effects of occupational licensing in general.[65]

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60. *See* Chris Paul, *Physician Licensure Legislation and the Quality of Medical Care*, 12 ATL. ECON. J. 18 (1984).

61. CHRISTOPHER J. CONOVER, HEALTH CARE REGULATION: A $169 BILLION HIDDEN TAX 12 (Cato Inst., Policy Analysis No. 527, 2004), https://object.cato.org/sites/cato.org/files/pubs/pdf/pa527.pdf [https://perma.cc/YX6W-2JSB].

62. *See id.* at 10; *see also* Gregory Dolin, *Licensing Health Care Professionals: Has the United States Outlived the Need for Medical Licensure?*, 2 GEO. J.L. & PUB. POL'Y 315 (2004); Barry J. Seldon, *Market Power among Physicians in the U.S.*, 1983–1991, 38 Q. REV. ECON. & FIN. 799 (1998).

63. Darla Mercado, *Here's why a quarter of American families are skipping their doctor visits*, CNBC (June 7, 2017, 12:17 PM), https://www.cnbc.com/2017/06/07/heres-why-a-quarter-of-american-families-are-skipping-their-doctor-visits.html [https://perma.cc/P8C2-Z5DP].

64. Tom Rademacher, *Don't Try This at Home: Man Does Own Root Canals*, ANN ARBOR NEWS, Feb. 9, 1999, at A11.

65. *See* Larkin, *supra* note 5, at 209, 237–38 ("Occupational licensing restrictions can result in more than two million fewer jobs nationwide, with an annual cost to

Occupational licensing is one of the country's "principal forms of economic regulation," subjecting a myriad of fields—including auctioneers, cosmetologists, hair braiders, and florists—in many cases to inane and onerous licensing requirements.[66] Licensure requirements are generally defended on the ground that they mitigate informational asymmetry because consumers ordinarily lack the time necessary to acquire the pertinent expertise to judge an individual's qualifications.[67] Medical licensing rules are the classic example, as the Supreme

consumers of more than $100 billion. Moreover, government regulators or law enforcement officials enforce licensing rules, sometimes through the criminal law, and tax dollars fund the salaries and expenses of those officials. The result is that consumers lose twice from licensing requirements—through higher prices and higher tax bills—and the beneficiaries do not incur the transaction costs of enforcement. Licensing programs also do not provide guaranteed improvements in service quality. Studies show the difficulty of proving that quality enhancements offset price increases from licensing. One explanation is that many factors affect the quality of a service-provider's work (such as the amount of time a professional spends with a client), and the service provider is free to adjust the inputs not controlled by licensing (by reducing that time, for example). Consequently, even a 'mandated increase in one or several inputs' (satisfying fixed educational or training requirements is one example) 'does not necessarily imply that quality will increase.' Competition, by contrast, spurs quality improvements in order to retain existing customers and attract new ones. The higher prices resulting from licensing requirements also may persuade consumers to attempt 'do-it-yourself' projects, a practice that can prove dangerous for the consumer as well as third parties when, for example, an untrained individual attempts to perform electrical work." (footnotes omitted) (citations omitted)).

66. *See id.* at 219 ("Are the health, welfare, and safety of the community really put at risk if society allows unlicensed florists, interior designers, and frog farmers to ply their trades? Is anyone's life cheapened if he or she hires an unlicensed cat groomer, home entertainment installer, or makeup artist? Why do we need to license bartenders? To ensure that they know a grasshopper from a Manhattan? To guarantee that they are good listeners? And how would anyone even go about deciding whether a fortuneteller is qualified? Do you ask, 'Who will win the next Super Bowl?' 'How many fingers am I holding up?' Besides, what is the passing rate? Is two-for-three good enough? And is it an automatic disqualification if the fortuneteller is not richer than Croesus?" (footnotes omitted)); *see also* PAUL J. LARKIN, JR., A BRIEF HISTORY OF OCCUPATIONAL LICENSING (Heritage Found., Legal Memorandum No. 204, 2017); PAUL J. LARKIN, JR., A PUBLIC CHOICE ANALYSIS OF OCCUPATIONAL LICENSING (Heritage Found., Legal Memorandum No. 205, 2017).

67. *See, e.g.*, Kenneth Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941, 966 (1963).

Court noted more than a century ago.[68] Nonetheless, occupational licensing regulations are not always necessary, and in most fields are far too onerous to be justified on informational asymmetry grounds. Additionally, licensing requirements encourage incumbents to pursue rent-seeking cartels created by

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68. As the Supreme Court explained in *Dent v. West Virginia*:

> Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society may well induce the state to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified. The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected. It would not be deemed a matter for serious discussion that a knowledge of the new acquisitions of the profession, as it from time to time advances in its attainments for the relief of the sick and suffering, should be required for continuance in its practice, but for the earnestness with which the plaintiff in error insists that, by being compelled to obtain the certificate required, and prevented from continuing in his practice without it, he is deprived of his right and estate in his profession without due process of law. We perceive nothing in the statute which indicates an intention of the legislature to deprive one of any of his rights. No one has a right to practice medicine without having the necessary qualifications of learning and skill, and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body designated by the state as competent to judge of his qualifications.

129 U.S. 114, 122–23 (1889). The Court has reaffirmed a state's authority to regulate the practice of medicine on numerous occasions since its decision in *Dent*. *See* Larkin, *supra* note 5, at 278–79 & n.332.

state lawmakers that protect incumbents and politicians while burdening consumers.[69]

Of course, medicine is inherently different from most other fields. Still, overly restrictive licensure laws always result in the same phenomenon: an artificial reduction in the number of practitioners. Those restrictions severely limit access to care, ironically hurting the very people they are designed to help. Thus, especially in light of the impending physician shortage, it is necessary to pursue improvements to the current medical licensure laws to alter the present state of affairs.

V. ADDRESSING THE PROBLEM: POLICY RECOMMENDATIONS

The practice of medicine in America is a highly regulated industry. The resulting insulation from competition contributes to the undersupply and misdistribution of medical providers nationwide. We propose two reforms that would increase the supply of medical care in this country without putting the public's health at risk.

A. Streamline Entry for Experienced Physicians from Abroad

Simply to obtain a license, the current medical system in the United States requires many experienced foreign doctors to complete the same type of postgraduate medical training as a graduate of an American medical school who has no independent practical experience.[70] Faced with the prospect of spending years repeating the same type of internship and residency training they completed decades ago at home, many highly qualified physicians from abroad might simply forgo the idea of practicing in the United States. Although some ac-

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69. *See* Larkin, *supra* note 5, at 241.

70. Catherine Rampellaug, *Path to United States Practice Is Long Slog to Foreign Doctors*, N.Y. TIMES (Aug. 11, 2013), https://www.nytimes.com/2013/08/12/business/economy/long-slog-for-foreign-doctors-to-practice-in-us.html [https://nyti.ms/2k9kgxu].

climation to the American medical system might be necessary for foreign doctors, the current system is far too onerous. To address that issue, state lawmakers should consider legislation that would streamline the process for admitting experienced foreign doctors to the medical workforce.

The Australian medical licensure system is a valuable case study. In Australia, foreign doctors who are licensed in their home countries, and who have passed Australian licensing exams or their equivalents, can obtain a provisional license to practice primary care under a collaborating physician or hospital.[71] The Australian Medical Board suggests four different potential levels of supervision, based on the foreign doctor's qualifications, ranging from constant supervision for those with less experience to regular but significantly less frequent supervision for those who have practiced independently for a substantial amount of time.[72] The Medical Board requires the supervising practitioner to adhere strictly to these regulations.[73] After demonstrating sufficient competence, experienced practitioners can be eligible for a full medical license from the Board.[74]

Canada and the European Union also have policies for accepting foreign doctors that are not nearly as onerous as the American system.[75] In addition, reciprocity agreements allow participating nations to accept training in a different nation as a

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71. *Competent Authority Pathway*, MED. BD. AUSTL. (Aug. 22, 2018), https://www.medicalboard.gov.au/Registration/International-Medical-Graduates/Competent-Authority-Pathway.aspx [https://perma.cc/P3TR-6EUG].

72. MED BD. OF AUSTL., GUIDELINES: SUPERVISED PRACTICE FOR INSTITUTIONAL MEDICAL GRADUATES 6–7 (2016).

73. *See id.* at 9.

74. *See Competent Authority Pathway*, *supra* note 71.

75. *See Automatic Recognition*, EUR. COMM'N, http://ec.europa.eu/growth/single-market/services/free-movement-professionals/qualifications-recognition/automatic_en [https://perma.cc/Z7GJ-9XKA] (last visited Nov. 30, 2018); *Recognized Training and Certification outside Canada*, C. FAM. PHYSICIANS CAN., http://www.cfpc.ca/RecognizedTraining/ [https://perma.cc/G8S7-FZUK] (last visited Sept. 29, 2018).

first step toward full medical licensure.[76] American licensing boards could benefit from pursuing similar policies. Doing so would not only help attract experienced foreign doctors, but also steer them away from the current graduate medical education system, which, as previously mentioned, depends heavily on federal funding and has a large bottleneck, with more medical graduates applying than slots available.[77]

Some policies are already in place offering limited licenses, advanced standing, and alternative pathways to a select number of experienced foreign physicians on an ad hoc basis.[78] Those policies, however, do not seriously address the physician shortage, and they do not alleviate the strain on the current GME system that has a fixed number of residency positions. Policies that address the issue of foreign doctors who wish to practice in the United States should be broader and need to include the option of allowing the most experienced physicians to practice independently, provided they meet established criteria.

B. Encourage States to Allow Provisional Licensure for Medical School Graduates Not Accepted into Residency Programs

For the years 2014 through 2018, on average each year 8,444 American and foreign medical school graduates did not find a position in a residency program.[79] That surplus of talent could

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76. *See Recognized Training and Certification outside Canada*, *supra* note 75.

77. Congress could also pass legislation encouraging states to offer provisional or regular licenses to foreign doctors, giving states the option to opt out of such policy if they desire.

78. *See, e.g.*, VA. CODE. ANN. § 54.1-2936 (2018); *Advanced Level Entry/Interprogram Transfers*, AM. BD. FAM. MED., https://www.theabfm.org/cert/advlevel.aspx [https://perma.cc/C9NF-29Y2] (last visited Sept. 29, 2018); *International Medical Graduates Alternative Pathway*, AM. BD. RADIOLOGY (Aug. 27, 2018), https://www.theabr.org/diagnostic-radiology/initial-certification/alternate-pathways/international-medical-graduates [https://perma.cc/9Y4P-ZHZ2]; *Training and Certification*, AM. BD. SURGERY, http://www.absurgery.org/default.jsp?certintlgraduates [https://perma.cc/TC7Y-CR8V] (last visited Sept. 29, 2018).

79. *See* NAT'L RESIDENT MATCHING PROGRAM (2018), *supra* note 43, at 15.

be immensely useful in ameliorating shortages of medical care throughout the country. Heritage Foundation research suggested that state lawmakers should allow the provisional licensing of those medical graduates to work under the supervision of a qualified physician.[80] After all, those graduates have acquired a substantial amount of education and training during their medical studies and, under appropriate supervision, could use their knowledge in areas of need.[81]

Requirements for the provisional license, which would be issued by a state's medical licensing board, should include earning a medical degree from an accredited medical school, passing the USMLE, and collaborating with a supervising licensed physician. Details regarding the supervision and the nature of collaboration should be documented by a contract between the medical graduate and the supervising physician subject to medical board approval.

Certainly, most graduates lack independent practical experience and will likely require closer supervision than many foreign doctors who have practiced independently for a number of years. But to prevent those well-educated medical school graduates from participating in any form of patient care and possibly end their hopes of pursuing a career in medicine, simply because the current process for training and licensing doctors cannot accommodate them, is a terrible waste of a valuable resource.

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80. *See* DAYARATNA & O'SHEA, *supra* note 16, at 4.

81. It is increasingly common to see Physician Assistants ("PAs") used to help ameliorate the physician shortage. *See, e.g.*, *Physician Assistants Moving Into Specialties Amid Doctor Shortage*, FORBES (July 14, 2016), https://www.forbes.com /sites/brucejapsen/2016/07/14/physician-assistants-moving-into-specialties-amid-doctor-shortage/#22c062105874 [https://perma.cc/66DA-D9S3]. PAs are seeking greater autonomy through changes in state scope of practice laws. If unsuccessful, they will still be involved in patient care. A medical school graduate who is unable to find a residency position, however, is effectively excluded from the health care workforce.

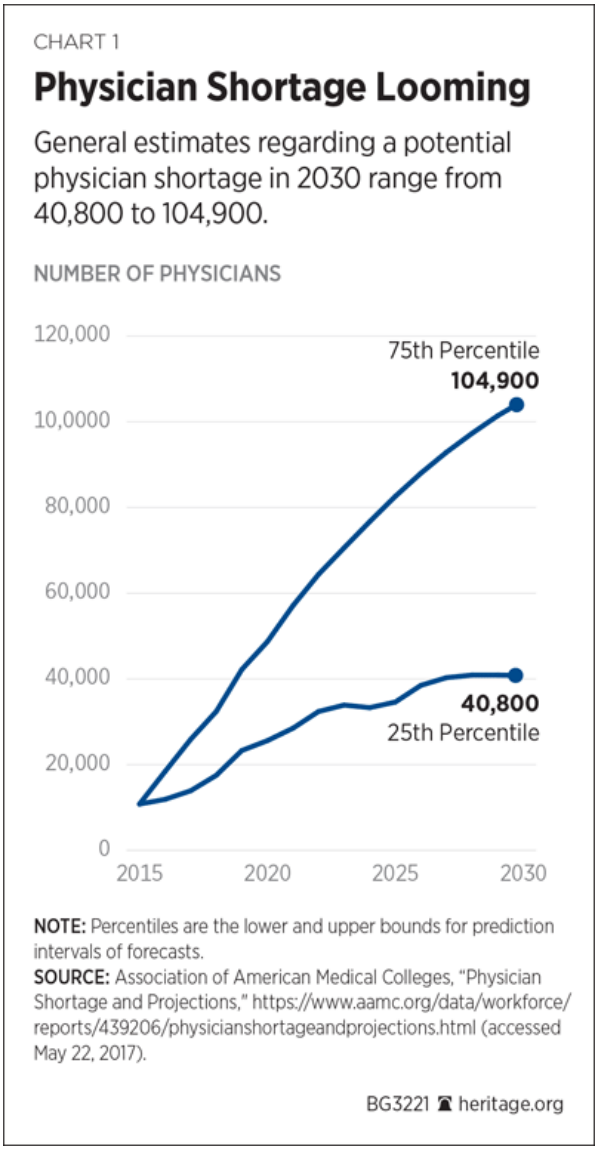
To address a dearth of primary care providers, four states—Missouri, Arkansas, Kansas, and Utah—have already passed laws to license medical graduates under this type of arrangement.[82] Other states throughout the country could benefit from similar reforms.

VI. CONCLUSION

The current medical training and licensure system in the United States limits the supply of medical practitioners, exacerbating the shortage of care our country is facing. Fundamental reforms to the process of training and licensing medical practitioners in the United States have the potential to expand the supply of medical providers significantly and thus improve patient access to needed medical care. Under the policy recommendations outlined above, experienced and qualified foreign-trained doctors could practice in the United States without having to repeat the same residency training that they have already completed at home. Furthermore, under a system of provisional licensure, recent medical school graduates who cannot obtain a residency training position would have alternative opportunities to participate in the care of patients, help ameliorate the physician shortage, and receive training in the process. These reforms will help alleviate the current and future shortage of qualified physicians.

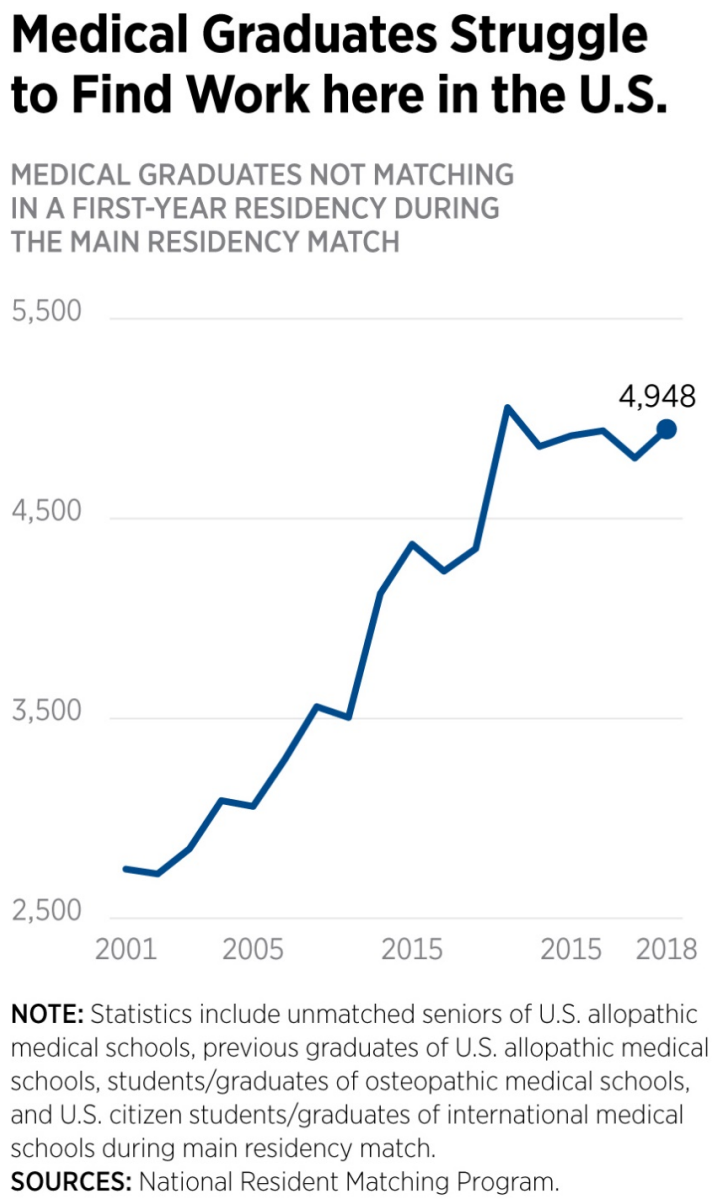
82. *See* ARK. CODE. ANN. § 17-95-903 (West 2015); KAN. STAT. ANN. § 65-2811(a) (2018); MO. ANN. STAT. § 334.036 (West 2018); UTAH CODE ANN. § 58-67-302.8 (West 2018).

APPENDIX A[83]



83. DAYARATNA & O'SHEA, *supra* note 16, at 2.

APPENDIX B[84]



84. *Id.* at 5.

BLOC PARTY FEDERALISM

MICHAEL S. GREVE*

INTRODUCTION

The first year of Donald J. Trump's presidency has produced numerous heated controversies that implicate two central constitutional themes of U.S. politics: federalism and the separation of powers. The Trump administration's immigration policies regarding travel from predominantly Muslim countries, "sanctuary" jurisdictions, and the suspension of the Obama administration's "Dreamers" program have all been met with vehement resistance and litigation, often led by Democratic state attorneys general.[1] The Environmental Protection Agency's (EPA) initiatives to rescind, revoke, or rewrite a raft of environmental regulations have likewise generated intense state opposition.[2] And state officials have sharply protested against what they view as the administration's deliberate efforts to un-

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* Professor of Law, Antonin Scalia Law School, George Mason University. Parts of this Essay are excerpted from a more extended article on polarized federalism, written under the auspices of the Dreier Roundtable at Claremont McKenna College and published in PARCHMENT BARRIERS: POLITICAL POLARIZATION AND THE LIMITS OF CONSTITUTIONAL ORDER 119 (Zachary C. Courser, Eric A. Helland & Kenneth P. Miller eds., 2018). Thanks to Jessica Bulman-Pozen, Chris DeMuth, Abbe Gluck, Eric Helland, Shep Melnick, Jeremy Rabkin, and Steve Williams for helpful comments on earlier drafts. Errors, dubious judgments, etc. are all mine.

1. *See, e.g.*, Abbie Bennett & Anne Blythe, *NC Attorney General Stein supports lawsuit against Trump immigration ban*, NEWS OBSERVER (updated Feb. 7, 2017 6:05 PM), http://www.newsobserver.com/news/politics-government/state-politics/article131140734.html [http://perma.cc/KUN3-2WRF]; Josh Gerstein, *California files suit over Trump sanctuary city policy*, POLITICO (updated Aug. 15, 2017 6:05 AM), https://www.politico.com/story/2017/08/14/california-trump-sanctuary-city-grant-lawsuit-241623 [https://perma.cc/L927-D2RH]; Dan Levine, *California, three other states sue over Trump action on 'Dreamer' immigrants,* REUTERS (Sept. 11, 2017, 1:01 PM), https://www.reuters.com/article/us-usa-immigration-lawsuit/california-three-other-states-sue-over-trump-action-on-dreamer-immigrants-idUSKCN1BM2IY [https://perma.cc/6TAZ-YKEC].

2. Richard Valdmanis, *States Challenge Trump over Clean Power Plan*, SCI. AM. (Apr. 6, 2017), https://www.scientificamerican.com/article/states-challenge-trump-over-clean-power-plan/ [https://perma.cc/RLH8-W98H].

dermine the Patient Protection and Affordable Care Act (ACA).[3]

All those controversies have been shaped to some extent by President Trump's idiosyncratic style of leadership and communication. But the controversies also signal the rising dominance of the executive branch and especially the White House, rather than Congress, over federalism relations. And all have played out under conditions of intense partisan polarization. Those joint tendencies—the rise of executive government, and partisan polarization—have driven federalism's development for well over three decades.

Scholars broadly agree that an "executive federalism" has replaced the legislative, "cooperative" federalism of the post-New Deal era.[4] In a presidential system, they observe, partisan polarization is naturally conducive to executive government.[5] Institutional mechanisms that generate cooperation and exchange in a system of divided powers break down, and a deadlocked, "dysfunctional" legislature yields power to the executive.[6] And because most domestic policies are embedded in intergovernmental statutes and arrangements, polarization and the attendant rise of executive government have naturally produced an executive-dominated federalism.[7] Its contours are

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3. *See* Rachel Roubein, *18 states sue over Trump-halted ObamaCare payments*, HILL (Oct. 13, 2017 3:09 PM), http://thehill.com/policy/healthcare/355360-15-states-sue-over-trump-halted-obamacare-payments [https://perma.cc/8BAE-XME7]; *see also* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

4. Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 954–55 (2016); Jessica Bulman-Pozen & Gillian E. Metzger, *The President and the States: Patterns of Contestation and Collaboration Under Obama*, 46 PUBLIUS: J. FEDERALISM 308, 308–10 (2016); Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739 (2015). For an earlier, excellent and remarkably prescient contribution see Thomas Gais & James Fossett, *Federalism and the Executive Branch*, in INSTITUTIONS OF AMERICAN DEMOCRACY: THE EXECUTIVE BRANCH 486, 487 (Joel D. Aberbach & Mark A. Peterson, eds., 2005).

5. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2314–15 (2006).

6. *See, e.g.*, Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 B.U. L. REV. 1159, 1165 (2014); Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 95 (2015); Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395 396–97 (2009).

7. *See* Bulman-Pozen, *supra* note 4, at 953. Arguably, the forces that have propelled the rise of executive government have been especially virulent in the federalism arena. Only the executive, not Congress, can hope to cajole and rein in in-

shaped by the EPA, the Department of Health and Human Services (HHS), and the Department of Education; by agencies that until recently had little if any truck with federalism, such as the Internal Revenue Service;[8] by nominally private, quasi-governmental agencies;[9] and through legal settlements between federal regulators, state prosecutors, and private enterprises.[10] These law- and policymaking initiatives have taken decidedly "unorthodox" forms.[11] Federal agencies exercise broad waiver authority, generate entire federalism programs from whole cloth, commandeer vast revenue streams to state and local governments at their discretion, and endeavor to entice or cajole ornery states into some form of cooperation with federal programs and ambitions.[12] Key federalism decisions are made not by bureaucrats in the context of a routinized regulatory process but by high-level political officials, acting in close concert with the White House.[13]

For the most part, the executive federalism literature has stressed the potent effects of partisan polarization at the national level.[14] This Essay complements the picture by examining the effects of partisan, ideological polarization at the state level. "Red" and "blue" states divide sharply over highly salient questions of public policy, and they act as blocs. Concur-

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creasingly ornery states. It has many more tools at its disposal than the legislature, is relatively nimbler, can act on individual states, and can act strategically across program areas. Gais & Fossett, *supra* note 4, at 507.

8. *See* Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 2015 PEPP. L. REV. 56, 68–69 ("[T]he IRS is now one of the government's principal welfare agencies, on par with the Department of Health and Human Services and the Social Security Administration.").

9. *See* Ann Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 846–49 (2014).

10. *See* PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA 91–95 (2015); Christopher C. DeMuth, Sr. & Michael S. Greve, *Agency Finance in the Age of Executive Government*, 24 GEO. MASON L. REV. 555, 567–72 (2017).

11. Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1794–97 (2015).

12. *See infra* Part II.

13. *See* Bulman-Pozen, *supra* note 4, at 962 ("Polarized parties more closely link the President and agencies and offer the White House additional leverage over administration.").

14. For a notable exception *see* Timothy J. Conlan & Paul L. Posner, *American Federalism in an Era of Partisan Polarization: The Intergovernmental Paradox of Obama's "New Nationalism,"* 46 PUBLIUS: J. FEDERALISM 281, 282–83 (2016) (examining state-level polarization).

rently, the ideological divide between the national executive and the "dissident" state bloc has also widened. Partisan, ideological polarization in this geographic, state-level dimension is a form of political sectionalism—that is, a political cleavage that is too deep to be overcome through ordinary, transactional politics and bargaining.[15] U.S. federalism has been "sectional" in this sense for most of our history. What is new is the interplay with an executive-dominated national government. The conjunction has produced a distinctive institutional pattern of federal-state relations. It has a distinctive political economy, and it operates largely without meaningful legal and especially constitutional constraints.

Part I of the Essay places our contemporary, sectional, executive federalism in historical perspective. Part II describes some of its central features: asymmetric treatment of individual states, policymaking at the outer limits of statutory and constitutional law, and litigiousness. Part III sketches contemporary federalism's political economy. Very roughly: the blue states' quasi-European business model of expansive (and expensive) social and environmental protections is difficult to sustain. So long as capital and labor can migrate to hospitable states, the blue-state model requires high federal fiscal transfers and, moreover, an extensive system of federal regulation that raises the red-state rivals' cost and curtails their competitive and comparative advantages. This conflict has shaped federalism in highly salient policy arenas, and it has reinforced the executive's dominance over federalism relations. Part IV notes the dearth of effective legal and constitutional controls: The Supreme Court's separation of powers and federalism jurisprudence is seriously mismatched with current institutional realities.

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15. In its strictest sense "sectionalism" refers to a constellation of rival, *contiguous* state jurisdictions that divide along a political line of existential salience (exemplified by the Confederacy and the Union). *See* RICHARD FRANKLIN BENSEL, SECTIONALISM AND AMERICAN POLITICAL DEVELOPMENT, 1880–1980, at 3–4 (1984). By some measures, contemporary federalism is sectional even in that strict sense. For example, it is entirely possible to travel—without detours—from Florida to Canada without going anywhere near a blue state. In other respects, contemporary federalism is "sectional" in a more attenuated sense—for example, the very real divide between coastal states and flyover country. To my mind, not much hangs on this difference in terms of federalism's political economy once political identity comes to be defined by party and ideology. Thanks to Jessica Bulman-Pozen for urging me to clarify this point.

The Conclusion briefly speculates about sectional, executive federalism's prospects and possibilities. On a cheerful view, federalism's contentiousness suggests that our politics, far from collapsing into a centralized autocracy, remain vibrant and that states—unlike, perhaps, Congress and arguably the judiciary—remain an effective check on the executive.[16] On a more pessimistic note, federalism's dynamics signal an acute danger of institutional corruption—not so much petty quid pro quo bargains, but a pattern that the Founders associated with the term "corruption": the systematic mobilization of the governmental machinery for purposes of partisan gain and oppression.

I. STATES OF POLARIZATION

Over the past decades, states have followed the national pattern of increasing partisan and ideological polarization.[17] By and large, increased partisan homogeneity *within* states has been accompanied by increased heterogeneity across and *among* states. The number of states under one-party control has risen markedly: in over two-thirds of the states, one party governs the executive and both houses of the legislature.[18] Meanwhile, the ideological distance between red and blue states, and between "dissident" state and the federal government, has increased sharply on many key policy questions. Red and blue states have formed and act as stable blocs over a wide range of issues, many of them of near-existential interest to states on both sides. Controversies over environmental and energy policy, immigration, the ACA, and tax policy are examples.[19]

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16. In the aftermath of President Trump's election, liberal scholars and pundits have emphasized that potential and urged like-minded constituencies and state officials to act accordingly. *See, e.g.*, Cristian Farias, *A New Romance: Trump Has Made Progressives Fall in Love With Federalism*, NEW YORK: DAILY INTELLIGENCER (Aug. 24, 2017, 8:00 AM), http://nymag.com/daily/intelligencer/2017/08/trump-has-made-progressives-fall-in-love-with-federalism.html [https://perma.cc/W2SE-Y8UK]; Heather K. Gerken & Joshua Revesz, *Progressive Federalism: A User's Guide*, DEMOCRACY (Spring 2017), https://democracyjournal.org/magazine/44/progressive-federalism-a-users-guide/ [https://perma.cc/2GQP-97UL].

17. Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530, 546, 549–50 (2011).

18. *Gubernatorial and Legislative Party Control of State Government*, BALLOTPEDIA, https://ballotpedia.org/Gubernatorial_and_legislative_party_control_of_state_government [https://perma.cc/Z5XE-899B].

19. *See infra* notes 48–49 and accompanying text.

Political scientists have described this form of geographic polarization as "sectionalism."[20] In varying shapes and with varying intensity, sectionalism has been the rule in U.S. politics, and it has powerfully shaped the contours of our federalism. A very brief survey helps to put its present-day, uniquely *executive* manifestation in context.

Throughout the nineteenth century, U.S. politics were intensely sectional. The central cleavage, of course, was slavery and, after the Civil War, its enduring legacy. Sectional politics were then conducive to a "dual" federalism, characterized by limited federal authority and a low level of fiscal transfers. For example, the Supreme Court—even in it most nationalist moments—never embraced a federal commerce power that would have entailed federal authority to regulate slavery within the states.[21] Similarly, fiscal transfers and other "cooperative" federalism arrangements could come about only rarely, due to intractable disagreements over the distribution of federal spending.[22]

The Progressive and pre-New Deal Era—like ours, a time of high partisan polarization and sectional politics—produced some cooperative federalism programs through federal statutes.[23] Such statutes were enacted in domains where states' interests were homogeneous (for example, federal aid for road construction)[24] or where Congress was able to compartmentalize political authority along state lines, as with liquor regulation.[25] But Congress steered clear of enacting statutes that would have threatened the racial caste structure in the South.[26] Only the massive dislocations and the unusually high partisan consensus of the New Deal broke the sectional alignments and

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20. *See* BENSEL, *supra* note 15 at 4.

21. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 206–07 (1824).

22. *See* JONATHAN A. RODDEN, HAMILTON'S PARADOX: THE PROMISE AND PERIL OF FISCAL FEDERALISM 59–63 (2006).

23. Frank R. Strong, *Cooperative Federalism*, 23 IOWA L. REV. 459, 461–62 (1938).

24. *See, e.g.*, Federal-Aid Road Act of 1916, Pub. L. No. 64-156, 39 Stat. 355 (repealed 1958).

25. *See* Webb-Kenyon Act, Pub. L. No. 62-398, 37 Stat. 699 (1913) (codified as amended at 27 U.S.C. §§ 122–122b (2016)).

26. The child labor statutes struck down by the Supreme Court in Hammer v. Dagenhart, 247 U.S. 251, 277 (1918), and Child Labor Tax Case, 259 U.S. 20, 44 (1922), are the conspicuous exceptions.

generated stable, broad-scale patterns of cooperative federalism.[27]

Initially, that emergent federalism had a distinctly executive hue. The emergency programs of the early New Deal years conferred virtually unlimited spending discretion on the executive, and President Roosevelt's confidants (led by Harry Hopkins) roamed the country and sought to entice local politicians to adopt relief programs on a one-off basis.[28] Cooperative federal entitlement programs—so called because they created legislative entitlements *for the states*—were enacted when and because Congress, the executive, and state and local politicians all shared an interest in greater regularity.[29] While those programs—for example, the 1935 Social Security Act—left a great deal to administrative discretion, they also established general funding formulas and ensured legislative budget and program control through appropriations as well as continuous committee oversight.[30]

The post–New Deal, post–World War II era was a time of high partisan consensus, chiefly because Southern whites ended up in the wrong party.[31] The sectional cleavage over race, however, remained. There could be no cooperative federalism in education or healthcare because for the South, there was nothing to negotiate. It took the Great Society, another episode of convulsion and single-party dominance, to break that pattern. The cooperative achievements of that period—the Elementary and Secondary Education Act of 1965,[32] the accompa-

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27. Jenna Bednar et al., *A Political Theory of Federalism*, *in* CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE 223, 258–59 (John Ferejohn et al., eds. 2001).

28. *See* James T. Patterson, *The New Deal and the States*, 73 AM. HIST. REV. 70, 71, 74 (1967).

29. John Joseph Wallis, *The Political Economy of New Deal Fiscal Federalism*, 29 ECON. INQUIRY 510, 512 (1991).

30. *See, e.g.*, Social Security Act of 1935, Pub L. No. 74-271, §§ 501–505, 49 Stat. 620, 629–31 (granting discretion to the Secretary of Labor to allot grants to the states for maternal and child health services.); *see also* Joel D. Aberbach, *Changes in Congressional Oversight*, 22 AM. BEHAV. SCI. 493, 493 (1979); Andrew M. Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 906, 931 (2014).

31. *See* Hahre Han & David W. Brady, *A Delayed Return to Historical Norms: Congressional Party Polarization after the Second World War*, 37 BRIT. J. POL. SCI. 505, 509–16 (2007).

32. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 6301–8961 (2012)).

nying civil rights mandates of Title VI of the Civil Rights Act of 1964,[33] and Medicaid[34]—reshaped the federalism landscape profoundly and with amazing speed. At the same time, though, the Great Society era also induced the collapse of the New Deal coalition and, over time, produced partisan realignment and polarization that now dominates U.S. politics at all levels.[35]

Racial attitudes still play an important role in our politics, and in more recent decades, "social" issues (such as the death penalty, abortion, or same-sex marriage) have proven beyond the scope of monetized, congressional bargains.[36] Central to contemporary politics, however, is an ideological confrontation between red states' low-tax, production-oriented policy commitments (exemplified by Texas) and the quasi-European model embraced by New York, California, and other blue states, which reflects a high domestic demand for social services and environmental amenities and a relatively high tolerance for accompanying tax payments.[37] Two prominent federalism scholars have described the attendant transformation in intergovernmental relations with admirable clarity and precision:

> Unlike the previous era of cooperative federalism and national expansion, gridlock in Washington is now matched by equally trenchant conflicts among the states. Rather than respond to pent up policy demands for public action on broadly agreed goals and concerns, states instead have cleaved to radically different policies and agendas mirroring the conflicts in Washington. Rather than acting as a relief valve for national policy paralysis, states have now tended collectively to ratify and intensify those conflicts.[38]

The conflicts, to repeat, play out in a national political process that is dominated by the executive. The following Part de-

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33. Pub. L. No. 88-352, §§ 601–605, 78 Stat. 241, 252–53 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-4a (2012)).

34. Social Security Amendments of 1965, Pub. L. No. 89-97, § 121(a), 79 Stat. 286, 343–52 (codified as amended 42 U.S.C. §§ 1396 to 1396w-5 (2012)).

35. MATTHEW LEVENDUSKY, THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS 1-11 (2009).

36. For this reason, the Supreme Court—rather than the Congress—locked dissident states into a kind of national, postmodern morals cartel. *See* MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION 268–72 (2012).

37. *See infra* Part III.

38. Conlan & Posner, *supra* note 14, at 299.

scribes some of the key features and dynamics of our sectional, executive federalism.

II. BARGAINING, REGULATION, LITIGATION

Under the Supreme Court's interpretation of the Constitution and as a practical matter, the federal government cannot *compel* a state to accept federal funds or to administer a federal program.[39] For this reason, the "cooperative" federalism programs of the New Deal and the Great Society aimed to produce uniform state cooperation through some combination of (often fiscal) carrots and sticks, coupled with an assurance of state flexibility.[40] The programs were structured so as to make it nearly impossible for any individual state to resist the federal "incentives."

That mode of "cooperative" federal integration works where and when states are tolerably homogeneous. It breaks down when a substantial number of states, *acting as a bloc*, refuse cooperation or affirmatively work to thwart federal objectives. This is true even where the federal statute provides for a fallback in the form of direct federal regulation in noncompliant states: no federal agency is built to administer its programs directly in more than a handful of states. State-level polarization has produced such blocs and, consequently, a distinctive set of bargaining incentives and dynamics.[41]

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39. *See* Printz v. United States, 521 U.S. 898, 935 (1997); New York v. United States, 505 U.S. 144, 188 (1992) ("The Federal Government may not compel the States to enact or administer a federal regulatory program.").

40. *Cf. New York*, 505 U.S. at 151 (framing the monetary, access, and the "take title" provisions of the Low-Level Radioactive Waste Policy Amendments Act, Pub. L. No. 99-240, 99 Stat. 1842 (1986) (codified as amended at 42 U.S.C. §§ 2021b–2021j (2012)), as incentives meant to "encourage the States to comply with their statutory obligation to provide for the disposal of waste generated within their borders").

41. The dynamics described in this Part predominantly unfold in areas of *new* major policy commitments, such as the Affordable Care Act's mandates and Medicaid expansion, the clean power plan, and immigration reform. Elsewhere (for example, in the education sector), federalism programs are embedded in a maze of ancient statutes and unwieldy regulations. *See* J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757, 782–88 (2003). They are administered by an entrenched intergovernmental machinery, and they have produced a vast ecology of supportive—and dependent—contractors, consultants, and constituencies. None of that can be undone under normal political conditions, and political fights usually concern incremental adjustments in the vertical and horizontal distribution of bene-

On the federal side, the attainment of national objectives under sectional conditions demands a strategy of picking off or subduing recalcitrant states, one at a time. That is necessarily an executive undertaking. Congress can bargain with the states so long as they have a broadly consensual position—for instance, against federal preemption or for more generous funding (and fewer "strings"). By contrast, Congress is institutionally incapable of bargaining with *individual* states whose interests run in opposite directions or with blocs of states whose demands are effectively non-negotiable.[42] To the extent that federalism maintenance demands such negotiations, the executive's dominance increases. Stateside, the objective for dissident states becomes to hold and hang together—either by thwarting the central government's "divide and conquer" strategy ex ante (that is, by blocking the legislative or executive creation of "cooperative" programs), or by preventing defections after the fact. Those bilateral incentives produce an executive federalism that is asymmetric, "unorthodox," and litigious.

First, executive federalism is highly asymmetric: nominally federal policies take on entirely different contours in individual states. Even in cooperative federalism's heyday, the interplay between federal law, agency discretion, and state and local administration produced a great deal of state-to-state variation. Especially over the past decade, however, the variance has become much greater. The use of executive waivers has increased greatly in scale and scope. Medicaid, which accounts for the largest share of federal transfer payments to state and local governments,[43] is an oft-cited example of asymmetric executive federalism.[44] Administrations under presidents of both parties

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fits and burdens within those policy silos. "Cooperative" federalism continues to operate, albeit under increased stress. Conlan & Posner, *supra* note 14, at 299.

42. Gais & Fossett, *supra* note 4, at 507.

43. *Compare* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2018, HISTORICAL TABLES, tbl.15.1 (2017) (showing Medicaid spending by the federal government totaling $349.8 billion in 2015 and $368.3 billion in 2016), *with id*. at tbl.12.1 (showing outlays for grants to the state and local governments totaling $565.1 billion in 2015 and $593.5 billion in 2016).

44. Frank J. Thompson & Courtney Burke, *Executive Federalism and Medicaid Demonstration Waivers: Implications for Policy and Democratic Process*, 32 J. HEALTH POL. POL'Y & L. 971, 972–73 (2007); *see also* Frank J. Thompson & Michael K. Gusmano, *The Administrative Presidency and Fractious Federalism: The Case of Obamacare*, 44 PUBLIUS: J. FEDERALISM 426, 430 (2014).

have routinely issued broad "Section 1115" waivers under Medicaid, to the point where none of the actual state programs has much to do with the statutory parameters.[45] In an effort to expand Medicaid as envisioned under the ACA, the Obama administration's Department of Health and Human Services (HHS) negotiated "Memoranda of Understanding" with individual states and extended funding for programs ranging from Vermont's single-payer system to quasi-privatized systems in Republican-led states.[46] The Trump administration has changed the political but not the institutional dynamics.[47]

Second, federalism has become highly "unorthodox." Administrative efforts to implement federal policy have often taken the form of extra-statutory accommodation: states have been granted asymmetric treatment by executive edict even where federal statutory law quite obviously forbids it or on conditions well outside the statutory parameters.[48] Under the Obama administration, the implementation of the Affordable Care Act, immigration reform, and climate change programs all proceeded through presidential initiative and at the outer limits of statutory law, without and often in defiance of the authority of Congress.[49] The Trump administration has reversed course on

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45. *See* Jonathan R. Bolton, *The Case of the Disappearing Statute: A Legal and Policy Critique of the Use of Section 1115 Waivers to Restructure the Medicaid Program*, 37 COLUM. J.L. & SOC. PROBS. 91, 163 (2003).

46. *See* Shanna Rose & Cynthia J. Bowling, *The State of American Federalism 2014–15: Pathways to Policy in an Era of Party Polarization*, 45 PUBLIUS: J. FEDERALISM 351, 361–62 (2015).

47. *See* Nicholas Bagley, *Are Medicaid Work Requirements Legal?*, 319 J. AM. MED. ASSOC. 763, 763–64 (2018) (discussing Trump administration's proposed waivers for state-imposed work requirements under Medicaid).

48. Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1716 (2016) ("To secure his principal achievement, President Obama has repeatedly tested the limits of executive authority in implementing the [Affordable Care Act]."); David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 277–99 (2013) (analyzing this phenomenon in several contexts). On occasion, executive federalism has created something resembling reverse preemption. For example, states that have legalized the use of marijuana have been granted a *de facto* exemption from the Controlled Substances Act and other federal regulatory statutes. *See* Bulman-Pozen, *supra* note 4, at 979–82, and references cited *id*.

49. *See, e.g.*, Nicholas Bagley, *The Legality of Delaying Key Elements of the ACA*, 370 NEW ENG. J. MED. 1967 (2014) (the ACA); Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501, 507–11 (2015) (climate regulation); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 759–61 (2014) (immigration).

all those fronts, again—and despite a GOP majority in both Houses of Congress—almost exclusively through unilateral administrative action.[50]

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50. In several instances, the Trump administration has explained drastic policy reversals on the grounds that in its view, the executive lacked legal authority to administer programs inherited from the Obama administration. *See, e.g.*, Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035, 48,036 (proposed Oct. 16, 2017) ("Under the interpretation proposed in this notice, the CPP exceeds the EPA's statutory authority and would be repealed."). Two of those reversals were accompanied by calls for congressional intervention and, on that account, productive of considerable irony. In September 2017, President Trump terminated the Obama administration's "Dreamers" program. *See* Statement on the Deferred Action for Childhood Arrivals Policy, 2017 Daily Comp. Pres. Doc. No. 00609, at 1 (Sept. 5, 2007), https://www.gpo.gov/fdsys/pkg/DCPD-201700609/pdf/DCPD-201700609.pdf [https://perma.cc/645Z-TLL5]. At the same time, the President called upon Congress to provide legislation to preserve the program in some form. *See* Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html [https://nyti.ms/2x7xOo2] (quoting Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 5, 2017, 5:38 PM), https://twitter.com/realDonaldTrump/status/905228667336499200 [https://perma.cc/9BBD-S6C7]) (referring to a late-evening tweet in which Mr. Trump called on Congress to "legalize DACA," something his administration's officials had declined to do earlier in the day). And in October 2017, the administration terminated certain subsidy payments to insurers under the ACA on the ground that Congress had failed to appropriate the requisite funds. *See* Jessica Chia, *Trump to Scrap Obamacare Subsidies Designed to Help Low-Income Americans*, N.Y. DAILY NEWS (Oct. 13, 2017, 12:24 AM), http://www.nydailynews.com/news/politics/trump-scrap-obamacare-subsidies-blow-health-care-article-1.3559497 [https://perma.cc/X4UP-ZDUB]. That reversal, too, was accompanied by a call for remedial legislation. *See id.* At the time this Essay went to print, proposed legislation on both items has stalled, chiefly because the President's own party has declined to act on them. *See id.* In each instance, the administration's claims of lacking statutory authority had a good measure of plausibility and support. *See* West Virginia v. EPA, 136 S. Ct. 1000, 1000 (2016) (per curiam) (granting a temporary stay of EPA's Clean Power Plan); U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165, 171–74, 188 (D.D.C 2016) (holding that the Obama administration's payments to insurers constituted spending of unappropriated funds); *cf.* Texas v. United States, 809 F.3d 134, 146, 149, 170, 178, 186, 188 (5th Cir. 2015) (affirming a district court's preliminary injunction against a different deferred action immigration program on the ground that the program likely violated procedural requirements and was likely beyond the Administration's statutory authority), *aff'd by an equally divided court,* 136 S. Ct. 2271, 2272 (2016). To that extent the Trump administration's posture differs from some of the preceding administration's bold "We Can't Wait" initiatives. *Cf.* Remarks in Las Vegas, Nevada, 2011 Daily Comp. Pres. Doc. No.00787, at 1 (Oct. 24, 2011), https://www.gpo.gov/fdsys/pkg/DCPD-201100787/pdf/DCPD-201100787.pdf [https://perma.cc/M2LU-THL5]. The common theme is congressional passivity even as major federal programs are being made and unmade.

In this institutional environment, statutory constraints matter only at the outer margins; the principal policy instrument is "big waiver."[51] Nominally, the parties bargain in the shadow of the statutory default regime. However, when neither the federal agency nor the individual state actually wants that regime to kick in, the parties negotiate on an open field. In that increasingly common scenario, the contours of the bargains are shaped by politicians and parties, not (as under legislative federalism) by professionals and bureaucracies.[52] Outcomes are contingent on partisan constellations, the individual parties' bargaining leverage, the states' ability to maintain sectional coalitions, and perceived political necessities. A couple of examples are the Obama administration's need to make the ACA work and the Trump administration's need to show toughness on "sanctuary" jurisdictions.[53]

Third, executive, sectional federalism is litigious. With striking frequency, intergovernmental bargaining has broken down entirely and given way to litigation. The organization and coordination of state blocs in this domain is supplied by partisan associations (the Republican Attorneys General Association and the Democratic Attorneys General Association) or through more informal, ad hoc arrangements. The long-running controversy over climate change policy, fought at shifting fronts for well over a decade, illustrates the partisan-sectional dynamics. The lawsuit that effectively compelled the EPA to regulate carbon dioxide as a "pollutant" under the Clean Air Act, duly captioned *Massachusetts v. EPA*,[54] was brought by a coalition of liberal state attorneys general and environmental groups.[55] Conservative attorneys general, most from energy-producing states, were on the opposite side.[56] Since then, the two blocs

51. The term was coined by Barron & Rakoff, *supra* note 48, at 267.

52. *See* Conlan & Posner, *supra* note 14, at 301("[T]he partisan pathway has come to life in policy implementation, where elected officials have vaulted to the lead in determining intergovernmental positioning and bargaining strategies.").

53. *See* Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

54. 549 U.S. 497 (2007).

55. *See. id.* at 502–05.

56. For example, ten Republican state attorneys general—representing Alaska, Idaho, Kansas, Michigan, Nebraska, North Dakota, Ohio, South Dakota, Texas, and Utah—submitted a brief in opposition to certiorari. *See* Brief in Opposition for the Respondent States of Michigan, Texas, et al., Massachusetts v. EPA, 549 U.S. 497 (2007) (No. 05-1631), 2006 WL 950756.

have opposed each other in numerous clean air and climate change controversies, both in the regulatory process and, with dreary regularity, in the Supreme Court.[57] The most consequential engagement is the controversy over the Obama administration's "Clean Power Plan," an ambitious attempt to reconfigure the energy structure of all fifty states under a rarely used section of the Clean Air Act.[58] Even before the plan was published in the Federal Register, the EPA sought to advance its objectives by promising compliant states and industries a great deal of flexibility, while at the same time signaling its resolute commitment to regulatory demands that would entail draconian impositions on the hold-outs.[59] A cohesive bloc of Republican states and energy industries, formed and battle-tested in earlier engagements over the administration's climate change initiatives, arrested the EPA's divide-and-conquer strategy by suing for a preliminary injunction against the EPA.[60] While the litigation remained pending, President Trump took office. In October 2017, the EPA issued a Notice of Proposed Rulemaking, explaining its intent to repeal the Clean Power Plan on the grounds that it exceeds the agency's statutory authority.[61] Naturally, the state bloc that championed the Obama administration's plan has threatened suit.[62]

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57. *See, e.g.*, West Virginia v. EPA, 136 S. Ct. 1000, 1000 (2016) (per curiam); Michigan v. EPA, 135 S. Ct. 2699, 2704 (2015); Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 305–06 (2014); EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 493–94 (2014).

58. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,663 (Oct. 23, 2015) (codified at 40 C.F.R. §§ 60.5700–.5880 (2017)) (invoking section 111(d) of the Clean Air Act); *see also* 42 U.S.C. § 7411(d) (2012) (directing the EPA Administrator to establish procedures for setting "standards of performance for any existing source for any air pollutant" meeting certain criteria).

59. *See* James W. Coleman, *Policymaking by Proposal: How Agencies Are Transforming Industry Investment Long Before Final Rules Can Be Tested in Court*, 24 GEO. MASON L. REV. 497, 523–24 (2017).

60. *See West Virginia*, 136 S. Ct. at 1000.

61. *See* Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035, 48,037 (proposed Oct. 16, 2017) ("[T]he [Clean Power Plan] exceeds the bounds of the statute. Consistent with this proposed interpretation, we propose to repeal the [Clean Power Plan] and rescind the accompanying legal memoranda.").

62. *See* Devin Henry, *Dem AG Vows to Sue over Clean Power Plan Repeal*, HILL (Oct. 9, 2017, 2:08 PM), http://thehill.com/policy/energy-environment/354572-dem-ag-vows-to-sue-over-clean-power-plan-repeal [https://perma.cc/9MTT-MHFC].

As the Clean Power Plan controversy illustrates, partisan state lawsuits either to compel federal action or to block it do not pit "the states" collectively against the federal government. They pit blocs of states against each other, and one of the blocs against the federal government. Bloc-driven litigation has accompanied the implementation of the ACA, immigration policies, and environmental and energy regulation on an ongoing basis.

Bipartisan state litigation has not ceased entirely. For example, New Jersey's challenge to a federal statute that effectively bars states (other than Nevada) from permitting or tolerating sports gambling has been supported by an eclectic, bipartisan group of states,[63] and defenses against legal theories that would expose state and local governments to liability (for example, private rights of action implied under federal statutes or the Constitution) continue to enjoy near-unanimous state support.[64] However, to an astounding extent and over a wide range of highly salient issues, state litigation has become partisan and sectional.[65]

III. POLITICAL ECONOMY AND FISCAL TRANSFERS

Contemporary sectional federalism has a discernible political economy. Under competitive conditions—that is, so long as labor and capital remain highly mobile in the United States—the blue-state bloc's European model of expansive social benefits and "quality of life" amenities is difficult to sustain. It requires some means of dampening and disguising the true cost of high transfer payments. "Cooperative" fiscal programs (such as Medicaid) are an essential means to that end: they help to sustain social programs that citizen-taxpayers would not agree to finance at comparable levels from own-source revenues. Moreover, the blue state model requires some means of eviscerating red states' potential gains from adopting policies that

63. *See* Brief of Amici Curiae State of West Virginia, 17 Other States et al. in Support of Petitioners at 28–30, Christie v. NCAA, 138 S. Ct. 464 (2017) (No. 16-476), 2017 WL 394184.

64. *See, e.g.*, Brief of Texas, Alabama, et. al. as Amici Curiae in Support of Petitioners, Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378 (2015) (No. 14-15), 2014 WL 6679371 (involving a broadly bipartisan group of twenty-six states).

65. *See* Paul Nolette, *State Litigation during the Obama Administration: Diverging Agendas in an Era of Polarized Politics*, 44 PUBLIUS: J. FEDERALISM 451, 452 (2014).

are calculated to attract capital and labor. Federal minimum regulatory standards are a principal means of raising red-state rivals' costs.[66]

Such near-existential conflicts among state blocs cannot be resolved through compromise by a polarized Congress. Thus, state blocs have turned to the executive and to the courts to advance or to protect their interests. The federalism transactions in turn play out in the context of an executive-centered party system. The parties have ceased to fight over the size of government; instead, they fight over its control,[67] and they rely on "presidents to pronounce party doctrine, raise campaign funds, campaign on behalf of their partisan brethren, mobilize grass roots support and advance party programs."[68] Accordingly, partisan calculations have begun to shape the national government's and especially the executive's distribution of federal funds and of regulatory burdens among and between rival state blocs. Both the Obama administration and the early Trump administration have mobilized the executive's vast discretion for the benefit of "their" respective state bloc, by regulatory as well as fiscal means.

Sectional politics is particularly pronounced in regulatory arenas where states are able to offer and exploit comparative or competitive advantages—most viscerally, over questions of energy and climate change policy. The blue-state bloc has consistently urged national policies that would raise red, energy-producing states' cost of doing business.[69] The red-state bloc

66. Another means to that end is the unilateral state regulation of production conditions in other, more pro-competitive states. *Cf.* James W. Coleman, *Importing Energy, Exporting Regulation*, 83 FORDHAM L. REV. 1357, 1390–92 (2014) (discussing the potential of state energy regulations to influence the cost structure of producers in other states).

67. *See* Sidney M. Milkis & Nicholas Jacobs, *"I Alone Can Fix It": Donald Trump, the Administrative Presidency, and Hazards of Executive-Centered Partisanship*, 15 FORUM 583, 586 (2017) ("With the development of executive-centered partisanship, political contestation in the United States is no longer a struggle over the size of the State; rather it is a struggle between liberals and conservatives, to seize and deploy the State and its resources.").

68. *See* Kenneth S. Lowande & Sidney M. Milkis, *"We Can't Wait": Barack Obama, Partisan Polarization and the Administrative Presidency*, 12 FORUM 3, 4 (2014); *see also* Sidney M. Milkis & Jesse H. Rhodes, *George W. Bush, the Republican Party and the "New" Party System*, 5 PERS. ON POL. 461, 461–62 (2007) (analyzing the interplay between presidential party leadership and executive-centered government).

69. *See* Jason Scott Johnston, *A Positive Political Economic Theory of Environmental Federalization*, 64 CASE W. RES. L. REV. 1549, 1550–51 (2014).

has vehemently resisted those initiatives. The Obama administration's policies were consistent with the blue state bloc's agenda. In very short order, the Trump administration has reversed course at every front. It has undertaken a raft of initiatives that benefit energy-producing and unfailingly red states: a rescission of the Clean Power Plan and several additional EPA rules,[70] the green-lighting of the Keystone pipeline and the Dakota Access pipeline,[71] and a sharp reduction of protected National Monument areas in Utah.[72] For good measure, the 2017 tax reform opened certain protected areas in Alaska to oil exploration and drilling.[73]

If regulation illustrates the executive's vast capacity configure federal programs in accordance with a supportive state bloc's interests and demands, the same has become increasingly true of fiscal affairs. Federal transfers to state and local governments exceed $600 billion per year, or roughly a quarter of state and local spending.[74] The system has become increasingly open to partisan manipulation. It has also come under acute sectional and fiscal stress.

The cooperative fiscal federalism of the New Deal and the Great Society rested on a rough, somewhat uneasy but durable political consensus: prosperous states (more precisely, states with disproportionate numbers of high-income taxpayers) supported poorer states.[75] Moreover, the system was built for expansion and ever-increasing cash infusions. It proved stable and served its self-reinforcing tendencies chiefly on account of

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70. *See, e.g.*, Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits, 82 Fed. Reg. 53,442, 53,443 (proposed Nov. 16, 2017) (to be codified at 40 C.F.R. §§ 1037.150, 1037.801, 1068.120) (proposing to exempt "glider vehicles" from EPA regulations).

71. *See* Remarks on the Keystone XL Pipeline Project, 2017 Daily Comp. Pres. Doc. No.00191, at 1 (Mar. 24, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-transcanada-keystone-xl-pipeline-announcement/ [https://perma.cc/Z2TL-5KLG].

72. *See* Proclamation No. 9682, 82 Fed. Reg. 58,089, 58,093 (Dec. 4, 2017) (reducing the area of Utah's Grand Staircase-Escalante National Monument from 1.7 million acres to 1 million acres.).

73. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 20001, 131 Stat. 2054, 2235–37 (2017).

74. For fiscal data and discussion, see Conlan & Posner, *supra* note 14, at 284–88, 286 fig.1.

75. *Cf.* David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2571–79 (2005).

its built-in fiscal illusion—that is, the effect of lowering the perceived tax price of public programs both at the federal and at the state level.

Invariably, though, fiscal transfers prompt moral hazard and overspending at the state and local level. Federally funded programs tend to crowd out non-funded or less generously funded programs. When state tax capacity reaches a limit, the cash must come from the federal government. For this reason (among others), Medicaid has been made progressively more generous. Far from relieving states' fiscal distress, however, those expansions—a form of undercover debt relief[76]—have made Medicaid consume a yet greater share of state budgets.[77]

Very likely, state-level polarization has further increased fiscal federalism's price. Dissident states' reservation price goes up. States whose preferences are aligned with the federal government's will ask why they should accept conditions less generous than those extended to renegade states. The Affordable Care Act responded to this difficulty—in a fashion—by offering a *100 percent* reimbursement, declining in later years to 90 percent, for states that agree to participate in the ACA's expansion of Medicaid.[78] Amazingly, about half the states responded to this unprecedented offer—far and away the most generous bargain ever offered to the states under any major federal pro-

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76. *Cf.* RODDEN, *supra* note 22, at 55–67 (explaining that more generous fiscal transfers benefitting all states are often a form of debt relief). For a recent example, the 2009 American Recovery and Reinvestment Act, though advertised as a "stimulus" response to an acute fiscal and economic crisis, was principally aimed at state and local debt relief. *See* Conlan & Posner, *supra* note 14, at 284-85; *see also* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (codified as amended in scattered sections of the U.S. Code).

77. *See* NAT'L ASS'N OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES 1 (Fall 2017), https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/Fiscal%20Survey/NASBO_Fall_2017_Fiscal_Survey__S_.pdf [https://perma.cc/KW4H-Z9TY] (reporting that, for estimated fiscal year 2017, Medicaid accounted for 29% of total state spending and 20.3% of "general fund" spending).

78. *See* 42 U.S.C. § 1396d(y)(1) (Supp. IV 2016); 42 U.S.C.A. § 1396a(a)(13) (West 2018); Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 636 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citation omitted) ("Under pre-ACA Medicaid, the Federal Government pays up to 83% of the costs of coverage for current enrollees; under the ACA, the federal contribution starts at 100% and will eventually settle at 90%.").

gram—by suing.[79] By a 7-2 vote, the Supreme Court held in *NFIB v. Sebelius* that despite the terms of the statute, the government could not condition the states' receipt of "old" Medicaid funds on their participation in the ACA's expansion.[80] To this day, many Republican-led states have declined to expand Medicaid—despite the short-term fiscal attractions, the federal government's exceptionally accommodating posture, and massive public and interest group pressures.[81]

Sectional conditions and calculations also shape the executive's fiscal policies. Federal spending programs provide enormous room to steer fiscal resources in accordance with partisan, electoral calculations. The conventional prediction is that resources will disproportionately end up in "swing" states and districts, especially in years preceding a presidential election.[82] Partisan polarization both facilitates and exacerbates that tendency: as the number of swing jurisdictions shrinks, the cost of identifying such jurisdictions decreases and target accuracy increases.[83] Under an intensely partisan, deal-oriented administration, the trend is bound to accelerate.

It also assumes a new dimension. "Presidential pork"—an oft-used moniker for discretionary executive grant distribution—carries parochial, localist connotations and invites comparisons to congressional earmarks or appropriation riders. That picture may accurately describe the dynamics of executive grant-making for infrastructure, emergency relief, and similar discretionary programs. However, entitlement programs also afford the executive enormous fiscal maneuvering room in the form of waiver authority and the manipulation of grant conditions. Exercises of spending authority under such programs are

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79. *See NFIB*, 567 U.S. at 540 (majority opinion) (noting that the challenge to the ACA was supported by twenty-six states).

80. *See id.* at 585, 588 (opinion of Roberts, C.J.).

81. *See* Bulman-Pozen & Metzger, *supra* note 4, at 1783; *see also* John Dinan, *Implementing Health Reform: Intergovernmental Bargaining and the Affordable Care Act*, 44 PUBLIUS: J. FEDERALISM 399, 409–10 (2014).

82. The United States experienced that pattern in the early New Deal years. *See* John Joseph Wallis et al., *Politics, Relief, and Reform: Roosevelt's Efforts to Control Corruption and Manipulation During the New Deal*, *in* CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 343, 355–57 (Edward L. Glaeser & Claudia Goldin eds., 2006). For a contemporary discussion, see JOHN HUDAK, PRESIDENTIAL PORK: WHITE HOUSE INFLUENCE OVER THE DISTRIBUTION OF FEDERAL GRANTS 26 (2014).

83. *See* HUDAK, *supra* note 82, at 26.

subject to minimal, or minimally effective, congressional and judicial oversight.[84] Under sectional conditions, the executive is bound to its discretionary authority not merely for electoral purposes but also for more systematic ends—at the limit, the resolute fiscal repression of the opposing state bloc.[85]

The evidence suggests that we are approximating that form of executive-dominated fiscal federalism. One could detect "telltale signs of an election-year strategy and partisan slant in the development of the [Obama administration's] We Can't Wait program": crucial initiatives were timed for the 2012 elections and disproportionately aimed at large swing states.[86] Under the early Trump administration, executive federalism's partisan orientation has become more pronounced and systematic. In 2017, Congress considered (but eventually declined to enact) a Medicaid "block grant" reform that was plainly designed to benefit Republican states that had declined to accept the ACA Medicaid bargain.[87] The proposal stalled in Congress, but the administration has the means and perhaps the will to accomplish a very similar objective by executive action.[88] Of potential-

84. *See* Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677, 1685 (2017).

85. Executive *fiscal* repression is a highly plausible strategy for a Republican administration. It is not readily available to a Democratic administration, which needs red states to accept federal funds to implement its policies. *See, e.g.*, Bulman-Pozen & Metzger, *supra* note 4, at 330 (noting the Obama administration's flexibility vis-à-vis Republican states in implementing the ACA). Instead, a Democratic administration will tend to resort to *regulatory* repression of the opposing state bloc. The Obama administration's energy policies and especially the Clean Power Plan were widely perceived in those terms. *See, e.g.*, Sterling Burnett, *Trump and the End of Obama's Bitter "War on Coal,"* THE HILL (Sept. 30, 2017, 12:00 PM), http://thehill.com/opinion/energy-environment/353232-trump-and-the-end-of-obamas-bitter-war-on-coal [https://perma.cc/P3WB-GGF4]; Michael Grunwald, *Inside the War on Coal*, POLITICO (May 26, 2015, 11:45 PM), https://www.politico.com/agenda/story/2015/05/inside-war-on-coal-000002 [https://perma.cc/M7AB-KWQC].

86. Lowande & Milkis, *supra* note 68, at 13.

87. *See* David Weigel & Amy Goldstein, *GOP Tries One More Time to Undo ACA with Bill Offering Huge Block Grants to States*, WASH. POST (Sept. 13, 2017), https://www.washingtonpost.com/powerpost/gop-bill-to-block-grant-major-parts-of-the-aca-unveiled/2017/09/13/bdcd1872-988b-11e7-87fc-c3f7ee4035c9_story.html?utm_term=.7b842905c1e4 [https://perma.cc/JBB7-3BTV] ("The . . . bill . . . would turn the billions of dollars spend on the ACA's Medicaid expansion, tax credits and subsidies into grants managed by each state.").

88. Milkis & Jacobs, *supra* note 67, at 603 ("[I]t may be that the [Trump] White House will achieve unilaterally what several Republican senators . . . hoped to accomplish with legislation: turn [Medicaid] funds and policy discretion over to

ly greater consequence, Congress enacted a comprehensive tax reform that severely limits taxpayers' ability to deduct state and local taxes from their federal income tax.[89] While sharply progressive (and in that respect consonant with Democratic preferences and at variance with Republican ideology), the reform strikes with near-surgical precision at the tax capacity of high-income, high-tax, Democratic states. On most accounts, the effect is intended.[90]

To note the implications of these policies is not to say that they are driven entirely by partisan calculations. But they map those calculations, and they illustrate both sectionalism's pull and executive federalism's enormous potential for political manipulation and mobilization. While presidents of both parties have increasingly availed themselves of their fiscal and regulatory authority, federalism's potential for unilateral partisan exploitation and constituency-building purposes has yet to be fully realized.

IV. CONSTITUTIONALISM AND THE COURT

Executive federalism is litigious federalism. The executive as well as the states have tested the boundaries of lawful, constitutional government, and those disputes have routinely ended up in the Supreme Court. The justices have been sharply split in those cases. A judicial divide once marked primarily by ideological rifts over abortion, gay rights, and other "social" issues has also come to characterize executive federalism questions, in cases over the Affordable Care Act, energy and the environment, immigration, and even in cases involving far more hum-

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the States. It is highly unlikely, however, that this devolution will succeed without national standards that impose conservative policies on state and local governments." (footnote omitted)).

89. *See* H.R. 1, 115th Cong. § 11042 (2017) (enacted) (limiting the deduction for state and local taxes to $10,000).

90. *See, e.g.*, Sasha Abramsky, *The GOP Tax Bill Was a Deliberate Attack on Blue States—and California Plans to Fight Back*, NATION (Jan. 6, 2018), https://www.thenation.com/article/the-gop-tax-bill-was-a-deliberate-attack-on-blue-states-and-california-plans-to-fight-back/ [https://perma.cc/VMM7-28EH]; Laila Kearney & Karen Pierog, *Republican Tax Plan a Blow to Democratic States, Officials Say*, REUTERS (Nov. 2, 2017, 8:35 PM), https://www.reuters.com/article/us-usa-tax-states/republican-tax-plan-a-blow-to-democratic-states-officials-say-idUSKBN1D300Q [https://perma.cc/6JDN-G5D6].

drum federalism questions over the Federal Arbitration Act or federal preemption.[91]

The judiciary's precarious ideological balance and its central role on the executive federalism front have figured prominently in highly partisan, polarized fights over judicial nominations. During the second Obama Administration, then-Senate Majority Leader Harry Reid undertook a dramatic and eventually successful campaign to appoint reliably liberal judges to the Court of Appeals for the District of Columbia Circuit, which hears most administrative law cases. The stated objective of the campaign was to clear the way for the executive's ambitious regulatory agenda;[92] it was accomplished by changing long-standing Senate rules to permit judicial appointments (except to the Supreme Court) by simple majority.[93] Republicans repaid the favor by bottling up President Obama's nomination of Judge Merrick Garland for the late Justice Scalia's seat on the Supreme Court.[94] The open seat and, more broadly, political control over judicial appointments loomed large in the 2016 presidential campaign. Both sides warned in often apocalyptic tones that their opponent's victory would produce an executive-dominated judiciary, operating at the President's beck and call.[95]

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91. *See* Michael S. Greve et al., *Preemption in the Rehnquist and Roberts Courts: An Empirical Analysis*, 23 SUP. CT. ECON. REV. 353, 378 (2015) (documenting increased bloc voting in preemption cases).

92. *See* Juliet Eilperin, *Obama Seeks to Shift Conservative Tilt of D.C. Circuit*, WASH. POST (Apr. 2, 2013), https://www.washingtonpost.com/politics/2013/04/02/d0cdde58-9bc3-11e2-a941-a19bce7af755_story.html [https://perma.cc/E4FX-EST4].

93. *See* Russell Berman, *How Democrats Paved the Way for the Confirmation of Trump's Cabinet*, ATLANTIC (Jan. 20, 2017), https://www.theatlantic.com/politics/archive/2017/01/democrats-trump-cabinet-senate/513782/ [https://perma.cc/P2T8-YRZ7].

94. *See* Nina Totenberg, *170-Plus Days And Counting: GOP Unlikely To End Supreme Court Blockade Soon*, NAT'L PUB. RADIO (Sept. 6, 2016, 4:30 PM), https://www.npr.org/2016/09/06/492857860/173-days-and-counting-gop-unlikely-to-end-blockade-on-garland-nomination-soon [https://perma.cc/X6EH-A2TK].

95. *See, e.g.*, Carl Hulse, *Supreme Court Showdown Could Shape Fall Elections*, N.Y. TIMES (Mar. 16, 2016), https://www.nytimes.com/2016/03/17/us/politics/supreme-court-nomination-obama-congress.html [https://nyti.ms/1R2PAHT]; Amita Kelly, *McConnell: Blocking Supreme Court Nomination "About A Principle, Not A Person,"* NAT'L PUB. RADIO (Mar. 16, 2016, 12:31 PM), https://www.npr.org/2016/03/16/470664561/mcconnell-blocking-supreme-court-nomination-about-a-principle-not-a-person [https://perma.cc/L2JL-CLQR]; Peter Roff, Opinion, *GOP Is Right to Wait on Supreme Court Hearings*, U.S. NEWS (Mar. 16, 2016, 5:05 PM), https://www.usnews.com/opinion/blogs/peter-roff/articles/2016-03-

The frightening prospect of a *lasting* executive-judicial alliance, with a jurisprudence to match, seems unlikely so long as the parties remain competitive. (Even judges who are firmly intent on dancing with the administration that brought them will have to consider what their doctrinal commitments might entail under a different administration.) A more realistic apprehension is that the judiciary may entrench executive government and federalism by default, for want of constitutional doctrine and institutional legitimacy. The Court has inherited doctrines and modes of thinking that are mismatched to executive federalism's operation, and especially under polarized conditions it has no plausible means of adjusting those doctrines to the current "crises of human affairs."[96]

Executive federalism implicates the separation of powers, and federalism. In both dimensions, the Supreme Court's jurisprudence rests on institutional assumptions that have become untenable and in some ways conducive to executive assertions of power. Separation-of-powers doctrine paints a picture of rival, empire-building institutions: Congress versus the executive.[97] That conceptual framework is poorly matched to a separation of parties, not powers.[98] Moreover, governing doctrine treats the Congress as a unitary, self-aggrandizing actor; thus, the pervasive phenomenon of congressional *abdication* finds no systematic recognition.[99] The lack of institutional realism extends to administrative law.[100] Its dogmatic premise is legislative supremacy: the will of Congress must prevail. But Congress need not express that will with any kind of clarity or precision. The executive is permitted to exercise ample discre-

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16/republicans-are-right-not-to-take-up-obamas-nomination-of-merrick-garland [https://perma.cc/WD53-KA7C].

96. *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis omitted).

97. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 951 (1983) ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objective, must be resisted.").

98. *See* Levinson & Pildes, *supra* note 5, at 2314.

99. *See* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1471 (2015).

100. *See, e.g.*, Daniel Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1152 (2014) (noting the Court's "emphasis on congressional primacy and on the agency head (not the executive branch as a whole) as the key decision maker"); *see also* Greve & Parrish, *supra* note 49, at 502.

tion so long as Congress has stated an "intelligible principle."[101] And while executive action remains subject to judicial review, the coin of that realm is judicial deference: when a statute is ambiguous, the Court presumes that Congress wanted the agency's judgment to carry the day.[102] Such doctrines are hardly calculated to constrain executive power, and recent cases have raised the specter of executive "re-writes" of entire federal statutes.[103] The pressing question of executive "underreach"—a wholesale dispensation or suspension of the law—is a matter of intense scholarly debate in a virtually doctrine-free environment.[104]

Federalism jurisprudence presents the same picture of doctrinal mismatch. "The states" appear as unitary actors with a set of uniform and symmetrical institutional interests; and those interests and the states' "dignity" are deemed to warrant judicial protection against congressional impositions.[105] While the Supreme Court routinely invokes a wide range of federalism "values,"[106] virtually all federalism canons serve to protect states "as states"—that is, as quasi-sovereign political actors.[107] Just as the Court has no separation-of-powers doctrine that accounts for congressional abdication, though, it simply assumes states have empire-building motives and thus fails to account for the pervasive state *demand* for federal intervention.

In its present shape and deployment, federalism jurisprudence misses entirely the starkly asymmetric and sectional fea-

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101. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)); Mistretta v. United States, 488 U.S. 361, 372 (1989).

102. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (explaining *Chevron* deference as an "across-the-board presumption that, in the case of ambiguity, agency discretion is meant").

103. *See* Greve & Parrish, *supra* note 49, at 505; *see also* Sohoni, *supra* note 84, at 1681.

104. *See, e.g.*, Price, *supra* note 49, at 679; Barron & Rakoff, *supra* note 48, at 272 (noting the paucity of doctrines to govern "big waivers").

105. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 714–15 (1999).

106. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

107. Those canons include the protection of state sovereign immunity, *see e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996), a clear statement rule for federal statutes that threaten to upset the "usual balance" of federalism, *see, e.g.*, *Gregory*, 501 U.S. at 460–61 (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989)), and a strong presumption against implied private rights of action under federal statutes, including 42 U.S.C § 1983 (2012), *see, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273, 276 (2002); Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

tures of our federalism. Thus, the Court has described the ACA's Medicaid expansion as a "gun to the head"—without any evident recognition that numerous states nearly demanded the imposition.[108] In the same fashion, the Court speaks confidently of the authentic position and interests of "the states" even when state blocs oppose each other in that very case.[109] The sectional dynamics that drive such state disagreements should prompt systematic judicial attention to federalism's "horizontal," state-to-state dimension. Such doctrines, however, are virtually extinct, and the Court has shown little interest in reconstructing them.[110]

Finally, federalism jurisprudence lacks a systematic comprehension of our federalism's *executive* nature. In administrative law cases, federalism canons come and go, more often than not without explanation.[111] Judicial opinions provide no framework and rarely even a hint that harmonizing administrative law and federalism canons—both very unsettled in their own right—demands sustained attention.[112]

This mismatch between judicial doctrine and institutional reality has worrisome implications. A judicial attempt to develop doctrines compatible with executive federalism but *in opposition* to the government in power may come to look like a *de facto* coup: if no pre-existing, tolerably clear and settled doctrines

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108. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 642 (2012).

109. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 407, 518 ("Well before the creation of the modern administrative state, we recognized that States are not normal litigants for the purposes of invoking federal jurisdiction."); *Alden*, 527 U.S. at 715 ("[The States] are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.").

110. *See, e.g.*, GREVE, *supra* note 36, at 287–307; Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENVER L. REV. 255, 257 (2017) (tracing "the remarkable decline of the dormant Commerce Clause"). *But see* Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 59 (2014) (arguing that political safeguards may adequately protect states against horizontal externalities and exploitation).

111. *See, e.g.*, William N. Eskridge Jr., *Vetogates,* Chevron*, Preeemption*, 83 NOTRE DAME L. REV. 1441, 1477 (2008); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2026 (2008) ("[M]ore run-of-the-mill administrative law concerns . . . are rarely viewed through a federalism lens."); Connor N. Raso and William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1732 (2010) (highlighting the difficulty of anticipating what motivates the Supreme Court in agency interpretation cases).

112. *See, e.g.*, Metzger, *supra* note 111, at 2047–48.

govern the cases, then the new doctrines must surely be made up. Conversely, executive federalism doctrines developed *in harmony* with the government-in-power will be perceived as a judicial surrender to the executive. The Supreme Court's predicament in the two Affordable Care Act cases[113] was widely discussed in these terms, and its rulings were widely understood as maneuvering between the horns of the dilemma. Neither of the cases has been viewed as a source of stable doctrine; overwhelmingly, the question has been whether the decisions are one-offs for the ACA line of cases only or whether they further unsettle doctrines once tolerably well understood.[114]

Under any interpretation, the cases illustrate the difficulty of developing a coherent set of doctrines that would constitutionally constrain and regularize executive, sectional federalism. An attempt to do so would either mean a confrontation that the Court cannot hope to win, or else an adjustment to the demands of executive government. Most likely, the Court will continue to muddle through. But if the Court cannot speak with a clear voice for the Constitution, it will come to speak for the executive.

V. CONCLUSION

The rise of executive government, high levels of partisan polarization at the national and state level, dire fiscal conditions, weak-to-nonexistent constitutional constraints, and an ideologically divided Court—we have never before encountered that confluence. The obvious, urgent question—where will this end?—has prompted intense public and scholarly debate. Shrill alarms over executive imperialism, lawless government, institutional corruption, and the deliberate use of central executive authority to suppress opposing states and their citizens often

113. King v. Burwell, 135 S. Ct. 2480 (2015); *NFIB*, 567 U.S. at 519.

114. *See King*, 135 S. Ct. at 2507 (Scalia, J., dissenting) ("The somersaults of statutory interpretation [the Court's two decisions on the Patient Protection and Affordable Care Act] have performed . . . will be cited by litigants endlessly, to the confusion of honest jurisprudence. And the cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites."); Samuel R. Bagenstos, *The Anti-Leveraging Principles and the Spending Clause After* NFIB, 101 GEO. L.J. 861, 906 (2013).

have sounded against the Obama administration and the early Trump administration alike.[115]

In full acknowledgment of such apprehensions, Jessica Bulman-Pozen has supplied a qualified defense of executive federalism.[116] In a polarized environment, she argues, executive federalism may offer a path to national policymaking and bipartisan cooperation, and a way of re-gaining the government legitimacy that comes from getting things done. While policy outcomes may rarely conform to the ideal order of a rational planner, improvisation and state-to-state variegation are among federalism's virtues. Moreover, executive federalism's inherently federal nature may help to dampen fears of autocracy that naturally attend a poorly constrained national executive.

Professor Bulman-Pozen's account has much to commend it. It resonates with urgent calls to revive a more parochial and transactional style of politics at the national level;[117] and, especially against the background of federalism's trajectory over the past century, it appears to be a plausible description of reality. The states that anchor the red bloc, by and large, are the states of the old Confederacy. From the Progressive Era and the New Deal to the Great Society and beyond, that bloc resisted and retarded cooperative federalism's expansion. One way or another, though, the center has always found ways to drag the recalcitrant, sectionalist South into modernity. That has usually been the work of decades, often marked by contention. But this

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115. *See, e.g.*, Veronique de Rugy, *Obama's Imperial Presidency*, NAT'L REV. (Jan. 12, 2017), https://www.nationalreview.com/corner/obama-imperial-presidency/ [https://perma.cc/V77Y-Y4ZR]; Jeet Heer, *Don't Just Impeach Trump. End the Imperial Presidency.*, NEW REPUBLIC (Aug. 12, 2017), https://newrepublic.com/article/144297/dont-just-impeach-trump-end-imperial-presidency [https://perma.cc/QL3C-6G6T]; John Wagner, *Trump and Republicans Bolster Red States, Punish Blue*, WASH. POST (Sept. 25, 2017), https://www.washingtonpost.com/politics/this-is-hardball-trump-and-republicans-bolster-red-states-punish-blue/2017/09/25/e114cea4-9ef5-11e7-8ea1-ed975285475e [https://perma.cc/C96B-FS3P]; David A. Graham, *How Obama Left Red States Deeper in the Red*, ATLANTIC (Jan. 29, 2015), https://www.theatlantic.com/politics/archive/2015/01/how-obama-has-left-red-states-deeper-in-the-red/384911/ [https://perma.cc/E5Z4-ZXFF].

116. Bulman-Pozen, *supra* note 4, at 993–1015. For a similar, equally judicious assessment see Bulman-Pozen & Metzger, *supra* note 4, at 325–32.

117. *See, e.g.*, Jonathan Rauch, *Political Realism: How Hacks, Machines, Big Money, and Back-Room Deals Can Strengthen American Democracy*, BROOKINGS (May 1, 2015), https://www.brookings.edu/book/political-realism/ [https://perma.cc/57XA-4N5P].

general, integrative tendency has persisted, and it may yet prevail. Grim, sectional confrontations over energy policy, health care, or immigration might merely manifest the kind of holdout resistance that has always accompanied our increasingly national federalism. Several reasons, however, counsel caution against such a prediction.

The scenario just sketched—a gradual submission of red-state sectionalism by means of transfer payments and regulation—might well have come to pass under a Clinton administration. Under the Trump administration, in contrast, all signs point to fiscal repression of blue states on the tax side and retrenchment on the spending side.[118] Beyond electoral contingencies, moreover, federalism's changed political economy suggests a very different, centrifugal story. A bloc of modernizing industrial states, with the resources and the will to pull the backward periphery into its policies (for example, through federal transfer payments) largely drove the past unfolding of cooperative federalism. Integration on *those* terms is very likely a thing of the past. Many once-backward states, mostly in the South, are now among the most modern and competitive in the nation, while once-dominant states such as New York, New Jersey, Connecticut, California, and Illinois must contend with out-migration,[119] often perilous fiscal conditions,[120] and a high and perhaps unsustainable demand for social services and consumption. Especially under conditions of severe fiscal stress and high indebtedness at all levels of government, it is hard to see how the blue-state bloc can maintain political dominance. Instead, the core dynamic of contemporary federalism is the interplay between executive dominance under one or the other party and a sectional divide that runs along partisan, ideologi-

118. *See supra* notes 85–86 and accompanying text.

119. Joel Kotkin & Wendell Cox, *The States Gaining and Losing the Most Migrants—and Money*, FORBES (Sept. 6, 2016), https://www.forbes.com/sites/joelkotkin/2016/09/06/the-states-gaining-and-losing-the-most-migrants-and-money/ [https://perma.cc/4MY6-3QMK].

120. Despite a booming stock market and a moderately but steadily growing economy the pension systems of many states—especially such large blue states as Connecticut, New Jersey, Illinois, and California—are more precariously underfunded now than they were in the fiscal crisis a decade ago. Steven Malanga, *The Public Pension Problem: It's Much Worse Than It Appears*, MANHATTAN INST. (July 22, 2016), https://www.manhattan-institute.org/html/public-pension-problem-its-much-worse-it-appears-9095.html [https://perma.cc/4GEJ-ZHL8].

cal lines. For good or ill, our sectional, executive federalism may prove durable.

CATHOLIC JUDGES HAVE NO OBLIGATION TO RECUSE THEMSELVES IN CAPITAL CASES

Professor Amy Barrett captured national headlines as nominee to the Seventh Circuit Court of Appeals when Democratic members of the Senate Judiciary Committee questioned her fitness for office on the basis of her devotion to her Catholic faith.[1] "The dogma lives loudly within you," admonished Ranking Member Dianne Feinstein. "And that's of concern when you come to big issues that large numbers of people have fought for, for years in this country."[2] "Dogma and law," Senator Feinstein also said, "are two different things, and I think whatever a religion is, it has its own dogma. The law is totally different."[3]

Although abortion and same-sex marriage dominated the news coverage of the hearing, many of the questions in the hearing itself were devoted to Professor Barrett's 1998 article *Catholic Judges in Capital Cases*,[4] which she co-authored with Professor John Garvey, then of Notre Dame Law School.[5] There they argued that, according to the principles of Catholic teach-

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1. *See, e.g.*, Aaron Blake, *Did Dianne Feinstein accuse a judicial nominee of being too Christian?*, THE FIX: WASH. POST (Sept. 7, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/09/07/did-a-democratic-senator-just-accuse-a-judicial-nominee-of-being-too-christian/?noredirect=on&utm_term=.147696c9874d [https://perma.cc/T6Q5-QPG9]; Editorial Bd., *Democrats and "Dogma": Are you now or have you ever been an "orthodox" Catholic?*, WALL ST. J. (Sept. 7, 2017, 7:20 PM), https://www.wsj.com/articles/democrats-and-dogma-1504826418 [https://perma.cc/LU5E-DTJR]; Michael McGough, Opinion, *Feinstein, a Catholic nominee and a dogma that didn't bark*, L.A. TIMES (Sept. 8, 2017, 2:30 PM), http://www.latimes.com/opinion/opinion-la/la-ol-feinstein-catholic-20170908-story.html [https://perma.cc/97JG-E8A6].

2. *Hearing to Consider Pending Nominations: Hearing Before the S. Comm. on the Judiciary* 2:44:38 to 2:44:56, 115th Cong. (Sept. 6, 2017), https://www.judiciary.senate.gov/hearings/watch?hearingid=3F0E1726-5056-A066-60D5-CB1FDA2B8F46 [https://perma.cc/NL3N-RF3H].

3. *Id.* at 2:44:08 to 2:44:23.

4. John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998).

5. *See* Emma Green, *Should a Judge's Nomination Be Derailed by Her Faith?*, ATLANTIC (Sept. 8, 2017), https://www.theatlantic.com/politics/archive/2017/09/catholics-senate-amy-barrett/539124/ [https://perma.cc/ET6Y-SFMD] (noting that "by far, the[] [Democratic Senators] spent most of their time questioning a 1998 paper Barrett wrote as a law student").

ing, the use of the death penalty in contemporary America is morally wrong, because there are other ways of defending society against unjust aggressors that do not involve killing.[6] Consequently Catholic trial judges may not issue death sentences, even if the law commands them to.[7]

These conclusions do not mean that now Judge Barrett would replace the law with Catholic dogma. She and Professor Garvey do not, as many others have,[8] argue that the death penalty must be unconstitutional because it offends their own personal sense of justice. Nor do they advocate finding pretexts to overturn or avoid issuing death sentences whenever possible.[9] They have too much respect for the objectivity of the law and for limitations on judicial power to take this easy way out. Instead, they argue that Catholic judges should participate in capital cases when it is possible to do so in good conscience and recuse themselves when it is not.[10] Recusal is called for only when participation would involve directly participating in the evil of capital punishment by ordering the death of the defendant.[11] They therefore conclude that trial judges must recuse themselves from the sentencing phase of death penalty cases but may participate in the guilt phase.[12] Appellate judges, on the other hand, need not recuse themselves at all, because they

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6. *See* Garvey & Coney, *supra* note 4, at 316–17.

7. *See id.* at 320–21.

8. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 305 (1972) (Brennan, J., concurring) (arguing that the death penalty is unconstitutional because it does not "comport[] with human dignity"); *id.* at 369 (Marshall, J., concurring) (arguing that the death penalty is unconstitutional because "the average citizen would," if he *truly* understood the nature of the punishment, "find it shocking to his conscience and sense of justice").

9. *See* Garvey & Coney, *supra* note 4, at 341 (calling it an act of "injustice" for a judge to let "his opposition to capital punishment control his decision of collateral issues" in the guilt phase of capital cases); *id.* at 342–43 (calling on appellate judges to apply the law impartially in capital cases, "even if [they] could save a life by cheating"); *see also* John Garvey, *Amy Barrett, a faithful judge*, WASH. EXAMINER (Sept. 7, 2017, 12:07 AM), https://www.washingtonexaminer.com/amy-barrett-a-faithful-judge [https://perma.cc/B8FJ-MUU5] ("Law professors less scrupulous than Prof. Barrett have suggested that sometimes judges should fudge or bend (just a little bit) laws that every right-thinking person would find immoral. In our article we rejected that course of action.").

10. *See* Garvey & Coney, *supra* note 4, at 303.

11. *See id.* at 317–19 (distinguishing "formal" and "material" cooperation with evil).

12. *Id.* at 320–25.

never themselves issue death sentences; they only determine whether the trial court committed any legal errors over the course of the trial and sentencing.[13] Judge Barrett and Professor Garvey thus do not call for wide-ranging lawlessness but for conscientious objection in a narrow set of circumstances.

Nevertheless, Judge Barrett and Professor Garvey's conclusions have serious implications for Catholic judges at all levels. Catholic trial judges would on their view not be able to issue sentences according to the laws of the United States in many of the most serious criminal cases facing the nation. Every affirmation of a capital sentence by an appellate judge would enable, albeit indirectly, a grave violation of human dignity. Many Catholic judges may not be able to stomach such participation in an unjust system,[14] even if the Church's teaching did not outright forbid it, and others have disagreed with Judge Barrett and Professor Garvey that such indirect participation would be morally permissible under Catholic teaching. The late Justice Antonin Scalia, for instance, argued that if the death penalty were contrary to Catholic teaching, it would be wrong not only to issue death sentences but even to affirm them at the appellate level, whether on direct or collateral review.[15] Every Catholic judge who adjudicates capital cases at any level of the judiciary from state trial courts to the U.S. Supreme Court would instead have an obligation to resign from office.[16] For Justice Scalia, the question of whether Catholic judges can participate in capital cases—or serve as judges at all—ultimately hinged on whether the Church does in fact condemn the death penalty as immoral.[17] And even if Judge Barrett and Professor Garvey have the better of the argument on what Catholic judges must do if the use of capital punishment violates Catholic teaching, this is to say nothing of Catholic prosecutors, jurors, elected

13. *Id.* at 326–31; *see also* Nomination of Amy Coney Barrett to the Seventh Circuit Court of Appeals: Answers to Questions for the Record from Senator Feinstein 5 (Sept. 13, 2017), https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20Feinstein%20QFRs.pdf [https://perma.cc/B6K4-N55R] ("I cannot think of any cases or category of cases, including capital cases, in which I would feel obliged to recuse on grounds of conscience if confirmed as a judge on the Seventh Circuit.").

14. *See* Garvey & Coney, *supra* note 4, at 341–42 (admitting as much).

15. Antonin Scalia, *God's Justice and Ours*, FIRST THINGS, May 2002, at 17, 18.

16. *Id.* at 18, 21.

17. *Id.* at 21.

officials, and voters, all of whom could face serious conflicts between the commands of the law and of their faith.

A close examination of Church teaching from its roots to the modern day, however, will reveal that any conflict between the Catholic faith and participation in death penalty cases is only apparent. From the book of Genesis to Pope Benedict XVI, the Catholic tradition has consistently acknowledged the legitimacy of capital punishment, not only as a kind of societal self-defense to be used in the last resort but as an affirmatively just and fitting punishment for grave crimes. The Old and New Testaments, the Fathers and Doctors of the Church, and popes across the ages from the fifth century to the twenty-first have all defended capital punishment's legitimacy as a form of punishment. At the same time, this defense of the death penalty in principle has always existed alongside the Church's efforts to limit or even eliminate the practice out of mercy and Christian charity.

Judge Barrett and Professor Garvey based their view on the writings of Pope John Paul II, who urged public authorities to limit the use of the death penalty to "cases of absolute necessity: in other words, when it would not be possible otherwise to defend society."[18] From these writings they concluded that "only reasons analogous to self-defense can justify capital punishment."[19] But John Paul II never questioned the state's right in principle to punish grave crimes with death, and he analyzed the question of the death penalty within the framework of the Church's traditional teaching on punishment. He instead made a prudential judgment that it would be more conducive to the common good if public authorities refrained whenever possible from exercising their right to punish malefactors with death.[20] Pope Benedict XVI taught likewise, reaffirming the retributive end of punishment, including capital punishment, while exhorting states to avoid bloodshed.[21]

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18. JOHN PAUL II, *EVANGELIUM VITAE*: ON THE VALUE AND INVIOLABILITY OF HUMAN LIFE ¶ 56 (1995) [hereinafter *EVANGELIUM VITAE*], http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.pdf [https://perma.cc/2UTN-DW23].

19. Coney & Garvey, *supra* note 4, at 316.

20. *See infra* Part II.B.1–.3

21. *See infra* Part II.B.4.

In August of 2018, almost one year after Judge Barrett's confirmation hearing, Pope Francis issued a revision of the *Catechism of the Catholic Church* that has reignited debate among Catholics over the moral status of capital punishment. The revised text of the *Catechism* now calls the use of the death penalty "inadmissible" in all cases in contemporary society.[22] While sweeping in the scope of its judgment, the revised *Catechism* still expresses only a prudential judgment and does not deny the legitimacy of capital punishment in principle.[23] The abolition of the death penalty may be the policy that best promotes the common good in today's world, but it is not outside of the legitimate authority of the state to impose it. For this reason Catholic judges have no moral obligation to recuse themselves from capital cases.

Part I of this Note outlines the Church's teaching on the purposes of punishment. Retribution is the primary and justifying purpose of punishment; a punishment is just if it is deserved. Part II examines the Church's historical and current teaching on capital punishment in particular. Scripture, the Fathers and Doctors of the Church, and the teachings of popes across the centuries all affirm public authorities' right to execute serious offenders. Pope Francis has not denied this right and does not have the authority to change the Church's teaching on this point even if he wished to. Part III applies the Church's teaching on capital punishment to the context of modern American judges. Judges may in good conscience issue death sentences, even if they personally favor the abolition of the death penalty. Part IV briefly concludes.

I. THE PURPOSES OF PUNISHMENT

Under the Church's traditional teaching, the primary purpose of punishment is retribution.[24] "Punishment," taught Pope

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22. *See New Revision of Number 2267 of the Catechism of the Catholic Church on the Death Penalty*, HOLY SEE [hereinafter 2018 CATECHISM ¶ 2267 revision], http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20180801_catechismo-penadimorte_en.html [https://perma.cc/HBX3-Q2ZN] (last visited Sept. 29, 2018).

23. *See infra* Part II.C.

24. *See generally* EDWARD FESER & JOSEPH M. BESSETTI, BY MAN SHALL HIS BLOOD BE SHED: A CATHOLIC DEFENSE OF CAPITAL PUNISHMENT 37–52 (2017); Joseph L. Falvey, Jr., *Crime and Punishment: A Catholic Perspective*, 43 CATH. LAW.

Pius XII, "is the reaction demanded by law and justice against crime; they are like blow and counter-blow. The order of justice which is disrupted by the crime demands to be re-established and restored to its original equilibrium."[25] According to Thomas Aquinas, "the act of sin makes man deserving of punishment."[26] The wrongdoer pays for his crime by suffering an evil that is proportionate to the evil he committed.[27] Pope John Paul II reaffirmed this traditional understanding, teaching that the "primary purpose of the punishment which society inflicts is 'to redress the disorder caused by the offence' . . . by imposing on the offender an adequate punishment for the crime."[28] The ordinary Christian, of course, must "not repay anyone evil for evil,"[29] but the state may exact retributive punishment, because it is charged with maintaining the civil order and safeguarding the common good.[30]

Judge Barrett and Professor Garvey deny that retribution can justify capital punishment.[31] In their view, in the rare instances where capital punishment is warranted, it is not justified *qua*

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149 (2004); Steven A. Long, Evangelium Vitae*, St. Thomas Aquinas, and the Death Penalty*, 63 THOMIST 511, 519–26 (1999). For an eloquent defense of the principle that retribution is the principal aim of punishment, see C.S. LEWIS, *The Humanitarian Theory of Punishment*, *in* GOD IN THE DOCK 287, 287–94 (Walter Hooper ed., 1970).

25. Pius XII, Crime and Punishment (Feb. 5, 1955), *in* 1 THE MAJOR ADDRESSES OF POPE PIUS XII 306, 308–09 (Vincent A. Yzermans ed., 1961); *see also* Pius XII, *An International Code for the Punishment of War Crimes*, 28 ST. JOHN'S L. REV. 1, 16 (1953) (calling "expiation of the crime committed . . . the most important function of the punishment" imposed by the state).

26. THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. I-II, q. 87, art. 6 (Fathers of the English Dominican Province trans, Christian Classics reprt. 1981) (1265–1274) [hereinafter *SUMMA THEOLOGICA*]; *see also* Pius XII, Crime and Punishment, *supra* note 25, at 308 ("Part of the concept of the criminal act is the fact that the perpetrator of the act becomes deserving of punishment.").

27. *See SUMMA THEOLOGICA*, *supra* note 26, pt. I-II, q. 87, art. 3, ad. 1 ("Punishment is proportionate to sin in point of severity, both in Divine and in human judgments."); *id.* pt. I-II, q. 87, art. 6 (teaching that a punishment must be an evil that is contrary to what the wrongdoer would wish for himself).

28. *EVANGELIUM VITAE*, *supra* note 18, ¶ 56 (quoting CATECHISM OF THE CATHOLIC CHURCH ¶ 2267 (1994)).

29. *Romans* 12:17; *see also Matthew* 5:39 ("But I say to you, Do not resist an evildoer. But if anyone strikes you on the right cheek, turn the other also."). All biblical quotations in this Note are from the New Revised Standard Version.

30. *See* CATECHISM OF THE CATHOLIC CHURCH ¶ 2263 (Geoffrey Chapman trans., Bath Press rev. ed. 1999) (1994) [hereinafter 1997 CATECHISM].

31. *See* Garvey & Coney, *supra* note 4, at 308 (concluding that retribution "does not justify capital punishment").

punishment but *qua* some other kind of legitimate killing, like self-defense.[32] As we shall see in Part II, however, Church authorities, including Pope John Paul II, have traditionally analyzed the death penalty within the framework of punishment. These same authorities have furthermore considered some crimes to be so heinous that death would be a just and proportionate response to the evil committed.

Although retribution is the primary purpose of punishment, it is not the only consideration that civil authorities must take into account. Punishments in this life may serve other "medicinal" purposes, such as restoring public order, defending public safety, and rehabilitation of the offender.[33] These secondary considerations, aimed at "improv[ing] those that witness or experience the punishment," may in some instances militate toward stopping short of exacting the full extent of retribution.[34] For this reason the death penalty need not always be applied in every situation where it would be a proportionate punishment. Nevertheless the justice or injustice of a particular punishment hinges on retribution, on whether it was *deserved*.[35]

Determining which punishment will best satisfy both the retributive and medicinal ends of punishment in a particular situation requires the exercise of prudence. Prudence is not just having the right first principles. It involves knowledge about

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32. *Id.* at 316. Self-defense is a shaky foundation for justifying capital punishment. When an agent justly kills in self-defense, he acts only to stop his assailant. The assailant's death is a secondary, unintended consequence of the act. 1997 CATECHISM, *supra* note 30, ¶ 2263. But the object of an execution is precisely the death of the condemned criminal. *See* CHRISTOPHER KACZOR, THE EDGE OF LIFE: HUMAN DIGNITY AND CONTEMPORARY BIOETHICS 141–42 (2005); Avery Dulles et al., *Avery Cardinal Dulles and His Critics: An Exchange on Capital Punishment*, FIRST THINGS, Aug./Sept. 2001, at 7, 14. Anything less is a botched execution.

33. *See EVANGELIUM VITAE*, *supra* note 18, ¶ 56 (By punishing, "authority also fulfils the purpose of defending public order and ensuring people's safety, while at the same time offering the offender an incentive and help to change his or her behaviour and be rehabilitated."); *see also* Falvey, *supra* note 24, at 160.

34. Patrick M. Laurence, Note, *He Beareth Not the Sword in Vain: The Church, the Courts, and Capital Punishment*, 1 AVE MARIA L. REV. 215, 240–44 (2003); *see also SUMMA THEOLOGICA*, *supra* note 26, pt. II-II, art. 43, q. 7, ad. 1 (saying that a proportionate punishment should not be inflicted if the punishment "will result in more numerous and more grievous sins being committed").

35. "*Justice* is the moral virtue that consists in the constant and firm will to give their due to God and neighbor." 1997 CATECHISM, *supra* note 30, ¶ 1807. A punishment satisfies the end of retribution if it is of the level of severity that the wrongdoer deserves, which is simply another way of saying that it is the punishment *due* to the wrongdoer.

the state of the world beyond just the general precepts of the moral law.[36] The Church's magisterium has the authority to teach infallibly on matters of faith and morals, but its infallibility does not extend beyond matters of faith and morals to a perfect understanding of the state of the world.[37] For this reason faithful Catholics can disagree in good faith about prudential judgments in a way that they cannot disagree about fundamental moral principles.

II. CATHOLIC TEACHING ON THE DEATH PENALTY

No pope or ecumenical council has in a singular act solemnly defined the Church's teaching on capital punishment.[38] Catholic teaching on the death penalty comes instead from Scripture,[39] the Fathers[40] and Doctors[41] of the Church, and popes ex-

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36. *See* SUMMA THEOLOGICA, *supra* note 26, pt. II-II, q. 47, art. 3 ("[I]t is necessary for the prudent man to know both the universal principles of reason, and the singulars about which actions are concerned.").

37. *See* 1997 CATECHISM, *supra* note 30, ¶ 890 ("Christ endowed the Church's shepherds with the charism of infallibility *in matters of faith and morals*." (emphasis added)).

38. The pope or an ecumenical council may by a singular act infallibly define a teaching of the Church if it solemnly declares the teaching with a manifest intent to speak infallibly. *See* 1983 CODE C.749; *infra* note 42.

39. The Catholic Church affirms the inerrancy of Scripture. *See* LEO XIII, *PROVIDENTISSIMUS DEUS*: ON THE STUDY OF HOLY SCRIPTURE ¶ 20 (1893), http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_18111893_providentissimus-deus.pdf [https://perma.cc/64EN-DUBN]; PIUS XII, *DIVINO AFFLANTE SPIRITU*: ON PROMOTING BIBLICAL STUDIES ¶¶ 3–4 (1943), http://w2.vatican.va/content/pius-xii/en/encyclicals/documents/hf_p-xii_enc_30091943_divino-afflante-spiritu.pdf [https://perma.cc/DG3W-DGE8]; SECOND VATICAN ECUMENICAL COUNCIL, *DEI VERBUM*: ON DIVINE REVELATION ¶ 11 (1965) [hereinafter *DEI VERBUM*], http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651118_dei-verbum_en.html [https://perma.cc/U5T5-LKY3].

40. Given their historical proximity, the Fathers of the Church are seen as having privileged access to the teachings of Jesus and the Apostles, and their views represent the consensus of the Church in their day. They have always been appealed to as an authority in settling matters of disputed doctrine. While individual Fathers are certainly fallible, it is doubtful that they could err collectively on an important matter of faith. *See* AVERY DULLES, MAGISTERIUM: TEACHER AND GUARDIAN OF THE FAITH 43–44 (2007).

41. As "canonized saints who have been singled out by popes or councils for their eminence in learning and soundness in doctrine," the Doctors of the Church occupy a position of authority in matters of doctrine similar to that of the Fathers. *Id.* at 44.

ercising their ordinary magisterium.[42] Taken together, these sources form an authoritative tradition that the pope and bishops in communion with him are bound to uphold.[43] This tradition speaks with one voice: public authorities may punish grave crimes with death.

Pope John Paul II worked within the Church's traditional framework to call on public authorities to refrain from executing criminals where possible without denying their legitimate authority to do so. Pope Francis's recent revision to the *Catechism* likewise expresses a prudential judgment about the application of the death penalty in today's circumstances. Catholics therefore cannot deny the legitimacy of capital punishment in principle.

Judge Barrett and Professor Garvey determine the Church's "[t]eaching [a]bout [c]apital [p]unishment" by looking almost exclusively to John Paul II's encyclical *Evangelium Vitae*, the *Catechism*, and recent statements by American bishops.[44] They then discuss only briefly magisterial statements on the death penalty written prior to the papacy of John Paul II.[45] By failing to read more recent sources against the backdrop of the preexisting tradition, Barrett and Garvey misread them as condemning the death penalty in modern societies as immoral, when they are instead applying the Church's traditional principles of punishment to make a prudential judgment about contemporary circumstances. By looking at the prior tradition only after coming to this conclusion about the Church's modern teaching,

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42. The pope teaches infallibly when, summoning his authority "as the supreme pastor and teacher of all the Christian faithful," he solemnly declares by a "definitive act that a doctrine is to be held" by all the faithful. 1983 CODE C.749, § 1. Even when he does not speak in this manner and is merely exercising his ordinary magisterium, however, Catholics still owe a level of deference to his teachings. The level of deference owed will vary depending on "the character of the documents," whether there is "frequent repetition of the same doctrine," and the pope's "manner of speaking." SECOND VATICAN ECUMENICAL COUNCIL, *LUMEN GENTIUM*: ON THE CHURCH ¶ 25 (1964), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html [https://perma.cc/XDU6-TDXC]; *see also* 1983 CODE C.752.

43. *See DEI VERBUM*, *supra* note 39, ¶ 10 ("Th[e] teaching office" of the pope and bishops "is not above the word of God, but serves it, teaching only what has been handed on, listening to it devoutly, guarding it scrupulously and explaining it faithfully.").

44. *See* Garvey & Coney, *supra* note 4, at 306–13 (emphasis removed).

45. *See id.* at 315 (devoting one paragraph to listing older authorities).

Barrett and Garvey mistakenly conclude that the Church "wandered a bit" before the issuing of *Evangelium Vitae*[46] when it in fact consistently and authoritatively affirmed the legitimacy of capital punishment.

A. From the Days of Noah to 1994

1. The Bible

The Old Testament explicitly approves and even commands the use of capital punishment. It first addresses the subject in the ninth chapter of Genesis, where God tells Noah and his sons:

> For your own lifeblood I will surely require a reckoning: from every animal I will require it and from human beings, each one for the blood of another, I will require a reckoning for human life. Whoever sheds the blood of a human, by a human shall that person's blood be shed, for in his own image God made humankind.[47]

The Law of Moses specifies no fewer than thirty-six capital crimes, including murder,[48] and a Davidic Psalm promises to God, "Morning by morning I will destroy all the wicked in the land, cutting off all evildoers from the city of the Lord."[49]

The New Testament likewise affirms the authority of the state to resort to capital punishment. Writing to the Romans, Paul warns:

> Let every person be subject to the governing authorities; for there is no authority except from God, and those authorities that exist have been instituted by God. Therefore whoever resists authority resists what God has appointed, and those who resist will incur judgment. For rulers are not a terror to good conduct, but to bad. Do you wish to have no fear of the authority? Then do what is good, and you will receive its approval; for it is God's servant for your good. But if you do what is wrong, you should be afraid, *for the authority does not bear the sword in vain! It is the servant of God to execute wrath on*

46. *Id.*

47. *Genesis* 9:5–6.

48. *See* Avery Dulles, *Catholicism & Capital Punishment*, FIRST THINGS, Apr. 2001, at 30, 30; *see also* E. CHRISTIAN BRUGGER, CAPITAL PUNISHMENT AND ROMAN CATHOLIC MORAL TRADITION 60–61 (2d ed. 2014) (enumerating offenses).

49. *Psalm* 101:8.

> *the wrongdoer*. Therefore one must be subject, not only because of wrath but also because of conscience.[50]

Thus the state, according to Paul, may use lethal force ("bear the sword") in order to exact retribution ("execute wrath") for serious crimes. He acknowledges as much in his trial before the Roman governor Festus, saying, "[I]f I am in the wrong and have done something for which I deserve to die, I am not trying to escape death."[51] Likewise, while on the cross at Calvary, the Good Thief confesses that he and the Wicked Thief "have been condemned justly, for we are getting what we deserve for our deeds."[52]

2. The Fathers and Doctors of the Church

The Fathers of the Church took the legitimacy of capital punishment for granted. On the authority of Scripture, particularly Romans 13:4, they believed that the practice was established by God for the purpose of exacting retribution against malefactors.[53] Every Father of the Church to address the question of the death penalty acknowledged its legitimacy. Specifically, Justin Martyr (100–165),[54] Athenagoras the Athenian (c. 133 – c. 190),[55]

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50. *Romans* 13:1–5 (emphasis added).

51. *Acts* 25:11.

52. *Luke* 23:41.

53. On this point both scholars who oppose capital punishment in principle, *see, e.g.*, BRUGGER, *supra* note 48, at 74–95, and those who do not, *see, e.g.*, FESER & BESSETTE, *supra* note 24, at 111–16, are generally agreed.

54. Justin says that the punishment for professing Christianity is death, JUSTIN MARTYR, FIRST APOLOGY ch. 11 (Thomas B. Falls trans., 1948) (c. 156), *reprinted in* WRITINGS OF SAINT JUSTIN MARTYR 21, 43 (Catholic Univ. Press., The Fathers of the Church Vol. 6, 1948), and admonishes the emperor Antoninus Pius "not [to] impose the death penalty on those who have done no wrong," *id.* ch. 68, at 107. If, however, the allegations lodged against Christians are true, Justin "demand[s]" that "they be punished, as any guilty persons should be." *Id.* ch. 3, at 34–35. "[W]e would do [Justin] a disservice to think he would commend by implication capital punishment for the guilty if he believed it to be wrong." BRUGGER, *supra* note 48, at 76.

55. *See* ATHENAGORAS THE ATHENIAN, A PLEA FOR CHRISTIANS chs. 2–3 (B.P. Pratten trans., 1867) (176/7), *reprinted in* 2 THE ANTE-NICENE FATHERS 129, 130 (Alexander Roberts & James Donaldson eds., Buffalo, Christian Literature Publ'g Co. Am. ed. 1885–1896) (1863–1873) ("If, indeed, any one can convict us of a crime, be it small or great, we do not ask to be excused from punishment, but are prepared to undergo the sharpest and most merciless inflictions . . . . [I]f these charges are true, spare no class: proceed at once against our crimes; destroy us root and branch . . . if any Christian is found to live like the brutes."); *id.* ch. 35, at 147 ("For when they know that we [Christians] cannot endure to see a man put to death,

Clement of Alexandria (c. 150 – c. 215),[56] Tertullian (c. 160 – c. 230),[57] Origen (c. 184 – c. 253),[58] Cyprian of Carthage (c. 200 – 258),[59] Lactantius (c. 240 – c. 320),[60] Ephrem the Syrian (303–

though justly, who of them can accuse us of murder or cannibalism?"). The latter quotation clearly expresses disapproval of the use of the death penalty, but the phrase "though justly" makes clear that Athenagoras accepts its legitimacy. *See* FESER & BESSETTE, *supra* note 24, at 112.

56. *See* CLEMENT OF ALEXANDRIA, *STROMATEIS* bk. I, ch. 27, ¶ 171.4, at 149 (John Ferguson trans., Catholic Univ. Press, The Fathers of the Church Vol. 85, 1991) (c. 200) ("[W]hen [the Law] sees a person in a seemingly incurable state, plunged up to his neck in crime, then in concern that the others may be infected by him, as if it were amputating a limb of the body, it executes him for the greatest health of all."); *id.* ch. 27, ¶ 173.2, at 150 ("It follows also that when a person is taken prisoner by criminal greed for gain and falls into irreparable vice, one who kills him would be doing him a benefit.").

57. Some scholars consider Tertullian, who died excommunicate, to be one of two Church Fathers to oppose capital punishment categorically. *See, e.g.*, Long, *supra* note 24, at 511 n.1. Tertullian believed that Christians should not join the military in part because it involved carrying out executions. *See* TERTULLIAN, ON IDOLATRY ch. 19 (S. Thelwall trans., 1869) (c. 197), *reprinted in* 3 THE ANTE-NICENE FATHERS, *supra* note 55, at 61, 73. Elsewhere, however, he wrote that "death that comes from the hands of justice, the avenger of violence, should not be accounted as violent," TERTULLIAN, ON THE SOUL ch. 56, ¶ 8 (Rudolph Arbesmann trans., 1950) (c. 208), *reprinted in* TERTULLIAN: APOLOGETICAL WORKS 163, 302 (Catholic Univ. Press, The Fathers of the Church Vol. 10, 1950).

58. *See* Origen, Homily 12 on Jeremiah ¶ 5.1–.2 (John Clark Smith, trans. 1998) (c. 240), *in* ORIGEN: HOMILIES ON JEREMIAH: HOMILY ON 1 KINGS 28, at 110, 117–18 (Catholic Univ. Press, The Fathers of the Church Vol. 97, 1998) (saying that it is better for the common good for a judge to execute a murderer rather than spare him).

59. *See* CYPRIAN OF CARTHAGE, TREATISE V: AN ADDRESS TO DEMETRIANUS ¶ 13 (Robert Ernest Wallace trans., 1868) (252), *reprinted in* 5 THE ANTE-NICENE FATHERS, *supra* note 55, at 457, 461 ("To be a Christian is either a crime, or it is not. If it be a crime, why do you not put the man that confesses it to death?").

60. Some scholars consider Lactantius to be one of two Church Fathers to oppose capital punishment categorically. *See, e.g.*, Long, *supra* note 24, at 511 n.1. In a passage of his *Divine Institutes* he appears to advocate for pacifism and a total rejection of capital punishment. *See* LACTANTIUS, THE DIVINE INSTITUTES bk. VI, ch. 20, at 452 (Mary Francis McDonald trans., Catholic Univ. Press, The Fathers of the Church Vol. 49, 1964) (c. 313) ("So, neither will it be permitted a just man, whose service is justice herself, to enter military service, nor can he accuse anyone of a capital crime, because there is no difference whether you kill a man with a sword or a word, since the killing itself is prohibited.") In the very same chapter, however, he concedes while discussing executions that "a man [may] be condemned deservedly." *Id.* at 451. Elsewhere, Lactantius argues for the justice of God's anger by comparing it to executions by human authorities, which are just. If God acts unjustly in punishing sinners then "judges who inflict capital punishment on those convicted of crime would also be acting unjustly." But since the law calling for capital punishment is "just" and a judge is "sound and good" in executing it, God is also just in punishing sinners. LACTANTIUS, ON THE WRATH OF GOD ch. 17 (Mary Francis McDonald trans., 1965) (313/4), *reprinted in* LACTAN-

373),[61] John Chrysostom (c. 349 – 407),[62] Gregory of Nazianzus (329–390),[63] Ambrose (c. 340 – 397),[64] Optatus (fl. 366),[65] and Je-

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TIUS: THE MINOR WORKS 59, 99–100 (Catholic Univ. Press., The Fathers of the Church Vol. 54, 1965).

61. EPHREM THE SYRIAN, COMMENTARY ON GENESIS § 6, ch. 15.1 (Edward G. Mathews, Jr. & Joseph P. Amar trans., 1994) (c. 368), *reprinted in* ST. EPHREM THE SYRIAN: SELECTED PROSE WORKS 57, 143 (Catholic Univ. Press, The Fathers of the Church Vol. 91, paperback ed. 2004) ("'*I will require your blood from every beast and from the hand of man*.' He requires it now and in the future. He requires it now in the case of a death that He decreed for a murderer, and also a stoning with which a goring bull is to be stoned." (quoting *Genesis* 9:5)); *id.* § 6, ch. 15.2, at 143 (God said, "*From the hand of a man and of his brother* I *will require the life of a man,*" just as satisfaction for the blood of Abel was required from Cain, that is, *whoever sheds the blood of man, by man shall his blood be shed.* The phrase *in the image of God He made . . .* , concerns his authority for, like God, he has the power to grant life and to kill" (alteration in original) (quoting *Genesis* 9:5–6)).

62. *See* John Chrysostom, Homiliy 6 on the Statues ch. 6 (W.R.W. Stephens trans., 1889) (387), *in* 9 NICENE AND POST-NICENE FATHERS: FIRST SERIES 381, 383 (Philip Schaff ed., New York, Christian Literature Publ'g Co. 1886–1890) (calling the execution of criminals "justifiable slaughter").

63. Gregory presents capital punishment as the just and natural consequence of lawlessness. *See* Gregory of Nazianzus, Oration XVII ¶ 6 (Martha Vinson trans., 2003) (373/4), *in* ST. GREGORY OF NAZIANZUS: SELECT ORATIONS 85, 90 (Catholic Univ. Press, The Fathers of the Church Vol. 107, 2003). ("[W]e must be *subject to all the governing authorities not only to avoid God's wrath but also for the sake of conscience.* We must not direct our hatred toward the law when we transgress nor wait for the axe to fall, but rather, chasten our behavior and seek to win their approval out of respect for their authority." (internal footnote omitted) (quoting *Romans* 13:1)).

64. *See* Ambrose, Letter XXV to Studius ¶¶ 1–2 (H. Walford trans., 1881) (c. 385), *in* THE LETTERS OF S. AMBROSE, BISHOP OF MILAN 182, 182 (E.B. Pusey ed., Oxford, James Parker & Co. 1881) (Writing to a magistrate, Ambrose says he would forbid him from ordering executions "had you not in this matter the Apostle's authority that he who judgeth *beareth not the sword in vain, for he is the avenger of God, upon him that doeth evil . . . .* [S]ome there are, although out of the pale of the Church, who will not admit to the divine Mysteries those who have deemed it right to pass sentence of death on any man . . . . [W]e so far observe the Apostle's rule as not to dare to refuse them Communion." (quoting *Romans* 13:4)).

65. Optatus defended the actions of Macarius, an imperial legate who put to death several leading Donatists. *See* OPTATUS, AGAINST THE DONATISTS bk. III, chs. 6–7, at 72–73 (Mark Edwards ed. & trans., Liverpool Univ. Press 1997) (c. 384) ("As if no-one ever deserved to die for the vindication of God! . . . [A]ccuse first Moses, the lawgiver himself, who, when he descended from Mount Sinai, almost before the tables of the law had been put forward, in which it was written, *Thou shalt not kill*, ordered the killing of three thousand people in a single moment. Defer Macarius' case for a little, and first call into judgment Phineas, the priest's son, whom I mentioned a little earlier: that is, if you can find some other judge than God. For what you accuse in his person has been praised by God, because it was done in zeal for God . . . . Go back to the prophet Elijah, who, in obedience to the will of God, killed 450 in the river Chison.").

rome (347–419)[66] all affirm the state's authority to punish grave wrongs with death.

This is not to say that the Fathers all enthusiastically favored the imposition of capital punishment. Augustine (354–430), for instance, wrote many letters to civil magistrates urging them not to carry out scheduled executions,[67] but that did not mean that he denied the legitimacy of the death penalty. In *The City of God*, he holds that those who carry out executions are acting in obedience to God's command:

> The same divine law which forbids the killing of a human being allows certain exceptions, as when God authorizes killing by a general law or when He gives an explicit commission to an individual for a limited time. Since the agent of authority is but a sword in the hand, and is not responsible for the killing, it is in no way contrary to the commandment, "Thou shalt not kill," to wage war at God's bidding, or for the representatives of the State's authority to put criminals to death, according to law or the rule of rational justice.[68]

The Doctors of the Church are similarly unanimous in their acknowledgment of the legitimacy of capital punishment.

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66. *See* JEROME, COMMENTARY ON JEREMIAH bk. IV, cmt. on *Jeremiah* 22:1–5, at 129 (Christopher A. Hall ed., Michael Graves trans., InterVarsity Press 2011) (419) ("'[N]or shed *innocent* blood in this place,' for to punish murderers, profaners and poisoners is not shedding blood but administering the law."); JEROME, COMMENTARY ON ISAIAH bk. V, ch. 8, at 229 (Thomas P. Scheck trans., Newman Press 2015) (410) ("For that which slays those who are cruel is not cruel, but it *seems* to be *cruel* to those who experience it. For even a thief hung on gallows thinks that the judge is *cruel*.").

67. *See, e.g.*, Augustine, Letter 100 to Donatus (Wilfrid Parsons trans., 1953) (408/9), *in* 2 ST. AUGUSTINE: LETTERS 141, 142 (Catholic Univ. Press, The Fathers of the Church Vols. 12, 18, 20, 30, 32, 1951–1956) ("[E]ven when you discover that the Church has been outrageously attacked and injured, we ask you to forget that you have the power of life and death, but not to forget our request."); Augustine, Letter 133 to Marcellinus (Wilfrid Parsons trans., 1953) (412), *in* 3 ST. AUGUSTINE: LETTERS, *supra*, at 6, 6 ("I have been a prey to the deepest anxiety for fear your Highness might perhaps decree that they be sentenced to the utmost penalty of the law, by suffering a punishment in proportion to their deeds. Therefore, in this letter, I beg you by the faith which you have in Christ, and by the mercy of the same Lord Christ, not to do this, nor to let it be done under any circumstances.").

68. AUGUSTINE, THE CITY OF GOD bk. I, ch. 21, at 53 (Demetrius B. Zema & Gerald G. Walsh trans., Catholic Univ. Press, The Fathers of the Church Vol. 8, 1950) (c. 420).

Thomas Aquinas (1225–74), the greatest Doctor of the Church,[69] expressed little ambivalence about the death penalty, calling arguments against its use "frivolous."[70] In the *Summa Theologiae*, he wrote that lawful "vengeance for sin should be taken by depriving a man of what he loves most," including "life."[71] Public officials must put certain criminals to death for the sake of the common good in the same way that a physician might have to cut off a diseased limb to preserve the health of the body as a whole.[72]

The *Greater Catechism* of Peter Canisius (1521–1597) taught on the authority of Genesis and the Psalms that God established capital punishment as fitting retribution for murder.[73] Robert Bellarmine (1542–1621) condemned the view "that among Christians there must not be power of capital punishment, etc., in any government, tribunal, or court" as one of the "chief heretical views of the Anabaptists and Antitrinitarians of our time."[74] He justified capital punishment on the basis of Scripture, the Fathers and Doctors of the Church, and natural reason.[75] The death penalty, according to Bellarmine, is a form of "[r]evenge" that is just "if it is sought by a legitimate judge and

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69. *See* LEO XIII, *AETERNI PATRIS*: ON THE RESTORATION OF CHRISTIAN PHILOSOPHY ¶ 17 (1879), http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_04081879_aeterni-patris.pdf [https://perma.cc/WC4U-D6HJ] (calling Thomas Aquinas "the special bulwark and glory of the Catholic faith"); *id.* ¶¶ 21–22 (cataloguing the unique reverence the Church has had for Aquinas's teaching throughout history).

70. THOMAS AQUINAS, *SUMMA CONTRA GENTILES* bk. III, pt. 2, ch. 146, ¶ 9 (Vernon J. Burke trans., Univ. Notre Dame Press 1975) (1259–1265) [hereinafter *SUMMA CONTRA GENTILES*].

71. *SUMMA THEOLOGICA*, *supra* note 26, pt. II-II, q. 108, art. 3.

72. *Id.* pt. II-II, q. 64, art. 2; *see also SUMMA CONTRA GENTILES*, *supra* note 70, bk. III, pt. 2, ch. 146, ¶ 5.

73. *See* PETRUS CANISIUS, *CATECHISMUS MAIOR: SUMMA DOCTRINAE CHRISTIANAE ANTE-TRIDENTINA* q. 164 (1555–1565), *reprinted in* 1 *CATECHISMI LATINI ET GERMANICI* 1, 57 (Friedrich Streicher ed., 1933) (quoting *Genesis* 4:10, 9:6; *Psalm* 54:24); *see also* PETRUS CANISIUS, *CATECHISMUS MAIOR*: *SUMMA DOCTRINAE CHRISTIANAE POST-TRIDENTINA* q. 170 (1566–1592), *reprinted in* 1 *CATECHISMI LATINI ET GERMANICI*, *supra*, at 77, 164 (teaching that it is a very grave sin to take life "without legitimate authority" (translation by Author)).

74. ROBERT BELLARMINE, ON LAYMEN OR SECULAR PEOPLE (1586), *reprinted in* ON SPIRITUAL AND TEMPORAL AUTHORITY 1, 5 (Stefania Tutino ed. & trans., 2012).

75. *See id.* at 49–52; *see also* Edward Feser, *Bellarmine on capital punishment*, ED FESER'S BLOG: BLOGSPOT (Mar. 23, 2018, 11:51 AM), http://edwardfeser.blogspot.com/2018/03/bellarmine-on-capital-punishment.html [https://perma.cc/G97E-BVRL].

for a good end."[76] Alphonsus Liguori (1696–1787) held that public authority may lawfully execute criminals even "outside the case of necessary defense" so that "the order of justice may be preserved," and that the Bible clearly sanctioned such executions.[77]

3. The Popes

From the fifth century to the twentieth, the popes consistently taught that grave crimes may be punished with death. The first pope to address squarely the subject of capital punishment was Innocent I (r. 401–417). Exsuperius, the bishop of Toulouse, wrote to him asking whether baptized public officials who carry out death sentences should be denied Communion or otherwise subjected to canonical sanction.[78] Pope Innocent I replied:

> As for these officials, we find no penalty designated by our predecessors. For they remembered that these powers were granted by God, that the sword was permitted for the punishment of the guilty, and that the punisher in a case of this sort is a servant of God. How would they have condemned an act which they saw had been granted by the authority of God? We therefore uphold for these officials what has been maintained up until now, so that we do not appear either to overturn teaching or to act against the authority of the Lord.[79]

Pope Nicholas I (r. 858–867), following in the tradition of Augustine, urged the newly converted Christians of Bulgaria to avoid executing wrongdoers when possible and "lead those whom you can not to death but life."[80] He never denied, however, that they possessed the legitimate authority to execute wrongdoers: he called for a total ban on capital punishment

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76. BELLARMINE, *supra* note 74, at 52.

77. 2 ALPHONSUS DE LIGORIO, THEOLOGIA MORALIS bk. IV, tract 4, ch. 1, dubium 2, ¶ 376, at 191 (P. Mich. Heilig ed., Adrien Le Clere, Paris, 1852–1857) (1748) (citing *Exodus* 22; *Romans* 13) (translation by Author).

78. *See* Innocent I, *Epistola VI: Innocentius Exsuperio episcopo Tolosano* ch. 3, ¶ 7 (405), *in* 20 PATROLOGIA LATINA 495, 499 (J.P. Migne ed., Paris, 1844–1855).

79. *Id.* ch. 3, ¶ 8, at 499 (translation by Author).

80. The Responses of Pope Nicholas I to the Questions of the Bulgars (Letter 99) ch. 25 (W.L. North trans., 1998) (866), *in* INTERNET MEDIEVAL SOURCEBOOK (Paul Halsell ed., Nov. 4, 2011), https://sourcebooks.fordham.edu/basis/866nicholas-bulgar.asp [https://perma.cc/XSG4-6SJ3].

only during feast days and Lent,[81] and he expressly approved of the execution of those who had murdered their own kinsmen or companions.[82]

In the twelfth century there arose a proto-Protestant sect called the Waldensians, which was condemned by the Church. They taught, among other things, that killing was never justified under any circumstances. Consequently they opposed all war and capital punishment. A group of Waldensians sought to reconcile with the Church in 1210. *As a condition of reentry into the Church*, Pope Innocent III (r. 1198–1216) required them to swear, "In regard to the secular power, we affirm that it can exercise a judgment of blood without mortal sin provided that in carrying out the punishment it proceeds, not out of hatred, but judiciously, not in a precipitous manner, but with caution."[83]

Following the Council of Trent, Pope Pius V (r. 1566–1572) promulgated the *Roman Catechism*, the most influential catechism in the history of the Church prior to the twentieth-century *Catechism of the Catholic Church*. It emphatically affirmed the retributive purpose of and scriptural basis for capital punishment:

> The power of life and death is permitted to certain civil magistrates because theirs is the responsibility under law to punish the guilty and protect the innocent. Far from being guilty of breaking this commandment [Thou shalt not kill], such an execution of justice is precisely an act of obedience to it. For the purpose of the law is to protect and foster human life. This purpose is fulfilled when the legitimate authority of the state is exercised by taking the guilty lives of those who have taken innocent life. In the Psalms we find a vindication of this right: "Morning by morning I will destroy all the wicked in the land, cutting off all evildoers from the city of the Lord" (Ps 101:8).[84]

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81. *Id.* chs. 12, 45.

82. *Id.* chs. 26–27 (with the caveat that those who seeking refuge in a church should be spared).

83. Innocent III, *Eius exemplo* (1210), *in* COMPENDIUM OF CREEDS, DEFINITIONS, AND DECLARATIONS ON MATTERS OF FAITH AND MORALS § 795 (Heinrich Denzinger & Peter Hünermann eds., Ignatius Press 43d ed. 2012) (1854) [hereinafter DENZINGER].

84. THE ROMAN CATECHISM 410–11 (Robert I. Bradley & Eugene Kevane trans., Daughters of St. Paul 1985) (1566).

For over a millennium the popes served not only as the spiritual heads of the Catholic Church but also as the temporal rulers of the Papal States. In their capacity as earthly political sovereigns, the popes oversaw the execution of criminals until the dissolution of the Papal States in the pontificate of Pope Pius IX (r. 1846–1878). 516 condemned criminals, mostly murderers, were put to death in the Papal States between 1796 and 1865 alone.[85] The popes' attitude toward capital punishment did not change with the loss of the Papal States. In the late nineteenth and early twentieth centuries, Popes Leo XIII (r. 1878–1903),[86] Pius X (r. 1903–1914),[87] and Pius XI (r. 1922–1939)[88] all affirmed the legitimacy of capital punishment in their magisterial writings, and all three distinguished capital punishment from killing in self-defense.

Pope Pius XII (r. 1939–1958) devoted particular attention to articulating the Church's teaching on crime and punishment in a systematic way.[89] He linked the death penalty to retribution, teaching its legitimacy "for the gravest crimes, well defined and proven."[90] He further clarified that the just use of the death penalty is not contrary to the dignity of all human life:

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85. *See* FESER & BESETTE, *supra* note 24, at 9. Six popes ruled over this period of time: Pius VI, Pius VII, Leo XII, Pius VIII, and Pius IX. *Id.*

86. LEO XIII, *PASTORALIS OFFICII*: ON THE MORALITY OF DEULING ¶ 2 (1891), http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_12091891_pastoralis-officii.pdf [https://perma.cc/RTE2-WEUA] ("Clearly, divine law, both that which is known by the light of reason and that which is revealed in Sacred Scripture, strictly forbids anyone, *outside of public cause*, to kill or wound a man unless compelled to do so in self defense." (emphasis added)).

87. THE CATECHISM OF POPE SAINT PIUS X, The Fifth Commandment, q. 3, at 137 (Instauratio Press 1993) (1910) ("It is lawful to kill . . . when carrying out by order of the Supreme Authority a sentence of death in punishment of a crime; and, finally, in cases of necessary and lawful defence of one's own life against an unlawful aggressor.").

88. PIUS XI, *CASTI CONNUBII*: ON CHRISTIAN MARRIAGE ¶ 64 (1930), https://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19301231_casti-connubii.pdf [https://perma.cc/QD8Q-UYWK] (teaching, in condemning state support for abortion, that "[i]t is of no use to appeal to the right of taking away life for here it is a question of the innocent, whereas that right has regard only to the guilty; nor is there here a question of defense by bloodshed against an unjust aggressor").

89. *See* FESER & BESSETTI, *supra* note 24, at 128–35.

90. *Discorso di Sua Santità Pio XII ai Parroci e ai Quaresimalisti di Roma* para. 22 (Feb. 23, 1944), http://w2.vatican.va/content/pius-xii/it/speeches/1944/documents/hf_p-xii_spe_19440223_inscrutabile-consiglio.pdf [https://perma.cc/7EVJ-UYV6] (translation by James McGlone).

> Even when there is question of the execution of a condemned man, the state does not dispose of the individual's right to life. In this case it is reserved to the public power to deprive the condemned person of the enjoyment of life in expiation of his crime when, by his crime, he has already disposed himself of his right to live.[91]

Starting in the mid-1970s, voices within the Church began to call for the political abolition of the death penalty in developed countries, while at the same time never denying the legitimacy of the state's authority to execute criminals.[92] In 1976, the Pontifical Commission for Justice and Peace, a Vatican office writing to the bishops of the United States under the authority of Pope Paul VI (r. 1963–1978), said, "That the state has the right to enforce the death penalty has been ceded by the church for centuries . . . . The Church has never condemned its use by the state . . . [and] has condemned the denial of that right."[93] At the same time, the Commission stressed the "medicinal role of punishment," in consideration of which a Catholic could come to conclude that abolition of the death penalty is an appropriate political course of action.[94]

Lastly, in 1994 Pope John Paul II (r. 1978–2005) issued the *Catechism of the Catholic Church*. The original text of the *Catechism* expressly reaffirmed the Church's traditional teaching on the legitimacy of capital punishment while at the same time exhorting civil authorities to exercise restraint whenever possible:

> Preserving the common good of society requires rendering the aggressor unable to inflict harm. For this reason the traditional teaching of the Church has acknowledged as well-founded the right and duty of legitimate public authority to punish malefactors by means of penalties commensurate with the gravity of the crime, not excluding, in cases of extreme gravity, the death penalty . . . .
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> . . .

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91. Pius XII, Moral Limits of Medical Research (Sept. 1952), *in* 1 THE MAJOR ADDRESSES OF POPE PIUS XII, *supra* note 25, at 225, 232–33.

92. *See* BRUGGER, *supra* note 48, at 133, 136–37.

93. Pontifical Comm'n for Justice & Peace, *The Church and the Death Penalty*, 6 ORIGINS 389, 391–92 (1976).

94. *See id.*

> If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority should limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person.[95]

From the days of Noah to 1994, the unquestioned consensus of the Church approved of the legitimacy of the death penalty as a punishment for the grave crimes. It cannot fairly "be said," as Judge Barrett and Professor Garvey suggest, "that the Church . . . wandered a bit before" the issuing of *Evangelium Vitae*.[96]

B. From Evangelium Vitae to Benedict XVI

Pope John Paul II published *Evangelium Vitae* (meaning "the Gospel of life") in 1995. It was at that time the strongest statement of opposition to the practice of the death penalty in a papal magisterial document. Shortly thereafter, in 1997, John Paul II revised the *Catechism of the Catholic Church*'s section on capital punishment to take into account the teaching of *Evangelium Vitae*. Although John Paul II passionately opposed the modern practice of the death penalty, he was careful to conform to the Church's traditional teaching that capital punishment can be a just punishment for the gravest of crimes. Pope Benedict XVI followed the lead of his immediate predecessor, opposing the death penalty in practice while acknowledging its legitimacy in principle.

1. Evangelium Vitae

Pope John Paul II wrote *Evangelium Vitae* to reaffirm the dignity of all human life in the face of new kinds of offenses against it in the modern world.[97] He focuses throughout the encyclical in a particular way on the evils of abortion and euthanasia, which he condemned in no uncertain terms.[98] After a discussion of "legitimate defence" of oneself and others,[99] the

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95. CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2266–67 (Geoffrey Chapman trans., Cassell 1994) [hereinafter 1994 CATECHISM].

96. Garvey & Coney, *supra* note 4, at 315.

97. *See EVANGELIUM VITAE*, *supra* note 18, ¶¶ 3–4.

98. *Id.* ¶¶ 62, 65.

99. *Id.* ¶ 55.

encyclical goes on to devote one paragraph to the death penalty:

> This is the context in which to place the problem of the death penalty [*poena capitali*]. On this matter there is a growing tendency, both in the Church and in civil society, to demand that it be applied in a very limited way or even that it be abolished completely. The problem must be viewed in the context of a system of penal justice ever more in line with human dignity and thus, in the end, with God's plan for man and society. The *primary purpose of the punishment* [*poena*] which society inflicts is "to redress the disorder caused by the offence." Public authority must redress the violation of personal and social rights by *imposing on the offender an adequate punishment for the crime*, as a condition for the offender to regain the exercise of his or her freedom. In this way authority *also fulfils the purpose* of defending public order and ensuring people's safety, while at the same time offering the offender an incentive and help to change his or her behaviour and be rehabilitated.
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> It is clear that, *for these purposes* to be achieved, the nature and extent of the punishment must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.
>
> In any event, the principle set forth in the new Catechism of the Catholic Church remains valid: "If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority must [or *should*] limit itself to such means,[100] because they better correspond to the concrete conditions of the

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100. "Must limit itself to such means" is somewhat of an over-translation of *his utatur instrumentis*. The same phrase is translated "should limit itself to such means" in the first edition of the *Catechism*. 1994 CATECHISM, *supra* note 95, ¶ 2267. Literally translated, it means "let it use these means." *Utatur* is a verb in the subjunctive mood. Subjunctive verbs used in independent clauses can carry either imperative or merely precatory force. *See* DIRK PANHUIS, LATIN GRAMMAR § 236 (Dirk Panhuis & Gertrud Champe trans., Univ. Mich. Press 2006) (1998).

> common good and are more in conformity to the dignity of the human person."[101]

Pope John Paul II then goes on to say that unlike with "criminals and unjust aggressors," "the commandment 'You shall not kill' has absolute value when it refers to the innocent person."[102] He concludes by "confirm[ing] that the direct and voluntary killing of an *innocent* human being is always gravely immoral."[103]

Evangelium Vitae makes no clear, unqualified condemnation of capital punishment, even capital punishment when "bloodless means are sufficient," in the way that it does unmistakably condemn abortion, euthanasia, and the taking of innocent human life; nowhere is capital punishment called "a grave moral disorder,"[104] "intrinsically illicit,"[105] or "a grave violation of the law of God."[106] The "problem of capital punishment" is nothing like "the unspeakable crime of abortion."[107]

Instead, the encyclical analyzes the death penalty as a punishment subject to the Church's traditional framework of the purposes of punishment. It refers to the death penalty as a kind of punishment (*poena capitali*) and then goes on to discuss the purposes that punishment (*poena*) fulfills.[108] The "primary pur-

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101. *EVANGELIUM VITAE*, *supra* note 18, ¶ 56 (footnotes omitted) (emphases added) (quoting CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2266–67 (1994)). The official text (also known as the *editio typica*) of a papal encyclical is the Latin text published in the *Acta Apostolicae Sedis*. The English text published by the Vatican is simply a translation. It will therefore be helpul to have recourse to the Latin in some instances. *See* IOANNES PAULUS II, *EVANGELIUM VITAE* ¶ 56 (1995), *in* 87 *ACTA APOSTOLICAE SEDIS* 401, 463–64 (1995) [hereinafter *EVANGELIUM VITAE* (*editio typica*)].

102. *EVANGELIUM VITAE*, *supra* note 18, ¶ 57.

103. *Id*. (emphasis added).

104. *Id*. ¶ 62 (speaking of abortion).

105. *Id*. (same).

106. *Id*. ¶ 65 (speaking of euthanasia).

107. *Id*. ¶ 58 (quoting SECOND VATICAN ECUMENICAL COUNCIL, *GAUDIUM ET SPES*: ON THE CHURCH IN THE MODERN WORLD ¶ 51 (1965), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html [https://perma.cc/F2KQ-XMEL]).

108. *EVANGELIUM VITAE* (*editio typica*), *supra* note 101, ¶ 56, at 463–64; *see also* OXFORD LATIN DICTIONARY 1395 (combined ed. 1982) (defining "*poena*" as "[t]he penalty paid in satisfaction for an offence, punishment"). The encyclical does also say that the death penalty is to be placed into the context of "legitimate defence," but this is no innovation. The 1994 edition of the *Catechism*, which explicitly contemplates the death penalty as a form of retributive punishment, also treats capital punishment under the heading of "legitimate defence." *See* 1994 CATECHISM,

pose" of punishment is retribution, i.e., "imposing on the offender an adequate punishment for the crime."[109] But there are also other purposes, namely defending public order, protecting people's safety, and rehabilitation of the offender.[110] This is all simply a restatement of the traditional Catholic view of punishment, as outlined above in Part I. When John Paul II counsels against the use of the death penalty where it is not "absolutely necessary," it is in order "for these purposes," i.e., retribution and the medicinal purposes of punishment, "to be achieved."[111]

If the primary purpose of punishment is retribution and if the death penalty is a punishment that can in some instances fulfill the purposes of punishment, then it must be the case that the primary purpose of imposing the death penalty is retribution, to impose on the offender an adequate punishment for the offense. It thus follows as a matter of logic from the principles laid out in *Evangelium Vitae* that the state has the legitimate authority to punish certain grave offenses with death. This is the traditional Catholic teaching on capital punishment, and it precludes Barrett and Garvey's view that "only reasons analogous to self-defense can justify capital punishment."[112] In a just act of self-defense, the goal is to use only as much force as is necessary to stop the attack, not to actively inflict harm on the assailant.[113] According to *Evangelium Vitae*, the primary goal of capital punishment, as with all other punishments, is to inflict harm in retribution for the offense committed.

Why then does the encyclical so strongly urge public authorities to refrain from making use of capital punishment? This is where the secondary, medicinal, purposes of punishment come into the picture. Although retribution is what makes a punishment essentially just, the secondary purposes of punishment can militate toward not exacting the full extent of retribution. John Paul II appeals to "steady improvements in

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supra note 95, ¶¶ 2263–67. The idea of defense speaks to whether a punishment is prudent; the idea of retribution speaks to whether a punishment is just.

109. *EVANGELIUM VITAE*, *supra* note 18, ¶ 56.

110. *Id.*

111. *Id.*

112. Garvey & Coney, *supra* note 4, at 316.

113. *Id.* at 309; *see also* 1997 CATECHISM, *supra* note 30, ¶ 2263.

the organization of the penal system."[114] This gets at safety, public order, and rehabilitation. Modern prison systems make it possible to protect safety and public order without having to kill the offender by securely separating him from the rest of society. They also give incarcerated criminals an opportunity to redeem themselves and live out some kind of worthwhile life of repentance while still being punished for their crimes. Thus, even though it would not violate justice to execute murderers in modern-day America, tempering the zeal for complete retribution may perhaps open the door to rehabilitation without endangering safety or public order.

John Paul II's opposition to the death penalty is an application of the Church's traditional teaching on the purposes of punishment to the realities of modern society and is therefore a prudential judgment. A Catholic could in good faith disagree with these prudential judgments and conclude that the use of the death penalty beyond cases of "absolute necessity" does in fact achieve the medicinal purposes of punishment. He could, like Thomas Aquinas, think that the death penalty promotes repentance, the highest form of rehabilitation, by forcing the condemned criminal to come to terms with the gravity of what he has done.[115] He could, like Clement of Alexandria, believe that the death penalty promotes public order by instilling a just fear of punishment in potential wrongdoers.[116] Or he could agree with Augustine, Nicholas I, and John Paul II that the state should refrain from exercising its authority to execute criminals whenever possible. These are not disagreements about the underlying principles to be used in determining how to punish a criminal but about their concrete application.

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114. *EVANGELIUM VITAE*, *supra* note 18, ¶ 56.

115. *See SUMMA CONTRA GENTILES*, *supra* note 70, bk. III, pt. 2, ch. 146, ¶ 10 ("Finally, the fact that the evil, as long as they live, can be corrected from their errors does not prohibit the fact that they may be justly executed, for the danger which threatens from their way of life is greater and more certain than the good which may be expected from their improvement. They also have at the critical point of death the opportunity to be converted to God through repentance. And if they are so stubborn that even at the point of death their heart does not draw back from evil, it is possible to make a highly probable judgment that they would never come away from evil to the right use of their powers.").

116. *See* CLEMENT, *supra* note 56, bk. I, ch. 27, ¶ 172.3, at 149 ("'It is a great education when a malefactor sees a criminal punished,' for 'the fear of the Lord breeds wisdom.'" (quoting *Proverbs* 22:36)).

2. The Catechism

The first, provisional edition of the *Catechism of the Catholic Church* appeared in 1994, but the second, official edition did not come until 1997, after the issuing of *Evangelium Vitae*.[117] The text was largely the same, but the paragraphs dealing with capital punishment had been revised to reflect the teaching of the encyclical. As in the 1994 edition, the 1997 edition of the *Catechism* begins its discussion of capital punishment with the acknowledgment that "[l]egitimate public authority has the right and duty to inflict punishment proportionate to the gravity of the offense."[118] It deletes, however, the phrase "not excluding, in cases of extreme gravity, the death penalty," which was present in the first edition.[119] Then, after acknowledging the "medicinal purpose" of punishment,[120] it goes on to say:

> Assuming that the guilty party's identity and responsibility have been fully determined, the traditional teaching of the Church does not exclude recourse to the death penalty [*poenam mortis*], if this is the only possible way of effectively defending human lives against the unjust aggressor.
>
> If, however, non-lethal means are sufficient to defend and protect people's safety from the aggressor, authority will [or *should*] limit itself[121] to such means, as these are more in keeping with the concrete conditions of the common good and more in conformity to the dignity of the human person.
>
> Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm—without definitely taking away from him the possibility of redeeming himself—the cases in which the execution of the offender is an absolute necessity "are very rare, if not practically nonexistent."[122]

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117. These dates refer to the Latin editions of the text. *See* BRUGGER, *supra* note 48, at 10–11.

118. 1997 CATECHISM, *supra* note 30, ¶ 2266.

119. *Compare* 1994 CATECHISM, *supra* note 95, ¶ 2266, *with* 1997 CATECHISM, *supra* note 30, ¶ 2266.

120. 1997 CATECHISM, *supra* note 30, ¶ 2266.

121. This same phrase is translated as "should limit itself" in the 1994 edition of the *Catechism* and "must limit itself" in *Evangelium Vitae*. *See supra* note 100.

122. 1997 CATECHISM, *supra* note 30, ¶ 2267 (quoting *EVANGELIUM VITAE*, *supra* note 18, ¶ 56). For the Latin text, see *CATECHISMUS CATHOLICAE ECCLESIAE* ¶ 2267

The *Catechism* largely restates *Evangelium Vitae*. It does not condemn executing criminals outside of cases of absolute necessity as a moral evil. It reasserts that the primary purpose of punishment is retribution and that the death penalty is a kind of punishment (*poenam*), which would of course mean that the primary purpose of the death penalty is retribution. It does, however, express more firmly the prudential judgment offered in *Evangelium Vitae* that public authorities should refrain from executing criminals whenever possible.

The first section of the paragraph is liable to be misinterpreted if read in isolation. It is true that the Church's traditional teaching permits the death penalty if it is the only way to protect human lives, but that is not the *only* circumstance under which it permits capital punishment. Reading "if" to mean "if and only if" would simply be incompatible with the historical evidence surveyed above. Nor can this section be read as narrowing the circumstances under which the death penalty is legitimate, because it is an appeal to, rather than a criticism of, the tradition. The rest of the paragraph is familiar. The second section is essentially the same as it was in the 1994 edition, and the final section is a paraphrasing of *Evangelium Vitae*'s prudential judgment in favor of abolishing the death penalty.[123]

3. The CDF's Interpretation

The above interpretation of *Evangelium Vitae* and the *Catechism* is confirmed by the interventions of the Congregation for the Doctrine of the Faith ("CDF"). The CDF is an office of the Roman Curia charged with the "duty . . . to promote and safeguard the doctrine on faith and morals in the whole Catholic world."[124] It offers authoritative interpretations of doctrine, including clarifications of papal statements,[125] as part of the

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(*editio typica* 1997), https://web.archive.org/web/20170622041430/http://www.vatican.va/archive/catechism_lt/p3s2c2a5_lt.htm.

123. *See* *EVANGELIUM VITAE*, *supra* note 18, ¶ 56.

124. JOHN PAUL II, *PASTOR BONUS* art. 48 (1988), http://w2.vatican.va/content/john-paul-ii/en/apost_constitutions/documents/hf_jp-ii_apc_19880628_pastor-bonus.pdf [https://perma.cc/FJ7L-M5M2].

125. *See, e.g.*, LUIS F. LADARIA & GIACOMO MORANDI, CONGREGATION FOR THE DOCTRINE OF THE FAITH , *PLACUIT DEO*: ON CERTAIN ASPECTS OF CHRISTIAN SALVATION ¶¶ 3–4 (2018), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20180222_placuit-deo_en.html

pope's exercise of his magisterium. The head of the CDF under John Paul II was none other than Cardinal Joseph Ratzinger, the future Pope Benedict XVI.

Shortly after *Evangelium Vitae*'s publication in 1995, Cardinal Ratzinger suggested at a press conference that the *Catechism* (then in its first edition) "would have to be revised in light of the encyclical."[126] Fr. Richard John Neuhaus, founder of *First Things*, wrote to Ratzinger asking for a clarification. Ratzinger responded:

> You ask about the correct interpretation of the teaching of the encyclical on the death penalty. Clearly, the Holy Father has not altered the doctrinal principles which pertain to this issue as they are presented in the Catechism, but has simply deepened the application of such principles in the context of present-day historical circumstances. Thus, where other means for the self-defense of society are possible and adequate, the death penalty may be permitted to disappear. Such a development, occurring within society and leading to the foregoing of this type of punishment, is something good and ought to be hoped for.
>
> In my statements during the presentation of the encyclical to the press, I sought to elucidate these elements, and noted the importance of taking such circumstantial considerations into account. It is in this sense that the Catechism may be rewritten, naturally without any modification of the relevant doctrinal principles . . . .[127]

Ratzinger thus explicitly rules out any interpretation of *Evangelium Vitae* or of the second edition of the *Catechism* that contradicts the principles laid out in the first edition of the *Catechism*, which affirmed the state's authority to punish grave crimes with death.

In 2004, after the publication of the revised *Catechism*, the archbishop of Washington wrote to Cardinal Ratzinger asking whether Catholic supporters of the death penalty should be denied Communion.[128] Ratzinger responded in the negative:

[https://perma.cc/385D-VRQP] (clarifying what Pope Francis means by his use of the terms "Gnosticism" and "Pelagianism" in his ordinary magisterium).

126. *See* Richard John Neuhaus, *A Clarification on Capital Punishment*, FIRST THINGS, Oct. 1995, at 83, 83.

127. *Id.* (reproducing the letter).

128. As a general matter those who publicly dissent from the Church's established moral teachings are to be denied Holy Communion. *See* 1983 CODE C.915

> Not all moral issues have the same moral weight as abortion and euthanasia. For example, if a Catholic were to be at odds with the Holy Father on the application of capital punishment or on the decision to wage war, he would not for that reason be considered unworthy to present himself to receive Holy Communion. While the Church exhorts civil authorities to seek peace, not war, and to exercise discretion and mercy in imposing punishment on criminals, it may still be permissible to take up arms to repel an aggressor or to have recourse to capital punishment. There may be a legitimate diversity of opinion even among Catholics about waging war and applying the death penalty, but not however with regard to abortion and euthanasia.[129]

The comparison to war is particularly instructive. While the Catholic Church strives for peace, it has never been pacifist. War is a core example in the Catholic tradition of a moral question where the legitimacy of action depends on an exercise of prudential judgment by civil authorities.[130] The United States Conference of Catholic Bishops ("USCCB") published Cardinal Ratzinger's response on this question nearly verbatim in a guide for American Catholics involved in public life.[131]

4. Benedict XVI

Pope Benedict XVI largely echoed Pope John Paul II's position on the death penalty, while subtly highlighting the continuity between his immediate predecessor and the prior tradition. Benedict called for the abolition of the death penalty in his

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("Those . . . obstinately persevering in manifest grave sin are not to be admitted to holy communion.").

129. Joseph Ratzinger, Congregation for the Doctrine of the Faith, *Worthiness to Receive Holy Communion: General Principles* ¶ 3, ETERNAL WORD TELEVISION NETWORK (July 2004), https://www.ewtn.com/library/curia/cdfworthycom.htm [https://perma.cc/SY6Z-NZ5B].

130. *See* 1997 CATECHISM, *supra* note 30, ¶ 2309 ("The evaluation of these conditions for moral legitimacy [of choosing to wage war] belongs to the prudential judgment of those who have responsibility for the common good.").

131. William J. Levada, *Theological Reflections on Catholics in Political Life and Reception of Holy Communion*, U.S. CONF. CATH. BISHOPS para. 17 (June 13, 2004), http://www.usccb.org/issues-and-action/faithful-citizenship/church-teaching/theological-reflections-tf-bishops-politicians-2004-06-13.cfm [https://perma.cc/Z77Y-3ZQN].

public speeches.[132] He also issued the *Compendium of the Catechism of the Catholic Church*, which discusses the subject of capital punishment under the heading "What kind of punishment may be imposed?"[133] The *Compendium*'s answer begins, "The punishment imposed must be proportionate to the gravity of the offense," and then goes on to restate John Paul II's view that public authorities should limit themselves to bloodless means when possible.[134] The *Compendium* thus reiterates that even after the publication of *Evangelium Vitae* and the 1997 revision of the *Catechism*, the death penalty still ought to be seen as a punishment meted out in retribution for grave crimes.[135] As was his wont, Pope Benedict XVI emphasized the continuity between modern articulations of Church teaching and those of previous generations. The Church seeks the abolition of capital punishment today, but it does not deny that grave crimes may justly be punished with death.

C. The 2018 Catechism Revision

On August 2, 2018, Pope Francis revised the *Catechism*'s language on the death penalty a second time. The revised text no longer says that "the traditional teaching of the Church does not exclude recourse to the death penalty" and now calls the death penalty "inadmissible." In full, paragraph 2267 now reads:

> Recourse to the death penalty on the part of legitimate authority, following a fair trial, was long considered an appropriate response to the gravity of certain crimes and an acceptable, albeit extreme, means of safeguarding the common good.
>
> Today, however, there is an increasing awareness that the dignity of the person is not lost even after the commission of very serious crimes. In addition, a new understanding has emerged of the significance of penal sanctions imposed by the state. Lastly, more effective systems of detention have

132. *See, e.g.*, EWTN News, *Pope Benedict: End the Death Penalty*, NAT'L CATH. REG. (Nov. 30, 2011), http://www.ncregister.com/daily-news/pope-benedict-end-the-death-penalty [https://perma.cc/Z884-DKZ8].

133. COMPENDIUM OF THE CATECHISM OF THE CATHOLIC CHURCH ¶ 469 (U.S. Conference of Catholic Bishops 2006) (2005).

134. *Id.*

135. *See* BRUGGER, *supra* note 48, at xvii–xviii; FESER & BESSETTE, *supra* note 24, at 182–83.

> been developed, which ensure the due protection of citizens but, at the same time, do not definitively deprive the guilty of the possibility of redemption.
>
> Consequently, the Church teaches, in the light of the Gospel, that "the death penalty is inadmissible because it is an attack on the inviolability and dignity of the person," and she works with determination for its abolition worldwide.[136]

The *Catechism* now clearly calls for an end to the practice of the death penalty worldwide. Its teaching on the moral status of the death penalty, however, is not clear on its face.[137] The word "inadmissible" does not have a precise, technical meaning in Catholic moral theology.[138] The death penalty could be "inadmissible" because, although legitimate in principle, it is not the policy the best advances the common good in today's

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136. 2018 CATECHISM ¶ 2267 revision, *supra* note 22 (quoting Address of His Holiness Pope Francis to Participants in the Meeting Organized by the Pontifical Council for the Promotion of the New Evangelization (Oct. 11, 2017), https://w2.vatican.va/content/francesco/en/speeches/2017/october/documents/papa-francesco_20171011_convegno-nuova-evangelizzazione.pdf [https://perma.cc/SJS3-RZX9]).

137. Commentators have split in their interpretations of the revision. *Compare* Steven A. Long, *Magisterial Responsibility*, FIRST THINGS, Oct. 2018, at 41 (*Catechism* revision makes only a prudential judgment), Vladimir Mauricio-Perez, *Interpreting the Catechism change on the death penalty from Tradition*, DENVER CATH. (Aug. 2, 2018), https://denvercatholic.org/interpreting-the-catechism-change-on-the-death-penalty-from-tradition/ [https://perma.cc/74DX-QMNN] (same), *and* Raymond J. de Souza, *Catechism Change on Capital Punishment: Justified and Inadmissible?*, NAT'L CATH. REG. (Sept. 26, 2018, 7:52 AM), http://www.ncregister.com/daily-news/catechism-change-on-capital-punishment-justified-and-inadmissible [https://perma.cc/5ZG3-KXDU] (same), *with* The Editors, *Dignity and the Death Penalty*, COMMONWEAL (Sept. 10, 2018), https://www.commonwealmagazine.org/dignity-death-penalty [https://perma.cc/KJF9-JJDU] (*Catechism* revision teaches the death penalty is wrong in principle), Patrick Lee, *A Genuine and Important Development of Catholic Teaching*, NAT'L CATH. REG. (Aug. 3, 2018, 2:26 PM), http://www.ncregister.com/daily-news/death-penalty-a-genuine-and-important-development-of-catholic-teaching [https://perma.cc/FM22-PT2F] (same), Inés San Martín, *Pope Francis changes teaching on death penalty, it's "inadmissible,"* CRUX (Aug. 2, 2018), https://cruxnow.com/vatican/2018/08/02/pope-francis-changes-teaching-on-death-penalty-its-inadmissible/ [https://perma.cc/59AL-KH48] (same), *and* Tobias Winright, *Pope Francis on capital punishment: A closer look*, AMERICA (Aug. 17, 2018), https://www.americamagazine.org/faith/2018/08/17/pope-francis-capital-punishment-closer-look [https://perma.cc/9PGR-T4RX] (same).

138. *See* Dan Hitchens, *The Catechism and the death penalty: Are Catholics right to be worried?*, CATH. HERALD (Aug. 4, 2018), http://www.catholicherald.co.uk/commentandblogs/2018/08/04/the-catechism-and-the-death-penalty-are-catholics-right-to-be-worried/ [https://perma.cc/58Q3-E63X] ("'[I]nadmissible' is a vague, non-technical term."). Professor Steven Long claims that "'inadmissibility' is a legal and prudential term." Long, *supra* note 137, at 42.

circumstances. In this case it would not be morally wrong to execute criminals in today's day and age, but neither, according to the *Catechism*, would it be the practice that best advances the common good and respects human dignity. The death penalty could also be "inadmissible" because it is intrinsically wrong and never justified under any circumstances. In that case the new revision would be making a claim that is at odds with Scripture and nearly two thousand years of Catholic tradition, and faithful Catholics could not assent to its teaching.

The new revision of the *Catechism* should be read in continuity with the Church's traditional teaching on capital punishment. The pope is not a prophet who receives new revelations but a custodian who preserves the deposit of faith given by Christ to the apostles.[139] Consequently a papal statement on a matter of doctrine, when ambiguous, should be read in harmony with the Church's prior teaching unless it expressly criticizes earlier formulations of the teaching.[140] This presumption of harmony certainly applies here, because the CDF has insisted that the revision "expresses an authentic development of doctrine that is not in contradiction with the prior teachings of

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139. *See* First Vatican Ecumenical Council, session 4 (July 18, 1870), *in* DENZINGER, *supra* note 83, § 3070 ("[T]he holy Spirit was promised to the successors of Peter not so that they might, by his revelation, make known new doctrine, but that, by his assistance, they might religiously guard and faithfully expound the revelation or deposit of faith transmitted by the apostles."); Homily of His Holiness Benedict XVI at the Mass of the Possession of the Chair of the Bishop of Rome para. 19 (May 7, 2005) [hereinafter Homily of Benedict XVI], http://w2.vatican.va/content/benedict-xvi/en/homilies/2005/documents/hf_ben-xvi_hom_20050507_san-giovanni-laterano.pdf [https://perma.cc/2VD2-TVU4] ("The Pope is not an absolute monarch whose thoughts and desires are law . . . . He must not proclaim his own ideas, but rather constantly bind himself and the Church to obedience to God's Word, in the face of every attempt to adapt it or water it down, and every form of opportunism.").

140. Pope Benedict XVI, for instance, taught that ambiguous statements in documents of the Second Vatican Council should not be interpreted by a "hermeneutic of discontinuity and rupture" but by a "'hermeneutic of reform,' of renewal in . . . continuity." Address of His Holiness Benedict XVI to the Roman Curia Offering Them His Christmas Greetings para. 37 (Dec. 22, 2005), http://w2.vatican.va/content/benedict-xvi/en/speeches/2005/december/documents/hf_ben_xvi_spe_20051222_roman-curia.pdf [https://perma.cc/FMM5-XDBE]. The Church may reform and change on matters of prudence, but on matters of doctrine it cannot. The "hermeneutic of discontinuity" risks driving a wedge between the Church today and the Church of ages past. *See id.* para. 38.

the Magisterium."[141] It is therefore best interpreted as making a prudential judgment about the use of capital punishment in today's world.

1. The "Inadmissible in Practice" Reading

Cardinal Luis Ladaria, writing in his capacity as head of the CDF, explains that the latest revision of the *Catechism* "situates itself in continuity with the preceding Magisterium" and in particular "follow[s] in the footsteps of the teaching of John Paul II in *Evangelium Vitae*."[142] John Paul II, of course, taught that the death penalty is a form of punishment that may be justly applied in some situations and that the primary purpose of punishment is retribution.[143] Consequently Cardinal Ratzinger, then the head of the CDF, insisted that John Paul II's teachings do not constitute a rejection of the Church's traditional teaching that grave crimes may justly be punished with death.[144] Since the new revision of the *Catechism* follows *Evangelium Vitae* in continuity with the prior teachings of the Magisterium, it cannot be read as denying the legitimacy of capital punishment in principle.

There is language in the new revision that indicates it is making only a prudential judgment about modern circumstances. The *Catechism* says that capital punishment "was long considered an appropriate response to the gravity of certain crimes and an acceptable, albeit extreme, means of safeguarding the common good."[145] Cardinal Ladaria also suggests that "the political and social situation of the past made the death penalty an acceptable means for the protection of the common good."[146] The *Catechism* continues, "Today, . . . more effective systems of detention have been developed" as an alternative to capital

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141. Letter of Luis F. Cardinal Ladaria, Prefect, Congregation for the Doctrine of the Faith, to the Bishops Regarding the New Revision of Number 2267 of the Catechism of the Catholic Church on the Death Penalty ¶ 7 (Aug. 1, 2018) [hereinafter Ladaria Letter], http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20180801_lettera-vescovi-penadimorte_en.html [https://perma.cc/8DVV-QHGD].

142. *Id.* ¶¶ 6–7.

143. *See supra* Pt. II.B.1–.2.

144. *See supra* Pt. II.B.3.

145. 2018 CATECHISM ¶ 2267 revision, *supra* note 22.

146. Ladaria Letter, *supra* note 141, ¶ 2.

punishment.[147] The emphasis on the change in circumstances implies that what was once necessary for the protection of the common good no longer is today. If the death penalty were intrinsically wrong, then it would be wrong regardless of how effective systems of detention are. Finally, the *Catechism* never directly calls the death penalty evil or morally wrong, only "inadmissible." By contrast, the *Catechism* refers to murder, abortion, and euthanasia respectively as "a sin that cries out to heaven for vengeance," "gravely contrary to the moral law," and "morally unacceptable."[148] When the *Catechism* aims to declare an action intrinsically wrong it does not mince words.

According to this interpretation, Pope Francis, like Pope John Paul II in *Evangelium Vitae*, is making a prudential judgment about the secondary, medicinal purposes of punishment. Catholics ought to take seriously his opposition to the death penalty, especially given the force with which it is expressed, even if they are not bound to agree. Prudential judgments about the medicinal purposes of punishment do not touch, however, on whether the punishment satisfies retributive justice. As long as a punishment is deserved, it cannot be essentially unjust, even if it would be better to impose a more lenient punishment. The use of the death penalty as a punishment for grave crimes therefore cannot be said to be contrary to "the inviolability and dignity of the person"[149] in an absolute sense, only less respectful of the inviolability and dignity of the person than some more lenient approach.

2. *The "Inadmissible in Principle" Reading*

The new *Catechism* revision nevertheless does not expressly say that the use of the death penalty is morally licit in some circumstances, only that it "was long considered to be."[150] By speaking of "an increasing awareness that the dignity of the person is not lost even after the commission of very serious crimes,"[151] the text also suggests that previous generations were simply not aware that in carrying out executions they were committing an offense against human dignity. Some commen-

147. 2018 CATECHISM ¶ 2267 revision, *supra* note 22.
148. 1997 CATECHISM, *supra* note 30, ¶¶ 2268, 2271, 2277.
149. 2018 CATECHISM ¶ 2267 revision, *supra* note 22.
150. *Id.*
151. *Id.*

tators, both those supportive of and critical of the new revision, have inferred from this that "inadmissible" should be interpreted to mean "wrong in principle."[152] Under this view, death would never be a just and proportionate punishment for grave crimes.

If, in fact, the newly revised text of the *Catechism* truly and unambiguously condemned the death penalty in principle, then faithful Catholics would have to withhold their assent to its teaching, because it would contradict centuries of authoritative Catholic tradition. The pope does not have the authority to abrogate the teachings of prior centuries. As the First Vatican Council taught, "the holy Spirit was promised to the successors of Peter not so that they might, by his revelation, make known new doctrine, but that, by his assistance, they might religiously guard and faithfully expound the revelation or deposit of faith transmitted by the apostles."[153]

If the death penalty were truly wrong in principle, then what God commanded Noah as a means of vindicating the sanctity of life would in fact be a violation of the sanctity of life.[154] Church authorities would have seriously misinterpreted Romans 13 for centuries.[155] The Church Fathers would have collectively been in error on a grave moral question.[156] What Pope Innocent I called "powers granted by God" would actually be an unjust form of killing.[157] Pope Innocent III would have required the Waldensians to abandon the true teaching of the Gospel and adopt an immoral view before they could be recon-

152. For supporters of the new revision, see *supra* note 137. For critics, see Hadley Arkes et al., *An Appeal to the Cardinals of the Catholic Church*, FIRST THINGS (Aug. 15, 2018), https://www.firstthings.com/web-exclusives/2018/08/an-appeal-to-the-cardinals-of-the-catholic-church [https://perma.cc/NA7C-HLDH]; Edward Feser, *Pope Francis and Capital Punishment*, FIRST THINGS (Aug. 3, 2018), https://www.firstthings.com/web-exclusives/2018/08/pope-francis-and-capital-punishment [https://perma.cc/KA4H-JUAQ]; Peter Kwasniewski, *Pope's change to Catechism contradicts natural law and the deposit of faith*, LIFESITE NEWS (Aug. 2, 2018, 10:12 AM), https://www.lifesitenews.com/blogs/pope-francis-change-to-catechism-contradicts-natural-law-and-the-deposit-of [https://perma.cc/4QYJ-JDDL].

153. First Vatican Ecumenical Council, *supra* note 139, session 4, § 3070.

154. *See Genesis* 9:6 ("Whoever sheds the blood of a human, by a human shall that person's blood be shed, *for in his own image God made humankind*." (emphasis added)).

155. *See supra* note 50 and accompanying text.

156. *See supra* Part II.A.2.

157. *See supra* note 79 and accompanying text.

ciled to the Catholic Church.[158] Arguments that Thomas Aquinas, the greatest Doctor of the Church, dismissed as "frivolous" would have been the correct arguments all along.[159] A position Robert Bellarmine, Doctor of the Church and master of dogmatic theology, called "heretical" would actually be the true position of the Church.[160] A practice the *Roman Catechism* commissioned by Pope Pius V called "an act of obedience to" the Fifth Commandment would in fact be a grave violation of it.[161] More recently, Popes Leo XIII, Pius X, Pius XI, and Pius XII would have all been in error in their magisterial statements on this question.[162] Even John Paul II and Benedict XVI, popes of the twenty-first century who vigorously opposed capital punishment in practice, would have erred by teaching that an intrinsically immoral act may sometimes be licitly carried out.[163]

A single paragraph of the *Catechism* could not overcome the weight of all the authorities outlined above. The *Catechism* is not an infallible document; it is simply a restatement of established Catholic teaching that serves as an aid to instruction in the faith.[164] According to Cardinal Ratzinger, "[t]he individual doctrines which the Catechism presents receive no other weight than that which they already possess."[165] If no authority in the Catholic tradition supports a proposition that is in the *Catechism*, the mere fact that the proposition is in the *Catechism* cannot thereby make it Catholic teaching.

Even so, if the *Catechism* did teach unequivocally that the death penalty is wrong in principle, many Catholics would still understandably shrink from calling a document promulgated by the pope erroneous. To say, however, that the death penalty is intrinsically wrong would be to say that many popes were in error, along with the Fathers and Doctors of the Church and, arguably, the Scriptures themselves. If the Catholic Church could not only fail to condemn but also explicitly sanction a

158. *See supra* note 83 and accompanying text.
159. *See supra* note 70 and accompanying text.
160. *See supra* note 74 and accompanying text.
161. *See supra* note 84 and accompanying text.
162. *See supra* notes 86–91 and accompanying text.
163. *See supra* Part II.B.
164. *See* 1997 CATECHISM, *supra* note 30, ¶¶ 11–12.
165. Joseph Ratzinger, *Introduction to the Catechism of the Catholic Church*, *in* INTRODUCTION TO THE CATECHISM OF THE CATHOLIC CHURCH 9, 26 (1994).

gravely immoral form of unjust killing so consistently for so many centuries, then its claim to be an infallible moral authority across time would be seriously undermined. If a traditional teaching so well established could be reversed in fewer than three decades, then other settled teachings of the Church could be abandoned just as swiftly. In the face of any such proposals, Catholics must instead adhere to the traditional teaching of the Church and reject any doctrinal innovation, even one coming from the *Catechism of the Catholic Church*.

Fortunately, Catholics do not face this difficult situation. The *Catechism* does not expressly say that capital punishment is intrinsically wrong, nor does it say that the Church's traditional teaching was in error. The CDF, moreover, has clarified that the new revision "situates itself in continuity with the preceding Magisterium."[166] The "inadmissible in principle" reading therefore not only contradicts the Church's traditional teaching on capital punishment; it also goes beyond the text of the *Catechism* and contradicts the CDF guidelines that Pope Francis himself authorized. To be truly obedient to Pope Francis, Catholics must also be obedient to his predecessors and affirm that grave crimes may justly be punished with death.

III. THE CHURCH'S TEACHING APPLIED TO AMERICAN JUDGES

Catholic citizens must wrestle with the implications of the new *Catechism* revision and come to their own conclusions about the continued prudence of the practice of the death penalty in their capacity as voters. For Catholic judges, however, the question is one of the legitimate authority of the state. Because the state has the legitimate authority to punish grave crimes with death, Catholic judges can in good conscience participate in capital cases, even if as a personal matter they favor ending the practice. Catholic judges can be confident in this conviction, because if Catholic teaching really required recusal the pope and bishops of the United States would not leave them without pastoral guidance on this matter.

166. Ladaria Letter, *supra* note 141, ¶ 7.

A. Catholic Citizens and Judges

Among faithful Catholics who acknowledge that state has the authority to impose capital punishment, there is indeed a legitimate diversity of opinion ranging from support for total abolition to firm support for retention. Archbishop Charles Chaput of Philadelphia, for instance, supports the total abolition of capital punishment "[i]n modern industrialized states" like the United States. At the same time, he has taught that the Church "cannot repudiate [the legitimacy of capital punishment] without repudiating her own identity."[167] Cardinal Avery Dulles, the late great dogmatic theologian, took a middling approach. He thought that the death penalty "should remain in law, and its implementation should be a real possibility" in modern societies, but its use should nevertheless "be extremely rare."[168] Professors Edward Feser and Joseph Bessette, on the other hand, have actively criticized Pope John Paul II's and Pope Francis's arguments for abolishing the death penalty and argued at length that the practice of the death penalty promotes the common good in modern American society.[169] These are all legitimate positions that lie within the bounds of the Church's teaching on capital punishment.

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167. *Archbishop Chaput clarifies Church's stance on death penalty*, CATH. NEWS AGENCY (Oct. 18, 2005, 11:00 PM), https://www.catholicnewsagency.com/news/archbishop_chaput_clarifies_churchs_stance_on_death_penalty_says_in_industrialized_societies_it_must_end [https://perma.cc/6JK8-NQBD]; *see also* Daniel M. Buechlein, *Declaration of Archbishop of Indianapolis USA on execution of Timothy McVeigh*, *L'OSSERVATORE ROMANO*, May 16, 2001 (weekly ed.), at 2, 8 ("Even as our Church opposes the death penalty in a case as awful as McVeigh's, we do not question, in principle, the state's right to impose the death penalty."); *Reverence for Life and the Preservation of the Common Good: A Statement from the North Dakota Catholic Conference Concerning the Death Penalty*, N.D. CATH. CONF. (Jan. 1995), http://ndcatholic.org/archives/feb04/index.html [https://perma.cc/QM43-8H3Z] ("Thus, although the traditional teaching of the church accepts that the state may have a right to punish by means of the death penalty in cases of extreme gravity, the state does not have the duty to do so, and it should reject use of the death penalty if bloodless means are available to achieve the objectives of punishment.").

168. Avery Dulles, *Catholic Teaching on the Death Penalty: Has It Changed?*, *in* RELIGION AND THE DEATH PENALTY: A CALL FOR RECKONING 23, 30 (Erik C. Owens et al. eds., 2004).

169. *See* FESER & BESSETTE, *supra* note 24, at 196–211; Edward Feser, *The new Catechism text on the death penalty will damage the Church*, CATH. HERALD (Aug. 8, 2018), http://catholicherald.co.uk/commentandblogs/2018/08/08/the-new-wording-on-the-death-penalty/ [https://perma.cc/VH94-6CYJ].

At the same time, Catholic citizens should not lightly dismiss the prudential arguments against the use of capital punishment in modern society. Popes John Paul II, Benedict XVI, and Francis have all vigorously opposed capital punishment in practice, and the bishops of the United States have consistently called for the abolition of the death penalty in hundreds of statements in the past four decades.[170] Bishops' conferences in other countries have issued similar statements.[171] These prudential judgments by Church leaders do not in themselves bind the consciences of the faithful, but they have powerful persuasive authority. Surely those who exercise the teaching authority of the Church are likely to have insight into how to apply Catholic moral principles to concrete situations.

These are all considerations for the Catholic citizen and legislator, whose role it is to decide upon which course of action will best "correspond to the concrete conditions of the common good and [most be] in conformity to the dignity of the human person."[172] The relevant consideration for a Catholic judge, however, is not whether the death penalty is good policy but whether the state has the authority to impose it. In the American legal system, once the jury returns a recommendation that the defendant be sentenced to death, the law *commands* the judge to issue an order carrying out the sentence.[173] Catholics have a moral obligation to obey the just commands of the civil law,[174] which means that Catholic judges have an obligation to apply the law faithfully regardless of whether they favor the outcome as a matter of policy.[175] The civil authority, however,

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170. *See* Howard Bromberg, *Pope John Paul II, Vatican II, and Capital Punishment*, 6 AVE MARIA L. REV. 109, 125 n.47 (2007) (collecting statements).

171. *See* BRUGGER, *supra* note 48, at 135.

172. *EVANGELIUM VITAE*, *supra* note 18, ¶ 56 (quoting CATECHISM OF THE CATHOLIC CHURCH ¶ 2267 (1994)).

173. *See* 18 U.S.C. § 3594 (2012) ("Upon a recommendation under section 3593(e) that the defendant should be sentenced to death . . . , the court shall sentence the defendant accordingly."); Garvey & Coney, *supra* note 4, at 321.

174. *See* LEO XIII, *LIBERTAS*: ON THE NATURE OF HUMAN LIBERTY ¶ 13 (1888) [hereinafter *LIBERTAS*], http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_20061888_libertas.pdf [https://perma.cc/NYM7-6EHG] ("[T]he highest duty is to respect authority, and obediently to submit to just law . . . ."); *SUMMA THEOLOGICA*, *supra* note 26, pt. I-II, q. 96, art. 4 (holding that just laws "have the power of binding in conscience").

175. *See id.* pt. II-II, q. 67, art. 4 ("For the inferior judge [i.e. not the sovereign with the power to pardon] has no power to exempt a guilty man from punish-

has no authority to command actions that are contrary to the moral law.[176] A judge therefore cannot directly will any evil act, even if the civil law commands him to.[177]

The death penalty is not like other situations a judge might face involving actions that are contrary to Catholic moral teaching. A Catholic judge can, for instance, in good conscience uphold laws permitting abortion, because in upholding the law the judge is not necessarily approving of abortion; he is only admitting that the law he grants him no authority to use the coercive power of the state to stop abortions from happening.[178] A trial judge issuing a death sentence, however, is directly willing that the criminal defendant be killed.[179] If the state has no authority to punish criminals with death in retribution for their crimes, then the execution of the criminal is simply an act of unjust killing, and Catholic judges facing the prospect of presiding over a capital case would have no choice but to resign or recuse themselves. If the state does have that authority, there is no evil in killing the defendant, and the judge may in good conscience order a sentence of death, regardless of whether he thinks that retention of the death penalty is the policy that best corresponds to the concrete conditions of the common good.

As demonstrated above in Part II, according to Catholic teaching the state has the authority to punish grave crimes with death. United States Supreme Court precedent currently permits the death penalty only for aggravated murder,[180] and the

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ment against the laws imposed on him by his superior."); William H. Pryor, Jr., *The Religious Faith and Judicial Duty of an American Catholic Judge*, 24 YALE L. & POL'Y REV. 347, 352–53 (2006) (discussing Catholic judges' duty to apply the law).

176. 1997 CATECHISM, *supra* note 30, ¶ 1903 ("If rulers were to enact unjust laws or take measures contrary to the moral order, such arrangements would not be binding in conscience.").

177. *See EVANGELIUM VITAE*, *supra* note 18, ¶ 74 ("Christians, like all people of good will, are called upon under grave obligation of conscience not to cooperate formally in practices which, even if permitted by civil legislation, are contrary to God's law."); *LIBERTAS*, *supra* note 174, ¶ 13 ("[W]here a law is enacted contrary to reason, or to the eternal law, or to some ordinance of God, obedience is unlawful, lest, while obeying man, we become disobedient to God.").

178. *See* Scalia, *supra* note 15, at 18.

179. *See* Garvey & Coney, *supra* note 4, at 320–22; Scalia, *supra* note 15, at 18.

180. *See* Kennedy v. Louisiana, 554 U.S. 407, 437 (2008) (forbidding the death penalty in "instances where the victim's life was not taken"); Zant v. Stephens, 462 U.S. 862, 878 (1983) (holding that death penalty statutes must limit the class of those eligible for the death penalty to those who fall under an enumerated set of aggravating factors). The Supreme Court has also left open the question of wheth-

Church has traditionally identified murder as a crime sufficiently grave to merit death.[181] When a punishment satisfies the requirement of retributive justice, that is, when it is deserved, it is essentially just, and there can be no sin in imposing it even if a less severe punishment might be more conducive to the common good on the whole. American Catholic judges can therefore preside over capital cases in good conscience even if they personally favor the abolition of the death penalty.[182]

B. The Church's Pastoral Practice

The pastoral practice of the Church confirms this. When the civil law conflicts with the moral law, the Church in its solicitude for the salvation of those involved in public life does not simply leave them without any pastoral guidance on the matter. *Evangelium Vitae* is clear, for instance, that it is "never licit" to advocate or vote for laws permitting abortion or euthanasia.[183] It then goes on to offer more specific guidance to legislators on when they can support compromise measures that increase restrictions on abortion and euthanasia without outright banning them.[184] The CDF and the USCCB have also issued guidelines making clear that politicians who promote abortion or euthanasia may be denied Holy Communion.[185] Pope John Paul II has given specific guidance to lawyers and judges on the subject of divorce as well. Lawyers are to "avoid being personally involved in anything that might imply a cooperation with divorce,"[186] but for judges, some entanglement is inevita-

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er "offenses against the state," including "treason, espionage, terrorism, and drug kingpin activity," may constitutionally be imposed even if no one's life was taken. *Kennedy*, 554 U.S. at 437.

181. *See, e.g.*, *Genesis* 9:6; *Exodus* 21:12–14; *Leviticus* 24:17; *Numbers* 35:31, 33; *Deuteronomy* 19:11–13; *supra* notes 58, 61, 66, 73, 84 and accompanying text.

182. For an example of an American judge who takes just such a position, see Michael R. Merz, *Conscience of a Catholic Judge*, 29 U. DAYTON L. REV. 305 (2004). This conclusion also accords with the position of Justice Scalia, who reviewed capital cases as a Catholic judge not because he supported or opposed the use of the death penalty in practice but because he did not "find the death penalty immoral" in principle. Scalia, *supra* note 15, at 21.

183. *EVANGELIUM VITAE*, *supra* note 18, ¶ 73.

184. *See id.*

185. *See* Ratzinger, *supra* note 129, ¶ 5; Levada, *supra* note 131, para. 17.

186. Address of John Paul II to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota ¶ 9 (Jan. 28, 2002), http://w2.vatican.va/content/john-paul-ii/en/speeches/2002/january/documents/hf_jp-ii_spe_20020128_roman-rota.pdf [https://perma.cc/ZF2G-7BBQ].

ble. "For grave and proportionate motives they may therefore act in accord with the traditional principles of material cooperation."[187]

Neither the USCCB nor any pope has ever offered any guidance to public officials warning them to avoid involvement with capital punishment.[188] Both the CDF and the USCCB have, in fact, explicitly confirmed that supporters of the death penalty, even those "at odds with the Holy Father" on the question, may receive Holy Communion.[189] If involvement in capital cases were truly an immoral cooperation with evil, then the pope and the bishops of the United States would be failing to offer essential pastoral guidance to those in public life on a grave moral issue.

IV. CONCLUSION

Catholics involved in public life must take seriously the obligations that both their faith and the law place on them. This includes carefully examining areas of potential conflict and determining what is called for when conflicts arise. Judge Amy Barrett and Professor John Garvey did this admirably in their 1998 article *Catholic Judges in Capital Cases*. Their conclusion, however, that the application of capital punishment violates Catholic moral principles is unwarranted. The Catholic Church has consistently taught over the centuries that the state has the authority to punish grave crimes with death. Neither *Evangelium Vitae* nor the *Catechism* as issued by Pope John Paul II sought to reverse that teaching, and both affirmed that public authorities could legitimately impose capital punishment. The latest revision to the *Catechism* by Pope Francis does not aim to reverse the Church's traditional teaching, nor could it even if it

187. *Id.* (emphasis removed).

188. A recent statement by the USCCB on capital punishment does say that "some [public officials] *may* find themselves required to participate in a process *they find* morally objectionable." U.S. CONFERENCE OF CATHOLIC BISHOPS, A CULTURE OF LIFE AND THE PENALTY OF DEATH 6 (2005) (emphases added). This general statement that public officials could *possibly*, but not definitely, find themselves in situations that violate *their own subjective* consciences, as opposed to the objective moral law, is nothing like the hard and fast specific commands issued to public officials under threat of denial of Holy Communion in the context of abortion, euthanasia, and divorce.

189. *See supra* notes 129, 131 and accompanying text.

purported to. There is therefore nothing essentially unjust in the American practice of executing those who have committed aggravated forms of murder, and nothing in the Church's moral teaching demands that Catholic judges must recuse themselves from capital cases.

Ryan M. Proctor